# OECD Reviews of Regulatory Reform

# AUSTRALIA

## TOWARDS A SEAMLESS NATIONAL ECONOMY

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# OECD Reviews of Regulatory Reform Australia 2010

TOWARDS A SEAMLESS NATIONAL ECONOMY

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# *Foreword*

*The* OECD Review of Regulatory Reform in Australia *is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.*

*The OECD has assessed the regulatory management policies of 23 member countries, as well as Brazil, China and Russia. The reviews aim at assisting governments to improve regulatory quality – that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. The review methodology draws on the 2005 Guiding Principles for Regulatory Quality and Performance, which brings the recommendations in the* 1997 OECD Report on Regulatory Reform *up to date, and also builds on the 1995 Recommendation of the Council of the OECD on Improving the Quality of government Regulation.*

*The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, and on the regulatory framework of specific sectors against the backdrop of the medium-term macroeconomic situation.*

*Taken as a whole, the reviews demonstrate that a well-structured and implemented programme of regulatory reform can make a significant contribution to better economic performance and enhanced social welfare. Economic growth, job creation, innovation, investment and new industries are boosted by effective regulatory reform, which also helps to bring lower prices and more choices for consumers. Comprehensive regulatory reforms produce results more quickly than piece-meal approaches; and they help countries to adjust more quickly and easily to changing circumstances and external shocks. At the same time, a balanced reform programme must take social concerns into account. Adjustments in some sectors is painful, but experience shows that the costs can be reduced if reform is comprehensive and accompanied by appropriate support measures.*

*While reducing and reforming regulations are key elements of a broad programme of regulatory reform, experience also shows that in more competitive and efficient markets, new regulations and institutions may be necessary to ensure compatibility of public and private objectives. Sustained and consistent political leadership is another essential element of successful reform, and a transparent and informed public dialogue on the benefits and costs of reform is necessary for building and maintaining broad public support.*

*The policy options presented in the reviews may pose challenges for each country. However, the in-depth nature of the reviews and the efforts made to consult with a wide range of stakeholders reflect the emphasis placed by the OECD on ensuring that the policy options presented are relevant and attainable within the specific context and policy priorities of the country.*

*The review consists of three parts. Part I presents an overall assessment, set within the macroeconomic context, of regulatory achievements and challenges across a broad range of policy areas: government capacity for quality regulation, competition policy, market openness and specific issues such as multi-level regulatory governance. Part II summarises the detailed and*

*comprehensive background reviews that were prepared for the policy areas on regulatory governance, both at federal level and from a multi level perspective. Part III summarises the background reviews on competition and market openness. All these background reviews have been considered and discussed by the relevant policy committee within the OECD. These chapters conclude with policy options for consideration which seek to identify areas for further work and policy development in the countries under review.*

# *Acknowledgements*

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Stéphane Jacobzone, Principal Administrator, co-ordinated the project, with responsibility for the synthesis. Gregory Bounds, Administrator, prepared the chapters on regulatory governance, and multi-level regulatory governance, with substantive inputs across the whole report. The macroeconomics part was prepared by Paul Conway, consultant, under the supervision of Claude Giorno, Senior Economist, Economics Department. The competition chapter was prepared by Michael Wise, Principal Administrator, Competition Policy Division, together with Ms. Caron Beaton-Wells, consultant. The Market Openness chapter was prepared by Ms. Evdokia Möisé, Principal Administrator, and Mr. Anthony Kleitz, consultant, under the supervision of Mr. Andrew Dale Trade Policy Linkages Division. Mr. Filippo Cavassini, policy analyst, provided substantive input to the chapter on multi-level regulatory governance. Emmanuel Job, and Agnès Cavaciuti provided statistical assistance, respectively in the OECD Regulatory Policy Division and Economics Department Country Studies Division. The documentation was prepared by Jennifer Stein.

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# Abbreviations

| | |
|---|---|
| **ANAO** | Australian National Audit Office |
| **APRA** | Australian Prudential Regulatory Authority |
| **APSC** | Australian Public Service Commission |
| **ASIC** | Australian Securities and Investments Commission |
| **BCA** | Business Council of Australia |
| **BCC** | Business Cost Calculator |
| **BRE** | Better Regulation Executive, United Kingdom |
| **CAC** | Commonwealth Authorities and Companies Act 1997 |
| **CBA** | Cost-Benefit Analysis |
| **COAG** | Council of Australian Governments |
| **DPD** | Deregulation Policy Division |
| **FMA** | Financial Management and Accountability Act 1997 |
| **LIA** | Legislative Instruments Act 2003 |
| **MAC** | Management Advisory Committee |
| **NAO** | National Audit Office, United Kingdom |
| **OBPR** | Office of Best Practice Regulation (successor body to the ORR) |
| **OLDP** | Office of Legislative Drafting and Publishing |
| **OPC** | Office of the Parliamentary Counsel |
| **ORR** | Office of Regulation Reform |
| **PC** | Australian Productivity Commission |
| **RIA** | Regulatory Impact Analysis |
| **RIS** | Regulation Impact Statement |
| **SCM** | Standard Cost Model |

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# Executive Summary

## Key messages

- Australia has been one of the most successful OECD countries in weathering the Global Financial Crisis. Mature regulatory settings and a strong fiscal position have worked in Australia's favour; it was among the few OECD countries which did not enter a recession. However Australia still has a challenge to lift productivity to return to a higher long-run growth path and continued future prosperity.
- The government has laid out an ambitious regulatory reform agenda to build a seamless national economy and unleash productivity. Regulatory reform is given a high profile in government, with the creation of a portfolio position of Minister for Finance and Deregulation, together with a Minister assisting the Finance Minister on Deregulation. The government is putting a new focus on the potential for well-designed and targeted regulation to reduce costs and complexity for business and the not-for-profit sector, and enhance Australia's productivity and international competitiveness. 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 portfolio.
- A significant effort has been made towards regulatory improvement at Commonwealth level and through renewed Commonwealth-State partnerships. A national reform agenda has been set in partnership with the Australian States and Territories (the States) to harmonise key regulations imposed on business operating across jurisdictions. Innovative institutional structures have been established to facilitate national reforms supported by federal fiscal arrangements. The current reform program hopefully should embed an ethos whereby Commonwealth agencies and the States co-ordinate the regulation of national markets where appropriate, because all players recognise that there are net benefits in doing so – not only because of financial incentives.
- Australian competition law has been effective in establishing robust and competitive markets. There has been significant reform in the last decade, but there is also 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.
- Globalisation also presents particular challenges for the Australian federation. Business has regularly identified costs associated with inconsistent or duplicative regulatory regimes between jurisdictions as a significant issue for competitiveness. Further streamlining of regulatory frameworks as part of the multi-level strategy will enhance market openness, as well as the ability to compete globally in knowledge intensive industries. Major reform of bio-security management, including border security, will also contribute to improving market openness.

### *Australia has a well managed economy, which has successfully weathered the crisis*

Australia has been one of the best performing economies in the OECD over the past two decades. From 1992 to 2008 Australia enjoyed 17 consecutive years of economic growth. Over the 1990s, improvements in the regulatory environment, coupled with the emergence of information and communication technology (ICT), led to vigorous growth in productivity. In the current decade, strong employment and particularly investment growth have driven GDP increases, despite a lower productivity performance. Incomes have also been boosted over recent years by a sharp rise in the terms-of-trade, which have increased by over 65% between 2003 and mid-2008. This increase was primarily driven by the commodities boom associated with the rise of China and India. As the global economy moved towards recession in 2008, Australia's terms-of-trade fell, offsetting some, but by no means all, of the previous gains.

The impact of the global recession on Australia has been less severe than in most other OECD countries. The economy has benefitted from a healthy macroeconomic situation, coupled with a strong fiscal position when the crisis started, even if the current account persists averaging 4.5% of GDP, with a net investment income deficit. Australia's well regulated and resilient financial sector has limited the direct negative impact of the financial crisis on the economy. Monetary and fiscal policies shielded businesses and citizens from the more damaging impacts of the global recession and Australia has benefited from the rapid rebound of some Asian economies, in particular China. As inflation risks are still present, Australia was the first G20 country to increase interest rates in the second half of 2009.

### *Regulatory reform has contributed significantly to economic success*

Increased exposure to international trade during the 1980s and the product market liberalisation conducted in the 1990s under the National Competition Policy (NCP) framework reduced barriers to entry, and increased competition in the Australian economy. This contributed to an impressive surge in productivity in the 1990s, which according to a 2005 Productivity Commission report, added at least 2.5%, or $20 billion, to Australia's GDP.

From 1993-94 to 1998-99, labour productivity increased at an annual rate of 3.3% per year. This is the fastest on record, and helped to close the productivity gap between Australia and the US. Employment also increased over the period, suggesting that gains in productivity were not acquired at the expense of increasing under-employment, with increased labour market flexibility. This was facilitated by the decentralisation of wage bargaining mechanisms in 1991 under the Hawke-Keating Labor government, followed by the *Workplace Relations Act* in 1996. Further reforms were introduced under the 2006 *WorkChoices* legislation. However, these measures did not receive broad support in the context of the 2007 Australian Federal election.

ICT and innovation has also increased productivity and internationally, diffusion of technology was a key driver of productivity growth. Australia has become a leading adopter and beneficiary of ICT investment, the diffusion of which has been facilitated by reforms to

product market regulation. The August 2008 report, *Venturous Australia – building strength in innovation*, by Terry Cutler, found that 98% of new technologies are sourced from outside the country.

### *But challenges to productivity remain*

However, further productivity improvements are required if Australia is to return to a higher long-run growth path. The Australian economy experienced a slowdown in productivity over the past recent decade. While subject to some debate, this may be reflective of the combined effect of short term economic shocks from a severe drought on agriculture, water and the electricity sector, increased investment in mining resulting in the increasing use of mining resources with lower yields as well as more systemic factors.

Meeting the challenges of globalisation calls for resolving infrastructure bottlenecks and improving core energy and communication activities. Ensuring that infrastructure investment delivers the strongest possible contribution to growth requires evaluation of potential projects and a strong policy framework. The Australian Government established the Building Australia Fund to augment funds available for infrastructure investment in the 2008-09 Budget. Infrastructure investment proposals are identified by an advisory board, Infrastructure Australia, which provides a national approach. This role could be further improved by the public disclosure of the supporting cost-benefit assessment for nominated projects. To ensure that the full value of increased investment is realised, remaining regulatory reform in relation to infrastructure, access, transport, energy and water should be completed.

Like many OECD countries, Australia faces long term fiscal challenges from an ageing population. While public finances are currently well-placed compared to other OECD countries, the second Intergenerational Report published in 2007 indicates that Australia's net debt position could swell to over 30% of GDP by 2046-47. Long term fiscal pressures related to health care spending are also expected to be a major source of future government outlays.

### *A sophisticated governance system with a renewed impetus towards deregulation*

Australia is one of the front-running countries in the OECD in terms of its regulatory reform practices. Australia benefits from a mature system for regulatory management, with early and comprehensive adoption of OECD good practices as well as introduction of novel approaches. The government elected in 2007 has provided a renewed reform impetus, establishing a solid institutional framework and announcing a commitment to "continuous improvement" in regulatory quality. The government has endorsed the principles of good regulatory processes recommended by the Banks Taskforce on Reducing the Regulatory Burdens on Businesses and adopted by the previous government, and has reaffirmed the commitment to best practice regulation requirements.

Recent reforms have strengthened Australia's system for Regulatory Impact Assessment (RIA) to protect business from new, unnecessary regulation, making it among the most rigorous and comprehensive in the OECD. A new policy function has been created in the Department of Finance and Deregulation to promote better regulation across the

administration, complementing the Office of Best Practice Regulation (OBPR), which was previously located within the Productivity Commission. RIA has been progressively extended to all policy instruments with a regulatory character. Formal Cabinet processes support the requirement for the preparation of Regulation Impact Statements (RIS) for proposals with a significant impact on business. The OBPR performs a gate-keeping function and also provides training and direct assistance in the application of cost-benefit analysis. The OBPR publishes information on the compliance of agencies with the agreed criteria for RIS.

New program initiatives include the initiation of partnerships with other Ministerial portfolios to identify and progress reforms. The government has also commenced a review of all pre-2008 Commonwealth subordinate legislation to document regulations which impose a net cost on business and identify scope to improve regulatory efficiency. The Commonwealth government has eschewed the use of targets to drive reductions in administrative burdens. However, Australia has been innovative in the use of other methods, in particular benchmarking by the PC to report comparisons of regulatory practices across the States and the Commonwealth, and to examine the burden in particular sectors of Commonwealth regulation. Australia is also implementing a range of e-government strategies to streamline reporting requirements for business, including the use of standard business reporting to pre-fill government forms and a one stop shop portal for business and citizens.

The use of *ex post* assessment is also well integrated in the regulatory process, with 10-year sunset periods for subordinate legislation, and scheduled reviews of legislation. The quality of legal drafting is carefully maintained through professional drafting offices, the complete legislative database is available online, and subordinate legislation is not enforceable unless it is on an official register.

### *A new and innovative model for state federal relationships to deliver a seamless national economy*

The new agenda for Commonwealth-State relationships includes efforts to build a national seamless economy, harmonising key regulations across jurisdictions. These efforts are conducted in the context of the Council of Australian Governments (COAG). COAG is chaired by the Prime Minister and comprises the first ministers of State and territory governments. In November 2008 COAG committed to new co-operative working arrangements between the Commonwealth and the States with a new Inter-governmental Agreement on federal fiscal relations. This reduced the number of Specific Purpose Payments to the States from over 90 to five, while increasing the overall quantum of funding. Funding arrangements have been refocused on outputs and outcomes, and the Commonwealth has agreed to provide incentive payments, in the form of National Partnership Payments to reward State efforts for implementing jointly approved regulatory reforms.

In November 2008, 27 priority areas of regulatory reform, and a further eight competition reforms, were reflected in the preparation of a National Partnership (NP) agreement to Deliver a Seamless National Economy, ratified in February 2009. Delivery on the deregulation priorities is supported by a AUD 100 million facilitation payment, and a further AUD 450 million in reward payments are scheduled for the period 2008-09 to 2012-13, contingent on the performance of the States. The agenda also involves reforms in

the areas of energy, transport, infrastructure, planning and the environment. The agenda is managed by the Business Regulation and Competition Working Group (BRCWG), which includes high level representation from the States and is co-chaired by the Minister for Finance and Deregulation and the Minister Assisting the Finance Minister on Deregulation. The BRCWG builds on the strength of central government departments both at Commonwealth and state level. Its strong capability is a potential resource to identify areas for further reform and to maintain a focus on deregulation outcomes in the future. The independent COAG Reform Council monitors the performance of all jurisdictions and ensures transparency in performance reporting.

The delivery of the COAG reform agenda requires significant co-ordination at State level, and has been facilitated by an alignment of the broad reform priorities of the individual States and the COAG agenda, even if the elements of emphasis differ. Early indications are that the Seamless National Economy NP is progressing according to schedule, but high expectations have been invested in the reform program and it is being carefully followed by business groups. It is too early to be definitive about final outcomes. The COAG agenda is extensive and complex and maintaining momentum over the remainder of the reform program will be a challenge. It can be anticipated however, that the schedule of reward payments and the oversight role of the COAG Reform Council will help significantly.

The COAG national reform agenda has also given impetus to improvements to regulatory management practices at the level of the States. In general the Australian States demonstrate regulatory management practices that are among OECD best practice. A commitment to develop regulation that is efficient, effective and in the national interest, appears to be a shared national objective.

### *Effective enforcement of competition law leading to a competitive market environment*

Australia has an integrated approach to the promotion of market competition, with market-based approaches the preferred policy approach. The Australian Competition and Consumer Commission (ACCC) has the primary responsibility for enforcing the *Trade Practices Act 1974* (TPA), which is Australia's competition, fair trading and consumer protection legislation. The TPA enhances consumer welfare by prohibiting certain anticompetitive conduct, such as restrictive agreements and practices, abuse of dominance and misuse of market power, and mergers and acquisitions that substantially lessen competition. The combination of consumer protection and sector regulation establishes a cohesive and integrated policy approach. The broad complementary enforcement and regulatory powers of the ACCC assist compliance and promote public support for pro-competitive reforms.

Since the NCP, Australia maintains consistent and complementary competition laws and policies that apply to all businesses regardless of ownership. This is supported through requirements for competitive neutrality (that government businesses should not enjoy net competitive advantage as a result of their public sector ownership); agreement that price oversight of state or territory government business enterprises is primarily the responsibility of the relevant State; and agreement regarding structural reform of public monopolies through the introduction of competition. Removing "exemptions" was closely related to rationalising infrastructure regulation in the context of the NCP, because infrastructure services and regulation provided by the States were not subject to Commonwealth

competition law. Impediments to competition have been progressively removed and a common, coherent scheme for assessing and regulating sectoral access to essential facilities has been established. The scope of exceptions to competition law has been reduced.

Australia's competition law was the subject of the 2003 Dawson Review, and the amendments recommended in the Review and a subsequent Senate Committee have been largely implemented. While these represent general improvements, notably in terms of increased sanctions for cartels, the scope and effectiveness of the prohibition against misuse of market power may be less clear now than it was before the amendments. This may reflect the influence of small business "politics" in Australian competition law, as the TPA now includes a prohibition aimed at predatory pricing that could curb discounting by large corporations. The new prohibition risks creating uncertainty, is inconsistent with international precedents, and at a minimum the market share aspect of the "Birdsville amendment" should be removed.

Some aspects of the NCP remain unfinished. The access regime has been subject to criticism, particularly in terms of access to railway lines, with litigation used as a means to frustrate the operation of the system. In October 2009, the government introduced legislation into the Australian Parliament to enact binding time limits on decision-makers for regulatory decisions, in place of previous target time limits. Outstanding reforms remain to be completed in the energy sector. The government has announced changes to improve the operation of the access regime which applies to telecommunications.

### *Enjoying the benefits from globalisation through strong market openness*

Australia has maintained a policy of market openness with full integration of its markets to international competition. This has delivered significant benefits, as two-thirds of Australia's trade is with APEC economies, with rapidly growing Asian markets in China and South Korea, as well as with India. Australia's trade policy supports international trade negotiations, endorsing the conclusion of the Doha Round taking place under the WTO. It also pursues bilateral free trade agreements with important trading partners.

Various domestic processes provide for transparency and information dissemination, including through the use of RIA. Stakeholders are routinely consulted on regulatory changes likely to affect trade. Value-for-money and transparency also apply to public procurement; and a central website lists all the contracts and annual procurement plans awarded through the AusTender website. Australian Customs and Border Security have also streamlined customs procedures to facilitate the transit of goods.

While Australia market openness generally reflects a strong commitment to free trade, quarantine inspections have been subject to criticism by Australia's trading partners. This is due to the comprehensive mandated inspection targets for air and sea vessels as well as air passengers. A major review of the quarantine system, the *Quarantine and Biosecurity Review*, conducted by an independent panel chaired by Mr. Roger Beale AO and released in 2008, recommended a move away from mandated inspection targets in favour of a risk-based approach to reduce the burden of border controls. A system has been trialled by the Australian Quarantine and Inspection Service, and the government announced in September 2009 a series of measures aimed at commencing implementation of these reforms.

Foreign equity restrictions remain in certain sectors and foreign purchases of Australian businesses or real estate are subject to screening procedures. To address concerns, the government issued a set of transparency principles in February 2008 and also announced some liberalisation measures in September 2009, with the threshold for investment screening for non-US investments raised to AUD 219 million, and exempting Greenfield investment. This is expected to exempt a fifth of the applications from screening.

### *Moving reforms forward and boosting economic growth*

Australia has endorsed a new growth-oriented reform agenda focused on strengthening regulatory frameworks to boost productivity growth. Many of the challenges facing the Australian economy have inter-jurisdictional dimensions. Success depends crucially on co-ordinated actions by a number of agencies at state level, as well as State Parliaments passing and amending state laws. Productive Commonwealth-State relationships are crucial for the reform agenda in Australia, as firms wanting to operate in more than one State face additional State-specific compliance costs, even if they meet regulatory requirements in their home State. In the future, the challenge will be to co-ordinate regulation of national markets so that new barriers are not created and that all jurisdictions regulate with regard to the national interest without the need for further financial incentives.

Australia represents in many ways a "role model" for OECD countries in its proactive approach to regulatory reform. Success will require maintaining momentum for reform, including through the more difficult task of implementation. The goal is to embed a commitment to good regulatory management in the development of regulatory policy. Australia demonstrates strong institutional capacities to serve the process. Regular communication with business and the community on the benefits of reforms will also be necessary to maintain support and ensure that the issues likely to deliver greatest benefit are included. Previous efforts at benchmarking the performance of all jurisdictions should be continued to provide good examples and maintain the focus on national objectives. COAG has well designed frameworks for the *ex ante* assessment of national regulatory responses, but compliance with these frameworks by Ministerial Councils needs to be strengthened.

Ultimately, the goal is for Commonwealth and State governments to work co-operatively in regulating national markets, with a shared understanding of the benefits of doing so. Current institutional frameworks are effective, but they will have to stand the test of time. The current effort reflects a unique opportunity, which needs to be seized, with gains demonstrated as early as possible to justify the energy and resources that have been invested, as well as providing positive incentives for the future.

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# Résumé

## Principaux messages

- L'Australie est l'un des pays de l'OCDE qui ont le mieux résisté à la crise financière mondiale. Le développement de son appareil réglementaire et la solidité de sa situation budgétaire ont joué en sa faveur ; elle fait partie des rares pays de l'OCDE qui ne sont pas entré en récession. Toutefois, l'Australie doit encore gagner en productivité pour retrouver un sentier de croissance à long terme plus élevé et pérenniser sa prospérité.
- Le gouvernement a tracé un ambitieux programme de réforme réglementaire pour construire une économie nationale sans barrières et libérer la productivité. Avec la création du portefeuille de *Minister for Finance and Deregulation,* secondé par un ministre chargé de la déréglementation, la réforme réglementaire prend une place de premier plan au sein du gouvernement. Le gouvernment porte une attention nouvelle aux possibilités qu'offre une réglementation ciblée et bien conçue de réduire les coûts et les formalités imposés aux entreprises et au secteur à but non lucratif, et de renforcer la productivité et la compétitivité internationale de l'Australie. La culture du progrès permanent reposant sur une prise de décision pragmatique doit être plus fermement ancrée dans la pratique gouvernementale, les ministres et leurs directions étant plus directement responsables de la qualité de la réglementation qui relève de leur compétence.
- Un important effort d'amélioration de la réglementation a été fait au niveau du Commonwealth et par un nouveau partenariat entre le Commonwealth et les États. Un programme national de réforme a été fixé en partenariat avec les États et les Territoires pour harmoniser les principaux textes réglementaires applicables aux entreprises qui exercent leurs activités sur plusieurs circonscriptions. Une organisation institutionnelle originale a été mise en place pour faciliter les réformes nationales, qui s'appuient sur des dispositions budgétaires fédérales. Si tout se passe comme prévu, le programme de réforme en cours ancrera un système de valeurs par lequel les agences du Commonwealth et les États coordonnent la réglementation des marchés nationaux lorsque c'est nécessaire, car tous les acteurs y voient leur intérêt bien compris, et pas seulement du fait des mesures d'incitation financière.
- Le droit australien de la concurrence a permis d'établir des marchés robustes et concurrentiels. D'importantes réformes ont été réalisées ces dix dernières années, mais il faut aussi prêter plus d'attention aux engagements pris de longue date de poursuivre les réformes dans des domaines particulièrement délicats des secteurs des transports, de l'énergie, de l'eau et des infrastructures.
- La mondialisation présente aussi des difficultés particulières pour la fédération australienne. Les entreprises ont régulièrement dénoncé les coûts de l'incohérence ou

de la duplication des régimes réglementaires d'une circonscription à l'autre comme un problème qui pèse sur la compétitivité. La poursuite de la modernisation de l'appareil réglementaire dans le cadre d'une stratégie à plusieurs niveaux renforcera l'ouverture des marchés, ainsi que la capacité d'affronter la concurrence mondiale dans les activités à forte intensité de qualifications. Une vaste réforme de la gestion de la biosécurité, notamment aux frontières, contribuera elle aussi à élargir l'ouverture des marchés.

### *L'économie australienne, bien gérée, a résisté avec succès à la crise*

L'Australie est l'une des économies de l'OCDE qui a enregistré les meilleurs résultats sur les deux dernières décennies. De 1992 à 2008, elle a connu dix-sept années consécutives de croissance économique. Durant les années 90, les progrès de l'environnement réglementaire, associés au développement des technologies de l'information et des communications (TIC), se sont traduits par un fort accroissement de la productivité. Dans la décennie en cours, la vigueur de l'emploi et surtout la croissance de l'investissement ont soutenu la croissance du PIB, malgré des performances en retrait en termes de productivité. Les revenus ont eux aussi été favorisés ces dernières années par une très forte hausse des termes de l'échange, qui ont augmenté de plus de 65 % entre 2003 et le milieu de 2008. Cette augmentation a été alimentée principalement par l'envolée des matières premières liée à l'expansion de la Chine et de l'Inde. À mesure que l'économie mondiale s'est approchée de la récession en 2008, les termes de l'échange de l'Australie ont chuté, neutralisant une partie des gains antérieurs, mais certainement pas la totalité.

Les conséquences de la récession mondiale ont été moins graves en Australie que dans la plupart des autres pays de l'OCDE. L'économie a bénéficié d'une situation macroéconomique saine, associée à une situation budgétaire solide lorsque la crise a commencé, même si le déficit de la balance courante persiste à 4.5 % du PIB en moyenne, avec un déficit net des revenus d'investissements. La bonne réglementation et la résistance du secteur financier de l'Australie ont limité les conséquences négatives directes de la crise financière pour l'économie. La politique monétaire et budgétaire a protégé les entreprises et les ménages des effets les plus nuisibles de la récession mondiale et l'Australie a bénéficié du rebond rapide de certaines économies d'Asie, en particulier de la Chine. Comme les risques d'inflation sont encore présents, l'Australie a été le premier pays du G20 à relever ses taux d'intérêt au second semestre de 2009.

### *La réforme réglementaire a contribué pour beaucoup aux succès économiques*

L'accélération de l'ouverture au commerce international durant les années 80 et la libéralisation des marchés de produits menée pendant les années 90 dans le cadre de la *National Competition Policy* (NCP, politique nationale de la concurrence) ont réduit les barrières à l'entrée et avivé la concurrence dans l'économie australienne. Ces facteurs ont contribué au bond spectaculaire de la productivité des années 90 qui, selon le rapport 2005 de la Commission de la productivité, a augmenté le PIB de l'Australie d'au moins 2.5 %, soit 20 milliards de dollars.

De 1993-94 à 1998-99, la productivité du travail a augmenté au rythme de 3.3 % par an. Ce rythme, le plus rapide jamais enregistré, a contribué à combler l'écart de productivité entre l'Australie et les États-Unis. L'emploi a lui aussi augmenté sur la période, ce qui permet de penser que les gains de productivité ne se sont pas faits au prix d'une aggravation du sous-emploi, avec une flexibilité accrue du marché du travail. Cette évolution a été favorisée par la décentralisation des mécanismes des négociations salariales en 1991 par le gouvernement travailliste Hawke-Keating, puis en 1996 par le *Workplace Relations Act* (loi visant les relations sur le lieu de travail). D'autres réformes ont été mises en œuvre en 2006 dans le cadre de la législation *WorkChoices* (choix du travail). Toutefois, ces mesures n'ont pas suscité une large adhésion lors des élections fédérales de 2007.

Les TIC et l'innovation ont, elles aussi, fait progresser la productivité et, au niveau international, la diffusion de la technologie a été un moteur essentiel de l'augmentation de la productivité. L'Australie est devenue l'un des pays leaders à adopter et à bénéficier de l'investissement dans les TIC, dont la diffusion a été facilitée par des réformes de la réglementation des marchés de produits. Dans son rapport d'août 2008, *Venturous Australia – building strength in innovation* (l'Australie entreprenante : construire la force dans l'innovation), Terry Cutler estime que 98 % des nouvelles technologies proviennent de l'étranger.

## *Mais les défis demeurent pour la productivité*

Toutefois, l'Australie devra réaliser des améliorations supplémentaires de productivité pour retrouver un sentier de croissance à long terme plus élevé. L'économie australienne a enregistré un ralentissement de la productivité depuis une dizaine d'années. La question prête à controverse, mais cette évolution peut s'expliquer par l'effet conjugué des chocs économiques à court terme dus aux conséquences d'une grave sécheresse dans l'agriculture, le secteur de l'eau et de l'électricité, d'une augmentation des investissements dans les industries extractives qui s'est traduite par l'exploitation de ressources minières à rendements décroissants, ainsi que des facteurs plus systémiques.

Pour relever les défis de la mondialisation, il faut lever des contraintes d'infrastructure et moderniser les activités essentielles des secteurs de l'énergie et des communications. Pour s'assurer que les efforts d'équipement contribuent le plus efficacement possible à la croissance, il faut évaluer les projets potentiels et renforcer le cadre d'action. Le gouvernment de l'Australie a créé le *Building Australia Fund* (fonds d'équipement de l'Australie) pour étoffer les crédits destinés à l'équipement d'infrastructure dans le budget 2008-09. Les propositions d'investissement d'infrastructure sont recensées par une commission consultative, *Infrastructure Australia*, qui offre une stratégie nationale. Cette fonction pourrait encore gagner si les évaluations coût-avantages qui servent à choisir les projets, étaient rendues publiques. Pour que l'effort d'équipement produise tous ses fruits, il faut achever la réforme réglementaire restante relative aux infrastructures, à l'accessibilité, les transports, l'énergie et l'eau.

Comme de nombreux pays de l'OCDE, l'Australie fait face à des défis budgétaires à long termes du fait du vieillissement de la population. La situation des finances publiques est bonne, comparée à celle des autres pays de l'OCDE, mais le deuxième *Intergenerational Report* (Rapport intergénérationnel) publié en 2007 indique que l'endettement net de l'Australie pourrait monter à plus de 30 % du PIB en 2046-47. Les tensions budgétaires à

long terme liées aux dépenses de soins de santé devraient, elles aussi, être une source importante de dépenses publiques à l'avenir.

## *Un système de gouvernance perfectionné et une relance du mouvement de déréglementation*

L'Australie est l'un des pays de l'OCDE les mieux placés du point de vue de la pratique de la réforme réglementaire. Elle jouit d'un système de gestion de la réglementation bien développé, qui a su adopter rapidement l'ensemble des pratiques recommandées par l'OCDE, et a introduit des approches innovantes. Le gouvernement élu en 2007 a relancé la réforme par la mise en place d'un cadre institutionnel solide et l'engagement public à un « progrès permanent » de la qualité de la réglementation. Il a approuvé les principes de processus de bonne réglementation recommandés par la *Banks Taskforce on Reducing the Regulatory Burdens on Businesses* (Groupe de travail sur la réduction des charges réglementaires imposées aux entreprises, présidé par M. Banks), adoptés par le gouvernement précédent, et il a réaffirmé l'engagement à des exigences réglementaires inspirées des meilleures pratiques.

Les réformes récentes ont renforcé la méthode nationale d'analyse d'impact de la réglementation (AIR) qui doit protéger les entreprises des effets négatifs des nouveaux textes réglementaires inutiles, et elle est ainsi devenue l'une des plus rigoureuses et complète de la zone de l'OCDE. Une nouvelle fonction, créée au ministère des Finances et de la Déréglementation pour favoriser la qualité de la réglementation dans l'ensemble des administrations, vient compléter l'*Office of Best Practice Regulation* (l'OBPR, au service de la meilleure pratique réglementaire), auparavant situé au sein de la Commission de la productivité (*Productivity Commission)*. L'AIR a été progressivement étendue à tous les instruments d'action à caractère réglementaire. Au sein du gouvernement, des mécanismes institutionnels sont prévus à l'appui de l'élaboration des *Regulation Impact Statements* (RIS, évaluations d'impact de la réglementation) jointes aux projets qui ont des effets notables sur les entreprises. L'OBPR exerce une fonction de filtre et assure aussi une formation et une assistance directe à l'application de l'analyse coût-avantages. L'OBPR publie des informations sur le respect par les administrations des critères convenus pour les RIS.

Parmi les nouveaux programmes, il faut citer le lancement de partenariats avec d'autres ministères pour identifier les réformes en évidence et les faire avancer. Le gouvernement a aussi commencé la révision de toute la réglementation fédérale déléguée antérieure à 2008 pour documenter les textes réglementaires qui imposent un coût net aux entreprises et définir les possibilités de renforcer l'efficacité réglementaire. Le gouvernment au niveau du Commonwealth a évité l'utilisation de cibles pour conduire les réductions des charges administratives. Toutefois, l'Australie a innové dans l'application d'autres méthodes, notamment le benchmarking effectué par la CP pour comparer les pratiques réglementaires à travers les États et au niveau fédéral, et pour examiner les charges qu'imposent certains domaines de la réglementation fédérale. L'Australie met aussi en œuvre une série de stratégies d'administration électronique pour rationaliser les rapports que les entreprises doivent fournir, notamment la normalisation de ces rapports pour pré-remplir les formulaires administratifs, et un portail unique pour les entreprises et les particuliers.

L'évaluation *ex post* est, elle aussi, bien intégrée dans le processus réglementaire, avec des périodes couperets de dix ans pour la réglementation subordonnée, et des révisions programmées de la législation. La qualité de la rédaction des textes est soigneusement préservée par le recours à des services spécialisés, la base de données sur la législation est intégralement accessible en ligne et la réglementation subordonnée n'est applicable que si elle est inscrite dans un registre officiel.

### *Un modèle novateur des rapports entre les États et les autorités fédérales pour une économie nationale sans barrières*

Le nouveau programme visant les rapports entre les États et le niveau fédéral prévoit des efforts pour construire une économie nationale sans barrières, par l'harmonisation des textes réglementaires essentiels dans l'ensemble des collectivités publiques. Ces efforts sont conduits dans le cadre du *Council of Australian Governments* (COAG, Conseil des gouvernements des États australiens). Le COAG, présidé par le Premier ministre, se compose des Premiers ministres des gouvernements des États et Territoires. En novembre 2008, le COAG s'est engagé à mettre en œuvre de nouvelles modalités de coopération entre le Commonwealth et les États, dans le cadre d'un nouvel accord entre les gouvernements sur les relations budgétaires fédérales. Cet accord a permis de réduire à cinq les plus de quatre-vingt-dix dotations spécifiques qui étaient versées aux États, tout en augmentant leur quantum global de financement. Les conditions de financement ont été recentrées sur les outputs et les résultats, et le Commonwealth a décidé d'instituer des dotations incitatives, sous la forme de *National Partnership Payments* afin de récompenser les efforts des États qui appliquent les réformes réglementaires approuvées conjointement.

En novembre 2008, 27 domaines prioritaires de la réforme réglementaire, ainsi que huit autres réformes de la concurrence, se sont traduites par l'élaboration d'un partenariat national (NP) pour une économie nationale sans barrières, accord ratifié en février 2009. L'accomplissement effectif des priorités de déréglementation est appuyé par une dotation de 100 millions de dollars australiens, auxquels s'ajoutent 450 millions de dollars de primes prévues pour la période 2008-09 à 2012-13, en fonction des résultats obtenus par les États. Le programme prévoit aussi des réformes dans les domaines de l'énergie, des transports, des infrastructures, de la planification et de l'environnement. Le programme est géré par le *Business Regulation and Competition Working Group* (BRCWG, Groupe de travail sur la réglementation des entreprises et la concurrence), où siègent de hauts représentants des États, sous la coprésidence du ministre des Finances et de la Déréglementation et du ministre délégué à la Déréglementation. Le BRCWG s'appuie sur la force des ministères centraux, tant au niveau du Commonwealth qu'au niveau des États. Ses moyens sont un atout pour recenser les domaines où les réformes doivent être poursuivies et pour garder le cap sur les résultats attendus de la déréglementation. Le Conseil des réformes, organe indépendant du COAG, suit les performances de toutes les juridictions et veille à la transparence des rapports sur les résultats obtenus.

La réalisation du programme de réforme du COAG suppose une étroite coordination au niveau des États, et elle a été facilitée par l'harmonisation des grands objectifs prioritaires de la réforme des différents États avec le programme du COAG, même si les accents diffèrent. Selon les premières indications, le partenariat pour une économie nationale sans barrières avance conformément à son calendrier, mais il a suscité des attentes importantes

et est suivi de près par les organisations du monde des entreprises. Il est trop tôt pour être sûr des résultats définitifs. Le programme du COAG est vaste et complexe, et l'entretien de la dynamique sur le reste du programme de réforme représente un défi. On peut toutefois prévoir que la programmation des dotations incitatives et la fonction de surveillance du Conseil des réformes du COAG seront d'une aide précieuse.

Le programme national de réforme du COAG a aussi donné de l'élan à la modernisation des méthodes de gestion de la réglementation au niveau des États. De manière générale, les États australiens appliquent des méthodes de gestion de la réglementation qui comptent parmi les meilleures des pays de l'OCDE. L'engagement à mettre en œuvre une réglementation efficiente, efficace et conforme à l'intérêt national, est, semble-t-il, un objectif national partagé.

### *Une application effective du droit de la concurrence aboutissant à des conditions de marché concurrentielles*

L'Australie a adopté une approche intégrée pour promouvoir la concurrence, en donnant la préférence à des méthodes fondées sur des mécanismes de marché. La Commission Australienne pour la Concurrence et la Consommation (*Australian Competition and Consumer Commission*, ACCC) est la principale autorité responsable de l'application de la Loi sur les Pratiques Commerciales (*Trade Practices Act* TPA) de 1974, qui constitue sa législation en matière de concurrence, de pratiques commerciales équitables et de protection des consommateurs. Le TPA améliore le bien-être des consommateurs en interdisant certains comportements anticoncurrentiels tels que les accords et pratiques restrictifs, l'abus de position dominante et l'usage abusif du pouvoir de marché, ainsi que les fusions et acquisitions qui ont pour effet de réduire sensiblement la concurrence. La combinaison de la protection des consommateurs et de la réglementation sectorielle permet la mise en place d'une approche cohérente et intégrée de la politique mise en œuvre. Les larges pouvoirs complémentaires dont dispose l'ACCC en matière d'application et d'élaboration des réglementations favorisent le respect de la législation et le soutien du public aux réformes permettant de renforcer la concurrence.

Depuis la NCP, l'Australie applique des législations et des politiques cohérentes et complémentaires en matière de concurrence qui visent toutes les entreprises quelle que soit la propriété de leur capital. Ces politiques s'appuient sur des conditions de neutralité concurrentielle (selon lesquelles les entreprises publiques ne doivent pas bénéficier d'un avantage concurrentiel net du fait qu'une partie de leur capital est détenue par le secteur public) ; des accords en vertu desquels le contrôle des prix des entreprises industrielles ou commerciales dont le capital appartient en partie au gouvernement d'un État ou d'un territoire relèvent essentiellement de la responsabilité de l'État concerné ; enfin un accord concernant la réforme structurelle des monopoles publics par l'introduction de la concurrence. La suppression des « exemptions » a été étroitement liée à la rationalisation de la réglementation des infrastructures dans le contexte de la NCP, dans la mesure où les services d'infrastructure fournis par les États et leurs réglementations n'étaient pas soumis au droit de la concurrence nationale. Les obstacles à la concurrence ont été progressivement supprimés et un dispositif commun et cohérent d'évaluation et de réglementation de l'accès des différents secteurs aux services essentiels a été mis en place. Le champ d'application des exceptions au droit de la concurrence a été réduit.

Le droit de la concurrence d'Australie a fait l'objet du *Rapport Dawson (Dawson Review)* de 2003 et les amendements recommandés dans ce rapport ainsi que ceux qui ont été préconisés par la suite par un Comité du Sénat ont été largement appliqués. Bien que ces dispositions représentent dans l'ensemble des améliorations, notamment pour ce qui est du renforcement des sanctions applicables aux ententes, la portée et l'efficacité de l'interdiction applicable à l'usage abusif du pouvoir de marché sont peut-être moins claires à présent qu'elles l'étaient avant les amendements. Cela s'explique peut-être par l'influence de la « politique » des petites entreprises sur le droit australien de la concurrence, car le TPA comporte désormais une interdiction visant la fixation de prix d'éviction qui pourraient empêcher les ventes au rabais des grandes sociétés. La nouvelle interdiction risque de donner lieu à des incertitudes, est incompatible avec les précédents internationaux et il faudrait au moins supprimer l'aspect de « l'amendement Birdsville » concernant les parts de marché.

Certains aspects de la NCP restent inachevés. Le régime d'accès a fait l'objet de critiques, notamment pour ce qui est de l'accès aux lignes ferroviaires, des procédures judiciaires ayant été utilisées pour mettre en échec le fonctionnement du système. En octobre 2009, le gouvernement a soumis un projet de loi au Parlement australien pour imposer des délais contraignants à l'élaboration des décisions de régulation, au lieu des délais qui étaient fixés entièrement comme objectifs. Des réformes restent en cours dans le secteur énergétique. Le gouvernement a annoncé des réformes en vue d'améliorer le fonctionnement du régime d'accès qui s'applique aux télécommunications.

### *Profiter des avantages de la mondialisation grâce à une ouverture forte du marché*

L'Australie a maintenu une politique d'ouverture du marché en intégrant totalement ses marchés à la concurrence internationale. Il en est résulté des avantages substantiels, dans la mesure où les deux tiers des échanges de l'Australie ont lieu avec les économies de l'APEC, et notamment les marchés asiatiques en croissance rapide de Chine et de Corée du Sud, ainsi que d'Inde. La politique commerciale de l'Australie est favorable aux négociations commerciales internationales ainsi qu'à la conclusion du Cycle de Doha sous l'égide de l'OMC. Elle poursuit par ailleurs la négociation d'accords bilatéraux de libre-échange avec d'importants partenaires commerciaux.

Dans le cadre national, diverses procédures s'efforcent de favoriser la transparence et la diffusion d'informations notamment par le recours à l'analyse d'impact de la réglementation. Les parties prenantes sont régulièrement consultées sur les réformes réglementaires susceptibles d'avoir une incidence sur les échanges. Les objectifs de rapport qualité prix et de transparence s'appliquent aussi aux marchés publics ; enfin, un site internet central énumère tous les contrats et programmes annuels d'achats publics établis au moyen du site Internet AusTender. L'Administration des douanes et de la sécurité aux frontières (*Australian Customs and Border Security*) a également harmonisé les procédures douanières pour faciliter le transit de produits.

Bien que l'ouverture du marché australien traduise dans l'ensemble une ferme volonté de libérer les échanges, des inspections liées au système de quarantaine ont fait l'objet de critiques de la part de ses partenaires commerciaux. Cela s'explique par l'existence d'objectifs globaux obligatoires en matière d'inspection des aéronefs et navires ainsi que

des passagers d'avion. Une étude majeure du système de quarantaine, *The Quarantine and Biosecurity Review*, menée par un comité indépendant présidé par M. Roger Beale AO et publiée en 2008, recommandait l'abandon des objectifs obligatoires d'inspection au profit d'une approche fondée sur le risque afin de réduire la charge des contrôles aux frontières. Un système a été expérimenté par l'*Australian Quarantine and Inspection Service*, et le gouvernement a annoncé en septembre 2009 une série de mesures visant à commencer à appliquer ces réformes.

Des restrictions aux prises de participations étrangères subsistent dans certains secteurs et les achats par des étrangers d'entreprises ou de biens immobiliers australiens font l'objet de procédures de filtrage. Pour répondre aux préoccupations exprimées, le gouvernement a énoncé en février 2008 une série de principes de transparence et il a également annoncé des mesures de libéralisation en septembre 2009, le seuil d'application du filtrage des investissements autres que ceux des États-Unis ayant été porté à 219 millions AUD, les investissements réellement nouveaux étant exemptés. De ce fait, un cinquième des projets d'investissement devraient se trouver exemptés du filtrage.

## *Faire avancer les réformes et stimuler la croissance économique*

L'Australie a adopté un nouveau programme de réforme orienté vers la croissance et mettant l'accent sur le renforcement des cadres réglementaires pour stimuler l'augmentation de la productivité. Beaucoup de défis auxquels doit faire face l'économie australienne présentent des dimensions interjuridictionnelles. Le succès dépendra de façon cruciale d'actions coordonnées d'un certain nombre d'agences au niveau des États, ainsi que de l'adoption et de l'amendement des législations des États par leurs parlements. Des relations constructives entre les administrations nationales et celles des États sont d'une importance essentielle pour le succès du programme de réforme en Australie, dans la mesure où les entreprises qui souhaitent exercer leurs activités dans plus d'un État doivent faire face à des coûts additionnels pour se conformer à la législation spécifique des différents États même si elles sont conformes aux dispositions réglementaires de leur État d'origine. À l'avenir, la difficulté sera de coordonner la réglementation des marchés nationaux de manière à ne pas créer de nouveaux obstacles et à faire en sorte que toutes les juridictions établissent leurs réglementations en vue de l'intérêt national sans que de nouvelles incitations financières soient nécessaires.

L'Australie représente à de nombreux égards une « référence » pour les pays de l'OCDE du fait de son approche volontariste de la réforme réglementaire. Le succès dépendra du maintien du rythme des réformes, notamment en ce qui concerne la tâche plus difficile qui consiste à les mettre en application. L'objectif est d'intégrer l'engagement d'assurer une gestion satisfaisante de la réglementation dans l'élaboration de la politique réglementaire. L'Australie dispose manifestement de fortes capacités institutionnelles pour mener à bien ce processus. Une communication régulière avec les représentants des entreprises et de la collectivité sur les avantages des réformes sera également nécessaire pour assurer leur soutien et faire en sorte que des aspects qui devraient s'avérer les plus avantageux soient pris en compte. Les efforts entrepris précédemment pour procéder à une évaluation comparative des performances de l'ensemble des juridictions devraient être poursuivis pour en tirer des exemples utiles et continuer à mettre l'accent sur les objectifs nationaux. Le COAG dispose de cadres d'analyse bien conçus pour l'évaluation *ex ante* des réponses

réglementaires nationales, mais il est nécessaire de renforcer la conformité des décisions des Conseils ministériels à ces cadres.

En définitive, l'objectif consiste, pour les gouvernements tant au niveau fédéral qu'à celui des États, à coopérer dans la réglementation des marchés nationaux, en ayant mutuellement conscience des avantages qui peuvent en résulter. Les cadres institutionnels actuels sont efficaces, mais il faudra qu'ils résistent à l'usure du temps. L'effort actuel représente une occasion unique qui doit être saisie, et dont les avantages devront être démontrés aussitôt que possible pour justifier l'énergie et les ressources qui ont été investies, ainsi que pour constituer des incitations positives pour l'avenir.

PART I

# The Macroeconomic Context

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*Chapter 1*

# Performance and Appraisal

*Chapter 1 sets out the macroeconomic context for the review, including recent macroeconomic trends, the contribution of regulatory reform to economic success as well as the remaining challenges facing the Australian economy, notably in terms of productivity. It presents the achievements of regulatory reform and competition-oriented reforms to date, with the strategy of co-ordinated efforts implemented to renew the regulatory reform agenda, at federal level as well as across levels of government. It discusses also the contribution of effective enforcement of competition law, as well as the policy framework for market openness. It concludes highlighting a number of policy areas for regulatory reform, as well as strategic points for moving forward the reform agenda. This includes maintaining momentum for reform, strengthening capacities at all levels of government, developing a common approach to communication and changing the culture and the approach to regulation.*

## Introduction

The review of regulatory reform in Australia comes at the right time to capture the attention of the OECD community. Just as OECD countries are grappling with the effects of the deepest and most widespread recession in over fifty years, Australia is demonstrating an economic resilience due in large part to the benefits of good economic policy settings and a legacy of reforms. In addition, Australia has capitalised on the success of past reform to build strong governance foundations that favour the development of good policy and are likely to be conducive to economic growth.

The *OECD Review of Regulatory Reform in Australia* provides an opportunity to examine the effects of this legacy and current initiatives for promoting and improving regulatory governance. It discusses Australia's performance in a macroeconomic context and its links to strategic microeconomic reform programmes. Specific attention is given to the congruence of policy settings for trade, competition and market openness, and regulatory management. Of very contemporary relevance are Australia's current ambitions to achieve a wide and unprecedented agenda of national reforms, and to embed past reform achievements in new working arrangements between the States and the Commonwealth.

The report is structured into three main sections. The first section provides a broad macroeconomic analysis seeking to understand Australia's success in weathering the economic crisis. This section also discusses the contribution of regulatory reform to economic success while outlining a number of structural economic challenges faced by the Australian economy. The second section reviews achievements of regulatory reform and competition-oriented reforms to date. A third section discusses the remaining challenges for regulatory reform. This includes a discussion of policy areas for action, drawing on the contributions of the various chapters of the review, before highlighting strategic options for moving forward the reform agenda.

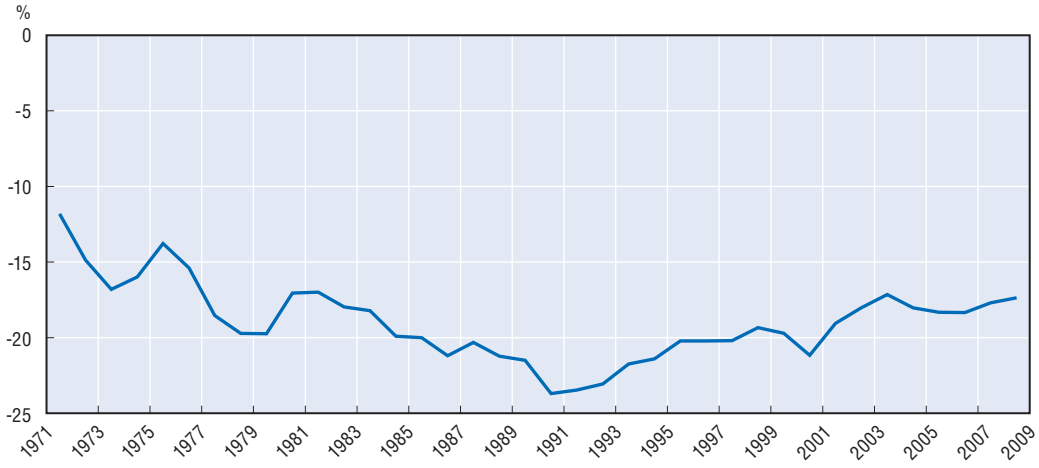
## The macroeconomic and structural context

### *The macroeconomic context*

#### *An impressive economic performance over the last two decades…*

Over the last two decades, Australia has had one of the best performing economies in the OECD area. Since the turbulent years of the 1970s and 80s, GDP per capita has been increasing relative to the United States, indicating that Australian living standards have been consistently catching up with those in the wealthiest countries (Figure 1.1). From 1992 to 2008, Australia enjoyed 17 consecutive years of economic expansion with robust real GDP growth compared with other countries, resulting in significant improvements in per capita incomes and living standards. In terms of ranking, GDP per capita in Australia increased from 16th place among OECD countries in 1992 to 8th highest in 2007. This impressive growth performance was accompanied by sustained falls in unemployment and consumer price inflation from the high levels seen in the 1980s.

Figure 1.1. **GDP per capita relative to the United States**



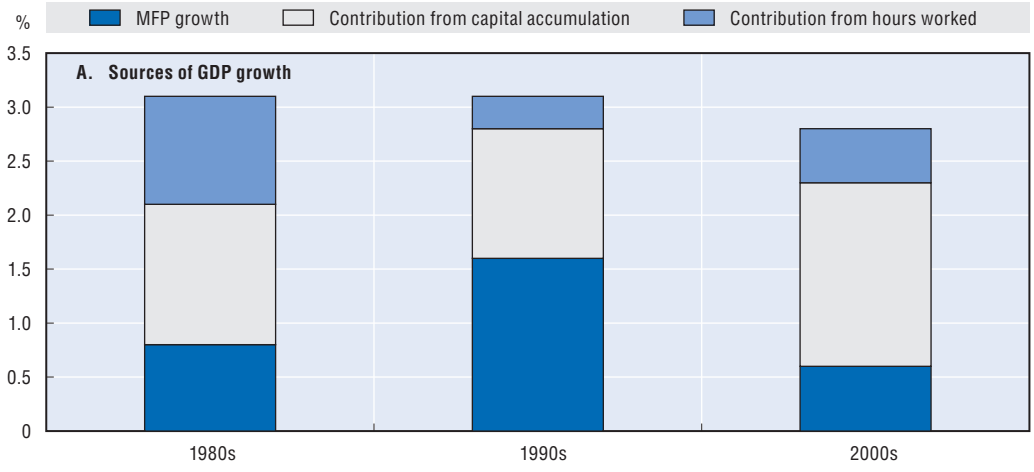

While output growth has been relatively stable over this period, sources of growth have changed considerably (Figure 1.2). Over the 1990s, improvements in the regulatory environment, coupled with the emergence of information and communication technology (ICT), led to vigorous increases in multi-factor productivity, which was the predominant driver for GDP growth. In the current decade, strong employment and particularly investment growth have driven GDP increases, despite a relatively weak productivity performance.

Incomes have also been boosted over recent years by a sharp rise in the terms of trade. After a period of relative stability during the 1990s, Australia's terms-of-trade increased by over 65% between 2003 and mid-2008, the largest upward movement since the 1950s peak driven by the Korean War-induced wool price boom (Figure 1.3). This increase was primarily driven by the commodities boom associated with the rise of China and India. From the second half of 2008, as the global economy moved towards recession, Australia's terms-of-trade fell by around 17%, offsetting some, but by no means all, of the previous gains.

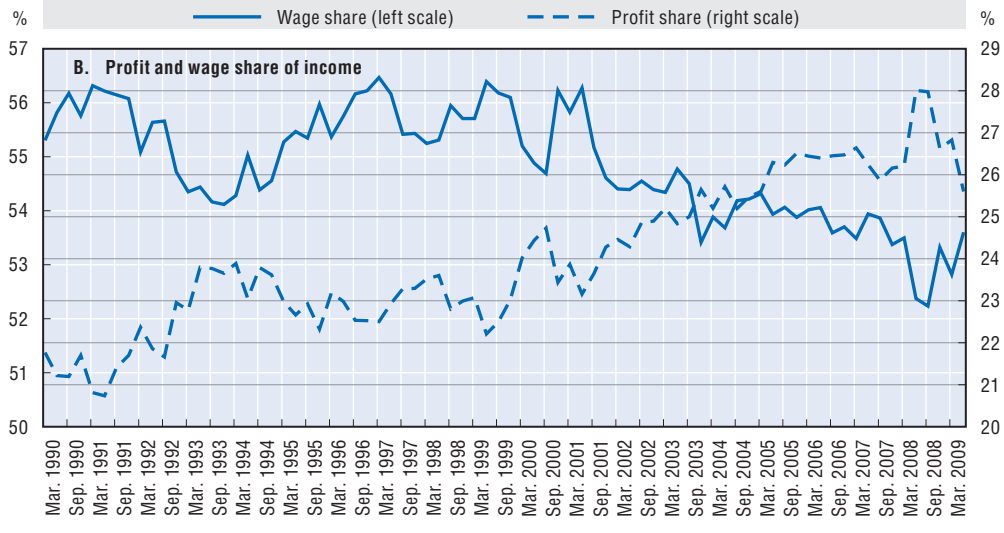
Reflecting solid productivity growth over the 1990s and an increasing terms of trade until recently, the share of profits in national income increased, reaching a record high in 2008 (Figure 1.2b above). In large part, this is driven by higher average returns in the capital-intensive resource sectors, which have been enjoying strong profit growth up until the recent softening in commodity prices. In addition, the mining sector has increased its share of national income, which also lowers the national wage share.[1] Although the wage share of national income has been falling, labour income has increased over the course of Australia's recent terms of trade boom. The decreasing wage share reflects relatively stronger growth in corporate profits due to the boom.

Spurred by high profitability, the investment rate in the business sector is high from an historical perspective, even though it has recently weakened because of the crisis. This reflected very rapid growth in non-residential construction, especially in the mining sector, which has been at the epicentre of Australia's dramatic rise in terms of trade up until mid-2008. In international comparison, business investment in Australia since the turn of the century has also been among the highest in the OECD (Figure 1.2c).

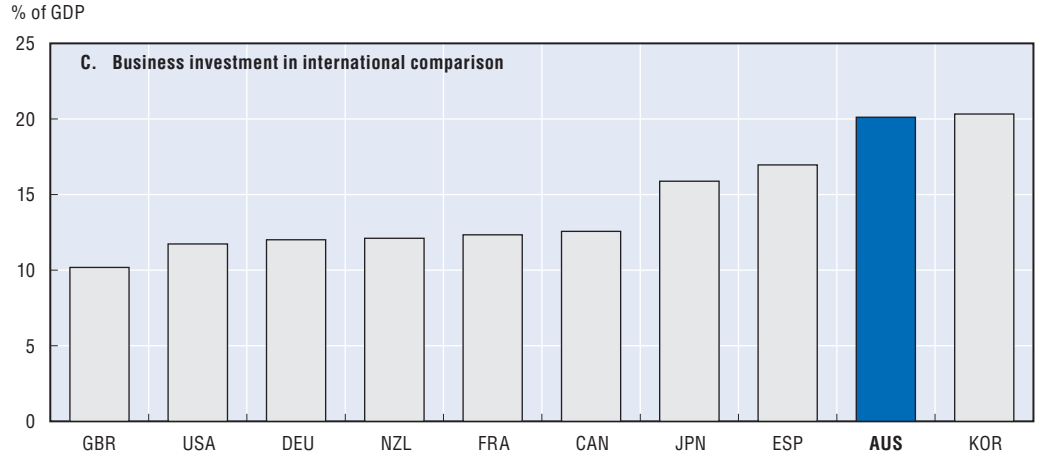
Figure 1.2. **Key economic indicator**




*Source:* Productivity Commission (2007), *Annual Report 2007-08*.

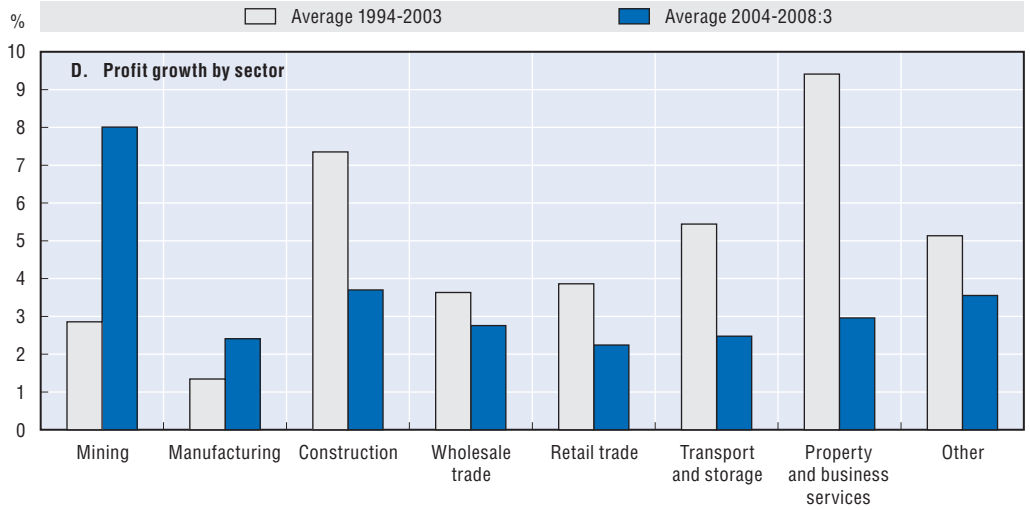



*Source:* Australian Bureau of Statistics, Cat. No 5206.0.

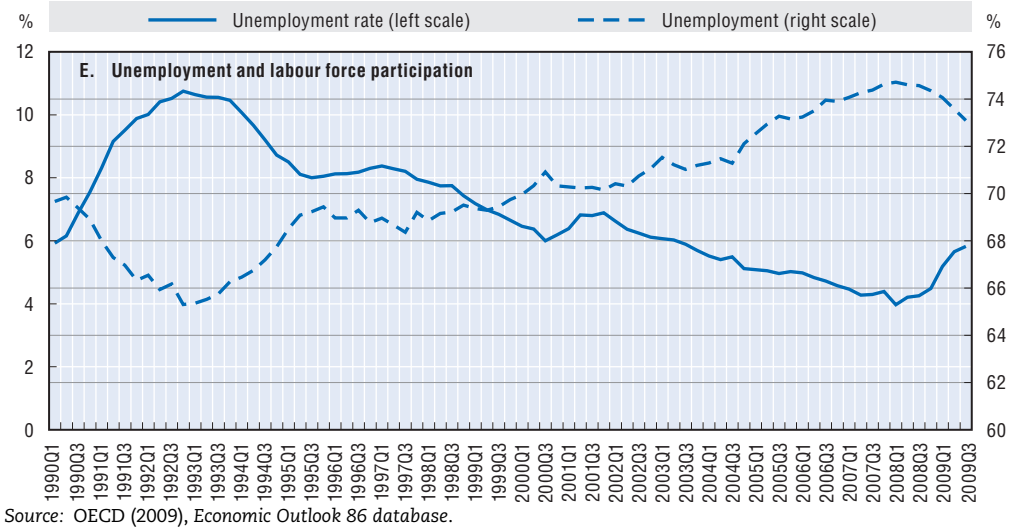



*Source:* OECD (2009), *Economic Outlook 86 database*.

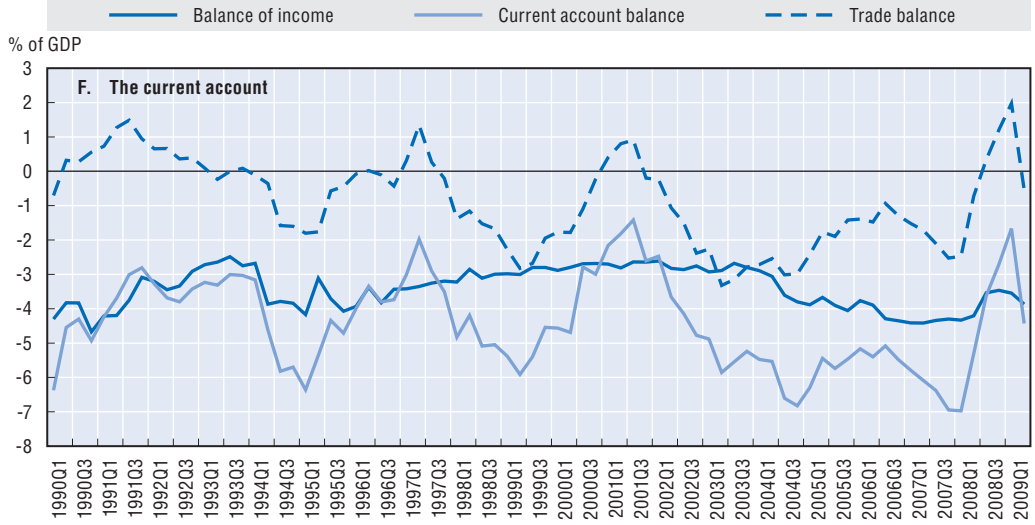
Figure 1.2. **Key economic indicator** *(cont.)*




*Source:* ABS Company Gross Operating Profits, Cat No. 5676.0.

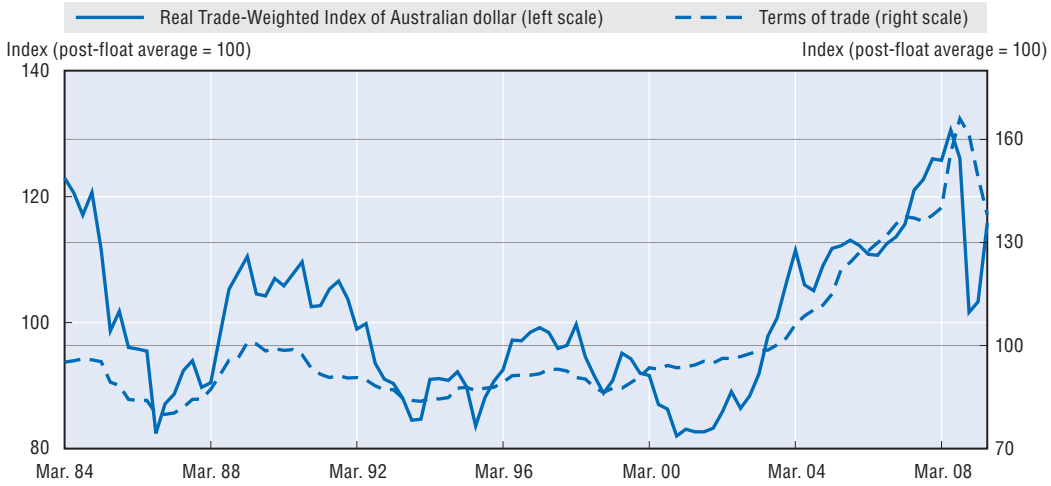



*Source:* OECD (2009), *Economic Outlook 86 database.*




*Source:* OECD (2009), *Economic Outlook 86 database.*

Figure 1.3. **Australia's terms of trade and the real exchange rate**




*Source:* ABS Balance of payment, Cat No. 5302.0 and Reserve Bank.

Prior to the onset of the global economic recession, Australia's unemployment rate had dropped to around 4%, its lowest level since the early 1970s. As the labour market has become more flexible and incentives have improved, labour force participation has increased from 68% in 1990 to a record high of 73% in 2008. Increased participation has made a solid contribution to income growth over the last eight years (Productivity Commission, 2007). Indeed, with productivity growth recently falling below productivity growth in the United States, Australia's continuing catch-up in terms of GDP per capita reflects improvements in labour utilisation in conjunction with terms of trade gains.

Australia has run a persistent current account deficit that has averaged 4.5% of GDP since the start of the 1990s (Figure 1.2f). From time to time, the balance of trade has run into surplus but has averaged a small deficit over the same period. Australia's net investment income deficit, which is primarily made up of net interest and dividend payment to foreigners, has been firmly in deficit over this period. In large part, this reflects rapid growth in investment with the contribution from business investment, in particular in the mining sector, increasing over recent years. With persistent current account deficits, net foreign liabilities have gradually increased over recent decades. This increase has largely been accumulated by the private sector, reflecting high private sector investment and a fall in private savings rates.

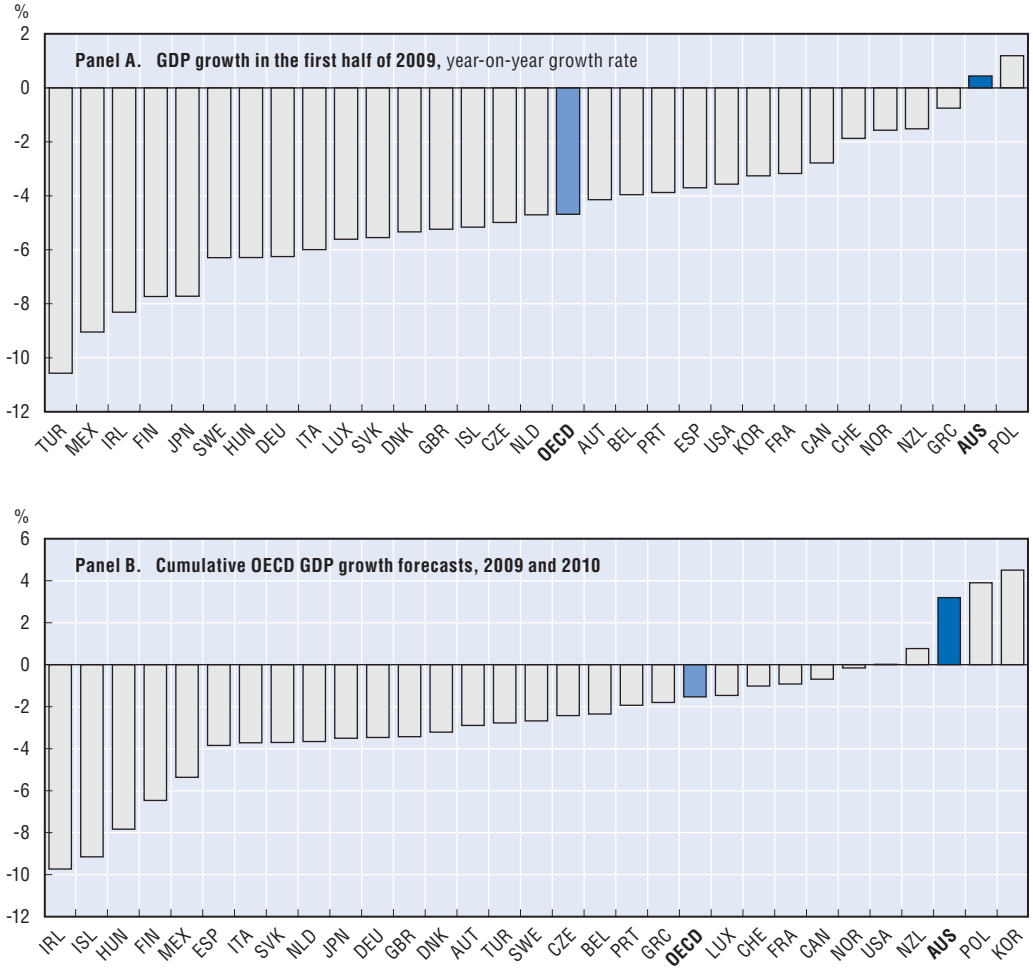
### *… which has remained very strong in international comparisons since the beginning of the crisis*

Although the global recession has not spared Australia, its impact appears to have been less severe than in most other OECD countries. The economy has benefitted from a healthy macroeconomic situation, coupled with strong fiscal positions when the crisis started. Its well regulated and resilient financial sector has also limited the direct negative impact of the financial crisis on the economy. This would not have been enough, if monetary and fiscal policies had not been developed progressively to respond to the crisis. These have in no small part shielded businesses and citizens from the initial damaging impacts of the global recession. In addition, while Australia was negatively impacted by the fall in the terms of trade accompanying the global downturn, it has benefited from a

relatively rapid rebound in some Asian economies, in particular China, which has introduced extremely large monetary and fiscal stimuli.

In the first half of 2009, the Australian economy recorded positive growth of 0.5% (year on year). It outperformed most other OECD economies (Figure 1.4), which in the face of the severe global recession, contracted on average by 4.75%. Conditions in the household sector have remained more favourable than in many other OECD countries with income holding up relatively well as a result of robust growth in labour income and payments as part of the government's fiscal stimulus package. In addition, large falls in mostly variable mortgage interest rates in response to the sharp easing in monetary policy have also provided a significant boost to household balance sheets. As a result, household spending has held up well. Consumer sentiment has recovered from low levels in 2008 and is stronger than in many other countries. Despite a weak international environment, Australia has also benefited from a positive contribution from foreign trade in early 2009, thanks in part to strength in Chinese commodity imports, which are expected to remain robust in the foreseeable future.[2] This relatively favourable situation has in turn boosted business confidence, and firms, which have benefited for temporary tax deductions, are becoming more optimistic about their investment plans. All in all, according to recent

Figure 1.4. **Cumulative GDP growth forecasts**




*Source:* OECD (2009), Economic Outlook 86 database.

projections the Australian economy is likely to weather the global financial and economic crisis better than most other OECD countries, with a cumulative GDP growth forecast of 3.2% over 2009-10, the third highest in the OECD (Figure 1.4).

### *A strong financial sector*

In contrast to almost all of the large OECD economies, the Australian banking sector has held up exceptionally well to the global financial crisis. Banks' profitability has remained solid and the banks are soundly capitalised. When the crisis erupted, the Australian financial sector was relatively free of the serious issues that have affected other OECD countries. The government has not had to bail out any financial institutions. Policy response by the Reserve Bank and the federal government has helped to protect the financial system against the spillovers from the global crisis. The RBA was prepared to expand its balance sheet to assist in maintaining liquidity and the government guarantees were important in shoring up confidence and maintaining access to wholesale funding (Stevens, 2009). Overall, at a time when global financial conditions have significantly improved after a period of significant stress, four of the world's nine most highly rated banking groups are now Australian. The strength of Australia's financial service sector in face of the global financial and economic crisis has also been highlighted by the World Economic Forum's Financial Development report 2009, which ranked Australia second among the world's financial centres.

This resilience of the financial system is due to a number of factors. First, consistent with Australia's current account deficit, the banking sector was focused on domestic lending in the run up to the crisis and tended to seek offshore funding for their activities rather than being buyers of foreign assets. By "sticking to their knitting" the Australian banks did not accumulate large exposures to assets that subsequently turned toxic. Previous banking crises in Australia in the not too distant past may have also dampened risk appetites in the run up to the financial crisis.[3]

Sound regulation of the financial sector compared with a number of other countries has also played a role in safeguarding Australian banks from the global financial crisis. In part, the importance of banking supervision has been emphasised by the separation of prudential regulation from the RBA with the creation of the Australian Prudential Regulation Authority (APRA) in 1998. APRA is the only prudential regulator of the finance sector and has the sole objective of monitoring financial institutions with the aim of protecting depositors, policy holders and superannuation fund members.

After a rocky beginning, regulatory changes after the collapse of HIH in 2001 gave APRA greater flexibility for early intervention and increased its investigative responsibility and power. In response, APRA substantially upgraded its risk assessment and supervisory capabilities. In the run up to the global financial crisis, APRA was quite active and spoke publicly about the quality of the banks' loan books. In addition, APRA was wary of "sub-prime" lending and increased capital requirements for relatively risky "low-doc" loans in 2004. More generally, APRA has tended to adopt a relatively conservative stance on capital adequacy compared with its counterparts in a number of other OECD countries.

Prudent regulation of the financial sector is also aided by effective co-ordination across regulators. The Council of Financial Regulators is a co-ordinating body that meets regularly and provides a high-level forum for co-operation and collaboration among its members.[4] These arrangements provide a flexible and low-cost approach to regulatory

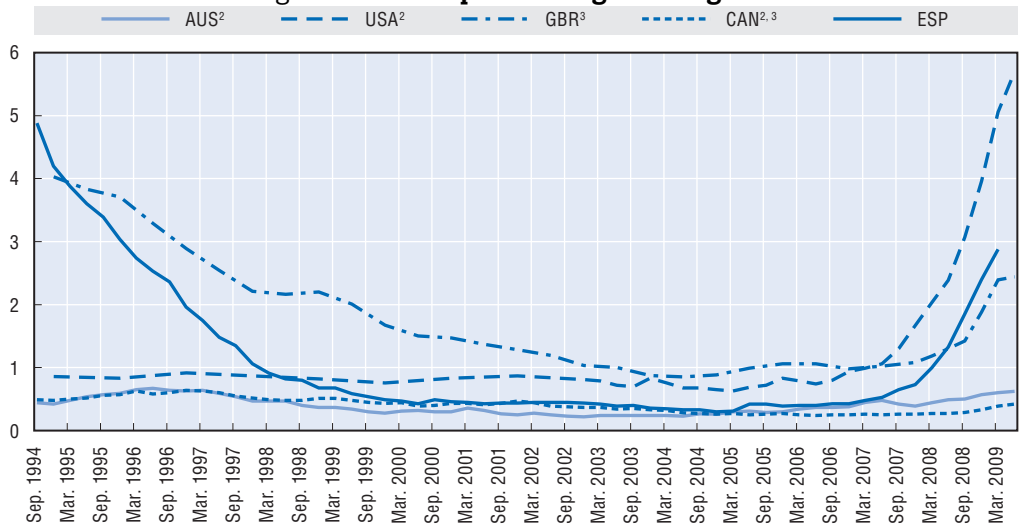
co-ordination and promote confidence in the financial system. This good co-ordination among regulators proved again effective during the recent crisis, thanks to the timely federal government intervention which responded to the increased nervousness of the financial market when the crisis was intensifying. In October 2008, the government guarantees of deposits and wholesale funding were announced. All deposits of AUD 1 million or less in eligible financial institutions were guaranteed for a three-year period, and a fee-based guarantee was put in place for large deposits and wholesale funding. These measures were successful in lowering tensions in the market and limiting the increase of funding conditions, which thereafter have gradually improved with the reduction of global risk aversion in the course of 2009, as evidenced for instance by the pick-up of stock markets over the recent months (RBA financial stability review, September 2009).

Other aspects of Australia's financial and legal system have also helped ensure that Australian banks have survived the global financial crisis in good shape. For instance, all mortgages in Australia are "full recourse" and allow banks to pursue assets in addition to the house in the event of non-repayment. This implies that mortgage holders in financial difficulty cannot extinguish their debt by simply walking away from their home. In addition, the Australian Uniform Consumer Credit Code – which has been in operation since 1996 – means that the courts can set aside mortgage agreements where the lender could have reasonably known that the borrower would not be able to repay the loan without causing substantial hardship. This places a strong obligation on lenders to make responsible lending decisions. Finally, the tax system is such that Australian households cannot deduct interest payments against their tax, which increases incentives to lower borrowing (RBA, 2009).

Australia's regulatory and legal framework has been an important factor in avoiding a deep crisis in the housing market. Although securitisation has long been part of the Australian lending environment with around 20% of housing loans securitised prior to the crisis, there has not been the same disassociation between lenders and borrowers as in other countries relying more on securitisation. Intermediation is still the dominant model, implying little incentive for banks to expand loan volumes without paying adequate regard to risk. Lending standards have also been comparatively tight in Australia. There is only a very limited incidence of sub-prime loans, most of which originate in the non-bank financial sector.[5] However, even this segment of the mortgage market has performed reasonably well and, in total, only around 0.6% of home loans are estimated to be in arrears and there are very few incidences of negative equity in the housing market (Figure 1.5). Compared with some other OECD countries, such as Spain or the United States, the Australian housing market has not been as over-extended with housing construction slowing considerably from a peak in 2003. For several years, the housing markets have actually been characterised by a shortage of supply caused by supply side constraints relative to the underlying demand (Richards, 2009).[6] Without an overhang in housing supply, the Australian housing market has thus not suffered from steep price declines as shown by their pick-up in the second quarter of 2009 when housing demand started to improve with the support of very low interest rates and fiscal incentives.

Despite the financial turbulence, the authorities have remained attentive to maintain adequate competitive pressures in the banking sector. In this sector, market concentration is above the OECD average, although net interest margins charged by banks have been around average in international comparison over recent years

Figure 1.5. **Non-performing housing loans**[1]




1. Per cent of loans by value. Includes "impaired" loans unless otherwise stated. For Australia, only includes loans 90+ days in arrears prior to September 2003.
2. Banks only.
3. Per cent of loans by number that are 90+ days in arrears.

*Source:* APRA; Bank of Spain; Canadian Bankers' Association; Council of Mortgage Lenders; FDIC; RBA.

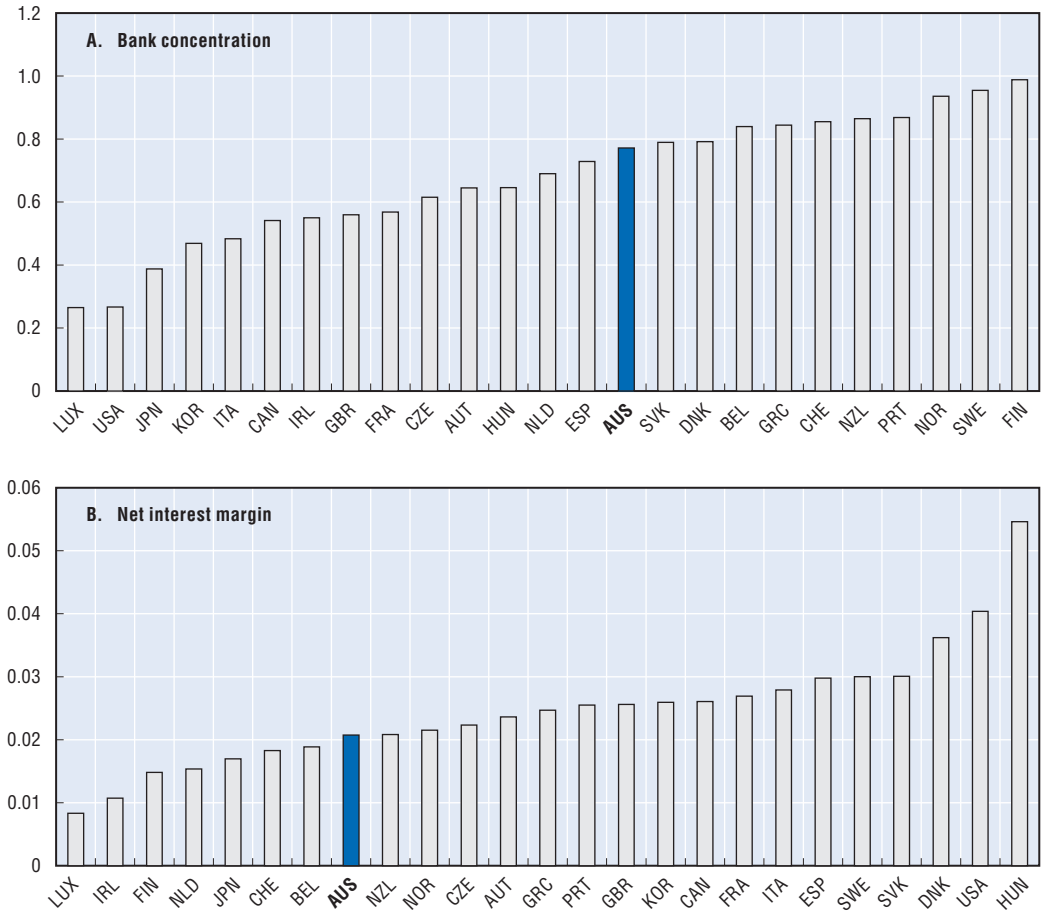
(Figure 1.6). Even though concentration in housing loans has recently increased, the market is still contestable as non-Australian banks account for 30% of business credit and competition is generally considered to be healthy. Moreover, the government has taken initiatives to reinforce competition, especially in the mortgage market. To support small lenders to lend at competitive rates of interest, on 11 October 2009, the Treasurer announced an extension of the government's investment in Australian residential and mortgage-backed securities (RMBS). Specifically, the government will provide up to AUD 8 billion of support to new issuances of high-quality RMBS. This follows the near completion of the government's AUD 8 billion investment in RMBS announced on 12 October 2008.

### *Prompt monetary policy reactions…*

The global financial crisis erupted just as Australia was coming off a peak in its business cycle. In the run up to the demise of Lehman Brothers in September 2008, the Australian economy was approaching capacity limits with headline inflation running at around 4.5% as a result of a prolonged economic expansion associated with a terms of trade boom. Unemployment, at 4.25%, was around its lowest for 33 years. Reflecting buoyant economic conditions, monetary policy was in contractionary mode before Australia entered the crisis, implying that the Reserve Bank of Australia (RBA) had significant scope for a substantial easing. Between September 2008 and April 2009, the cash rate was thus cut by 425 basis points to 3%. The transition mechanism of monetary policy in Australia has worked better than in most countries – of the 425 basis points reduction in the official interest rate, around 385 basis points were passed to the standard variable mortgage rate.

Australia was the first G20 country to raise interest rates after the period of very expansive monetary policy adopted in the whole OECD area in response to the financial

Figure 1.6. **Competition and efficiency in the banking sector**




1. Data updated in May 2009. The results reflect an average over 2000-07, except when data was missing.

*Source:* World Bank, *Financial Structure Dataset*.

crisis. This reflects the relatively favourable trends experienced by the economy over the recent period and the reduction of the large global downside risks which prevailed until mid-2009. This policy change can also be justified by the need to minimise the risk of building up other imbalances in the economy associated with very expansionary policy. This forward-looking monetary policy, based on a medium-term inflation targeting framework, has served Australia well over the past two decades.

### *Based on the inflation targeting framework*

A key component of the monetary policy framework has been the introduction of a floating exchange rate in 1983, which significantly mitigated the destabilising impact of large terms of trade movements. Previously, such events generally led to episodes of increased economic volatility. For example, the terms of trade increase in the 1970s resulted in an inflationary boom that ended with a significant economic slowdown and higher unemployment. In comparison, the large swings in relative trade prices over recent years have been absorbed with relatively minimal disruption at the macrolevel (Gruen, 2006).

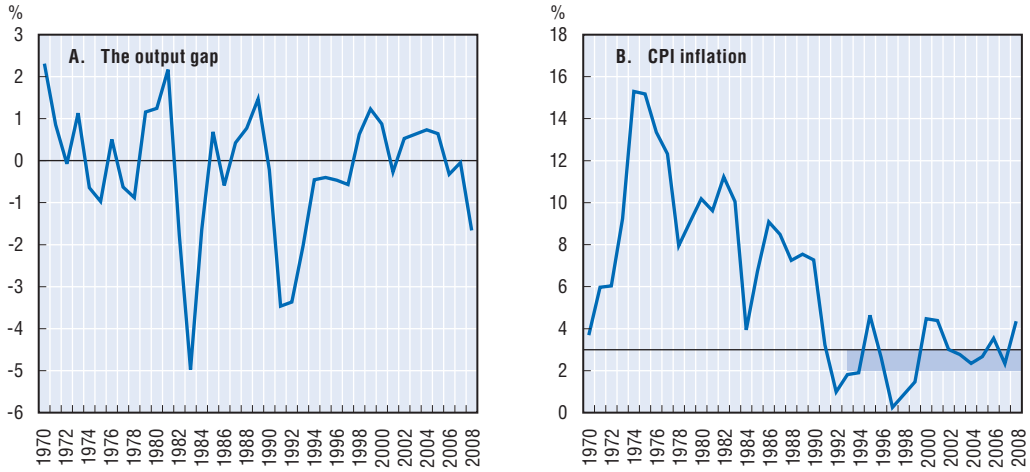
In essence, a flexible exchange rate plays the role of an automatic stabiliser, offsetting the impact of changes in terms of trade and other external shocks to some degree

(Figure 1.3). For example, an appreciation of the real exchange rate offsets some of the increase in national income arising from a higher terms of trade. In addition, such an appreciation also puts downward pressure on import prices, contributing directly and indirectly, through substitution effects, to a moderation in consumer prices. In these three ways, a flexible exchange rate helps dampen the domestic consequences of terms of trade changes. The Australian dollar generally has moved to offset the impact of foreign shocks by appreciating in response to improvements in global economic conditions and depreciating during slowdowns (Liu, 2007). This was particularly apparent during the Asian financial crisis in 1997, the global recovery in 2003 and the fallout from the recent global financial crisis.[7]

The adoption of flexible inflation targeting within an independent monetary policy framework has been another key policy event that has helped reduce macroeconomic volatility. Since 1993, the RBA has focused monetary policy on price stability while taking account of the short-run implications for economic activity and employment.[8] Price stability has been defined as keeping consumer price inflation in the range of 2 to 3% per annum, on average, over the business cycle. This target permits non-negligible price growth over time, allows for cyclical variability, and has "soft edges". This monetary policy objective was subsequently endorsed and formalised by government in a *Statement on the Conduct of Monetary Policy* in August 1996.

Although inflation decreased somewhat later than in a number of OECD countries,[9] inflation targeting has helped to deliver low and generally stable inflation in Australia, which has averaged around the midpoint of the inflation target band over recent years (Figure 1.7). Inflation variability has been similar to the OECD average (Figure 1.8) despite relatively wide exchange rate fluctuations. This sound performance has helped promote economic growth and strengthened the credibility of the central bank. Inflation expectations are now well anchored and there is widespread acceptance of the benefits of low and stable inflation. Consistent with its inflation target, monetary policy has also been largely successful in mitigating business cycle volatility in a counter-cyclical fashion, as implied by the relatively low volatility of output in international comparisons (Figure 1.8).[10]

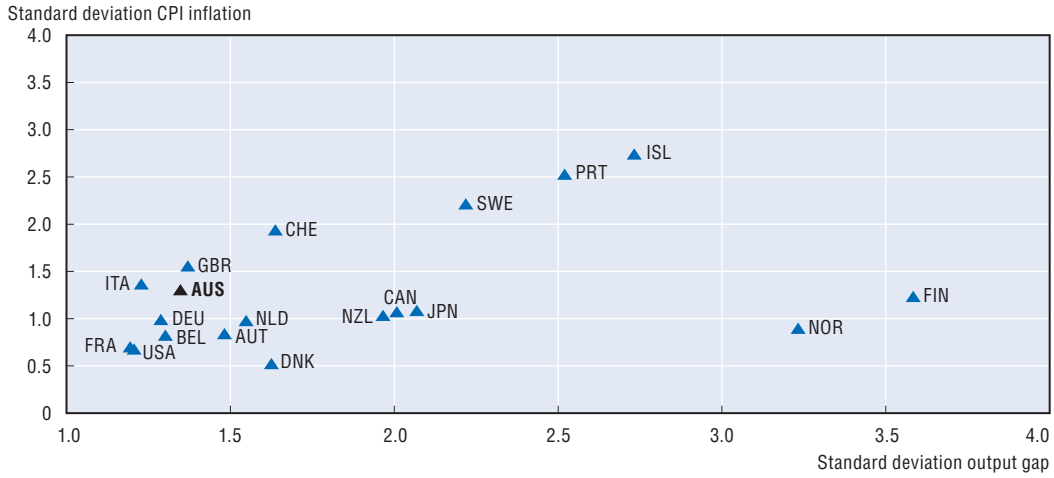
Figure 1.7. **Consumer price inflation and the output gap**




1. Shaded area corresponds to a price inflation range of 2 to 3% per annum since 1993.

*Source:* OECD (2009), *OECD Economic Outlook 86*, Paris.

Figure 1.8. **Business cycle and CPI volatility**



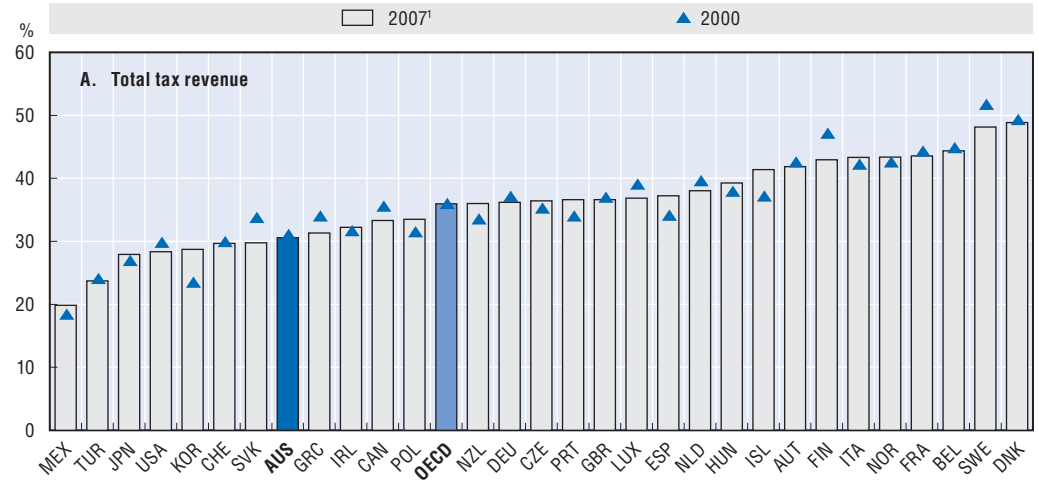

*Source:* OECD (2009), *OECD Economic Outlook 86*.

### *The healthy fiscal position has been helpful to develop a supportive budgetary policy*

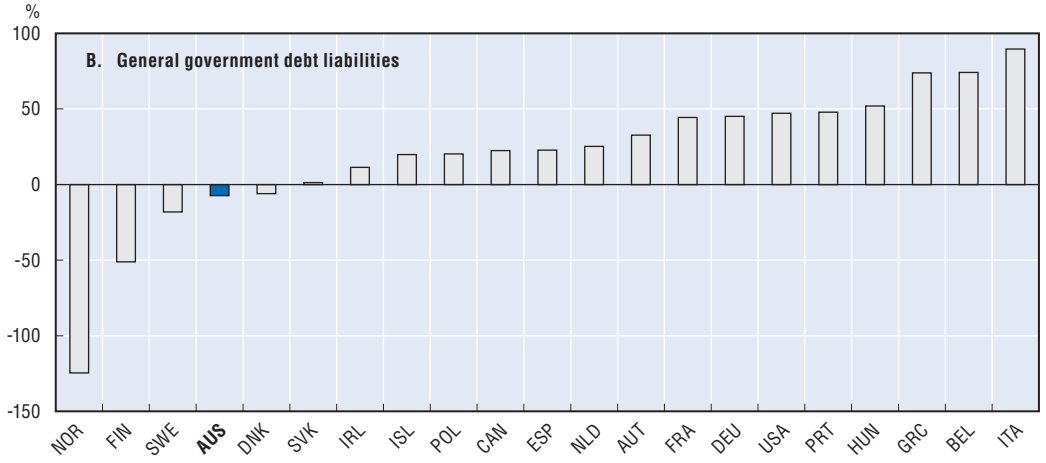
The significant budgetary leeway built in previous years has also made possible the adoption of a strongly expansionary fiscal policy, which has helped protect the economy against the adverse impact of the crisis. Overall, prior to the global economic crisis, Australia's fiscal position was in very good shape by international standards due to a mix of structural factors. The total tax burden in Australia, at 31% of GDP in 2007, is below the OECD average, but slightly higher than in the United States (Figure 1.9a). Although significant tax cuts, mainly on household income, and higher public spending were used in the recent past to spread terms of trade gains, the general government surplus was still around 1.14% of GDP between 1998-99 and 2007-08. As a result, and assisted by the privatisation programmes of the 1990s, net public debt was eliminated in 2005 while a small level of gross debt was maintained to facilitate a functioning bond market to allow efficient risk pricing more generally (Figure 1.9b).

By operating within a medium-term fiscal strategy, fiscal policy has contributed to moderate the cyclical fluctuations of the economy thanks to the role played by automatic stabilisers over the past decades. Discretionary budgetary policies in Australia have also been generally counter-cyclical to a stronger degree than in a number of OECD countries in the past (Table 1.2). This counter-cyclical discretionary policy has again had an effective stabilising role of the economy since the beginning of the crisis. Strongly supportive budgetary measures have been rapidly implemented via three stages of stimulus. The first phase, which began in October 2008, included one-off cash payments to predominantly low and middle-income households and additional support for first-home buyers. The second phase of stimulus, announced as part of the AUD 42 billion Nation Building and Jobs Plan in February 2009, is aimed at "shovel ready" infrastructure investments that can rapidly be implemented, with a focus on upgrading schools, homes and communities. The third phase, announced as part of the 2009-10 Budget, is targeted at larger and longer term infrastructure investments in nation-building infrastructure such as roads, rail, ports, universities and hospitals with a view to not only supporting the economy during the global recession but also to enhance its productive capacity and lay the foundations for future productivity growth.

Figure 1.9. **Total tax revenue and government debt (% GDP)**




1. 2006 data for Australia, Japan, Greece, Poland and OECD.




*Source:* OECD (2009), *Tax Revenue database*.

Overall, the government's stimulus measures amount to around 2.5% of GDP in 2009-10 and around 1.5% of GDP in 2010-11 and are relatively large by international comparison (Box 1.1).

This expansionary fiscal policy has supported activity. According to Treasury's estimate, the economy would have contracted by about 1.3% through the year to June 2009 without the budgetary stimulus. Private consumption has continued to grow in contrast with its evolution in most other OECD countries. According to survey evidence, 40% of households who said they received a government payment reported having spent it between March and May 2009, which is consistent with a short-term marginal propensity to consume of about 0.4 (Leigh, 2009). Firms' demand for machinery and equipments and public investment has also been boosted by government measures and the labour market has deteriorated much less than in most other OECD countries. The fall in employment has been limited by the reduction in the numbers of hours worked and the unemployment rate has stabilised at around 5.75% between March and

Table 1.1. **Correlation between discretionary fiscal policy and the output gap**

| | 1972-1980 | 1981-1990 | 1991-2000 | 2001-09 |
|---|---|---|---|---|
| **Australia** | 0.82 | –0.05 | 0.32 | 0.91 |
| Austria | 0.41 | –0.12 | –0.15 | 0.43 |
| Belgium | 0.09 | –0.35 | –0.88 | –0.02 |
| Canada | 0.74 | 0.48 | 0.11 | 0.77 |
| Denmark | 0.62 | 0.74 | 0.56 | 0.34 |
| Finland | 0.92 | 0.13 | 0.67 | 0.85 |
| France | 0.11 | –0.48 | –0.40 | 0.41 |
| Germany | | | –0.22 | 0.14 |
| Greece | 0.17 | –0.61 | 0.14 | –0.32 |
| Iceland | | 0.14 | 0.04 | –0.14 |
| Ireland | | –0.70 | –0.01 | –0.12 |
| Italy | 0.35 | –0.28 | –0.34 | –0.01 |
| Japan | 0.34 | –0.58 | –0.02 | 0.45 |
| Netherlands | 0.21 | –0.62 | 0.06 | 0.23 |
| New Zealand | | 0.78 | –0.31 | 0.81 |
| Norway | | –0.11 | 0.56 | 0.59 |
| Portugal | | –0.20 | –0.17 | 0.38 |
| Spain | | –0.09 | –0.17 | 0.52 |
| Sweden | 0.63 | 0.01 | 0.20 | 0.51 |
| Switzerland | | | –0.09 | 0.33 |
| United Kingdom | –0.78 | –0.09 | 0.86 | 0.84 |
| United States | 0.53 | 0.55 | 0.31 | 0.74 |
| Countries applying a counter-cyclical discretionary fiscal policy | 13 | 7 | 11 | 17 |
| Countries applying a pro-cyclical discretionary fiscal policy | 1 | 13 | 11 | 5 |

1. Counter-cyclical policies lead to a positive correlation between output gaps and the fiscal stance. Pro-cyclical policies lead to a negative correlation between output gaps and the fiscal stance. The fiscal stance measures the yearly change in the cyclically-adjusted balance as a percentage of potential output. It is only indicative of discretionary fiscal policy changes.

*Source:* OECD *Economic Outlook database and OECD Calculation*, 2009.

September 2009. According to the OECD estimate, employment in Australia in 2010 will be between 1.4 and 1.9 percentage point higher than it would have been without the stimulus measures adopted (OECD, 2009).

With the deterioration in economic conditions and the introduction of fiscal stimulus packages, net debt positions in all of the major OECD economies, including Australia, are increasing. However, as indicated in the 2009-10 Budget presented in May 2009, the Australian government is committed to pursuing prudent fiscal policy. Several expansionary measures adopted to support the economy, such as the transfers to the liquidity constrained households or the incentives to dwelling or business investments have already ended or are being phased out. In the 2009-10 *Mid-Year Economic and Fiscal Outlook* released in November 2009, the fiscal accounts are projected to return to surplus by 2015-16 reflecting the Australian Government's fiscal strategy of allowing the level of tax receipts to recover naturally and by holding real growth of government spending to 2% a year once the economy recovers and grows above trend. Even with one of the largest fiscal stimulus packages relative to GDP in the OECD, the Australian Treasury estimates that net debt will peak at only 10.0% of GDP in 2013-14, which is much more moderate than in most comparator countries. This budgetary strategy looks thus appropriate and, so far, on track. However, going forward the government will have to stick to its budget consolidation medium-term commitment and the withdrawal of fiscal stimulus will have to be carefully

## Box 1.1. **Australia fiscal stimulus in international comparison**

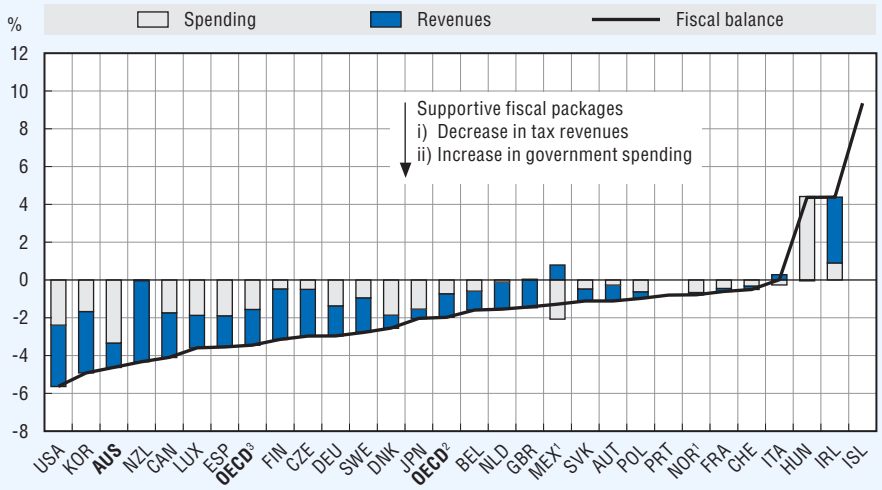
Virtually all OECD countries have introduced discretionary measures to support their economy in the face of the global economic recession. Based on a consistent approach to the definition of the fiscal stimulus packages (described in OECD, 2009c), the size of packages measured by their cumulated impacts on fiscal balances over 2008-10, amounts to about 3.5% of area-wide 2008 GDP. This needs to be seen in the context of the area-wide fiscal deficit, which is projected to widen from around 1.5% of GDP in 2007 to nearly 9% in 2010, with gross government debt increasing from about 75% of GDP to about 100%. Most of this increase can be related to the cyclical impact of automatic stabilisers in the deep downturn. For the average OECD country, this cyclical effect over the period 2008-10 is about three times the discretionary fiscal action taken in response to the crisis.

There is considerable variation in the size of packages across countries, reflecting *inter alia* differences in the severity of the economic crisis, differences in the fiscal position before the onset of the crisis and differences in the size of automatic stabilisers (Figure 1.10). In Australia, reflecting low public net debt, the scope for using fiscal policy to cushion the impact of the global recession is large. Indeed, Australia is one of five countries that have introduced fiscal packages amounting to 4% of GDP or more with the United States package, at about 5.5% of 2008 GDP being the largest. In contrast, a few countries (in particular Hungary, Iceland and Ireland) are expected to drastically tighten their fiscal stance. Outside the G7, a majority of countries have primarily opted for tax cuts over increased spending.

For the average OECD country, fiscal multipliers suggest that the level of support for GDP growth from discretionary fiscal stimulus in both 2009 and 2010 will be of the order of 0.5 percentage point. However, for Australia and the United States, the estimated multiplier effect exceeds one percentage point of GDP growth in both 2009 and 2010. These effects do not include cross-border spillovers.

### Figure 1.10. **The size and composition of fiscal packages**

Cumulative impact of fiscal packages over the period 2008-10 on fiscal balances as a % of GDP




1. Only 2008-09 data are available for Mexico and Norway.
2. Simple average of countries except Greece, Iceland, Mexico, Norway, Portugal and Turkey.
3. Weighted average of countries excluding Greece, Iceland, Mexico, Norway, Portugal and Turkey.

*Source:* OECD *Economic Outlook*, Interim Report, 2009c.

planned in terms of its timing, taking into account the significant uncertainties still surrounding future macroeconomic developments.

### *Economic volatility will remain relatively low but household debt is high*

The current downturn is hence likely to be relatively mild in Australia both in historical perspective and international comparisons. This development seems consistent with previous patterns. Although inflation volatility has been average relative to other OECD countries, business cycle volatility in Australia has fallen considerably since the 1980s and is low compared with other OECD countries (Figure 1.8). This has been achieved despite significant exposure to foreign macroshocks, including terms of trade shocks, which have been an important source of business cycle volatility for the domestic economy.[11]

In some respects, foreign macroshocks may have actually worked to help offset domestic shocks and moderate business cycle volatility in Australia over the last two decades as well as in the recent downturn. For instance, the Asian financial crises in the late 1990s acted to slow the Australian economy at a time when rising demand pressures were spilling over into inflation. The domestic slowdown after the Sydney Olympics and introduction of the GST in 2000 were attenuated by buoyant conditions in the United States. When the dot-com bubble did burst, the Australian housing market was experiencing a period of rapid price inflation that was driving up consumption. The pattern continued in late 2003 when the impact of a slowing housing market in Australian was offset by recovery in the United States.[12] Finally, the current financial and economic crisis erupted at a time when domestic demand was still quite vigorous because of the stimulus provided by the terms of trade gains and, when the impact of the global recession started to be more pronounced on the domestic economy, the external side has benefited from the stronger demand from Asian countries, especially China. Nevertheless, as well as good luck, both good fiscal and monetary policies and the resilience of the Australian financial system have been very important reasons for low business cycle volatility in Australia and for the impressive performance of the economy in face of the largest global recession since the 1930s.

Australia has not been left immune however, and some uncertainties remain. Most prominently, over the past 15 years or so Australian households have become increasingly indebted. Since the early 1990s, the ratio of household debt to annual household disposable income has more than tripled to around 160%, somewhat more than in the United States. The value of households' assets has also risen over this period, but not as fast, with the ratio of debt to assets increasing from under 10% in 1990 to about 18% in 2008 (Stevens, 2008). Although conditions in the household sector have remained more favourable than in many other OECD countries, households have responded to greater labour market uncertainty and falling asset values during the initial phase of the crisis by reducing their appetite for debt and lifting savings to levels not seen since the early-1990s.

Vulnerability to sharp reversals in foreign capital inflows and associated fluctuations in the exchange rate could to some extent be considered as another potential issue in Australia's macro-outlook. However, Australia's large current account deficits and foreign indebtedness are mitigated by a number of factors. To begin with, the increase in Australia's net foreign liabilities over recent years has almost exclusively been accumulated by the private sector, reflecting a fall in private savings rates and the elimination of net fiscal debt until recently. The so called "consenting adults" view of

Australia's current account deficits asserts that following the opening of the capital market in 1983, cycles in Australia's current account deficit have been consistent with optimal consumption-smoothing behaviour and may therefore not be a cause for concern.[13] In addition, much of Australia's foreign debt is effectively hedged, implying that Australian firms and households are reasonably resilient to large nominal exchange rate fluctuations.

The Australian economy benefits from a strong institutional framework conducive to the confidence of foreign and domestic investors which reduces vulnerabilities to external shocks. Macropolicies are credible and sustainable and the financial system is sound and well regulated. A flexible exchange rate regime also provides a mechanism through which Australia's external balance is continually subject to market assessment. The institutional features of the Australian economy that impart a degree of resilience to foreign shocks may also encourage sizeable capital inflows in the first place.[14] In addition, a shortfall of domestic savings relative to investment may, within limits, be an optimal outcome in a relatively young economy such as Australia with considerable natural resources.

### *The contribution of regulatory reform to economic success*

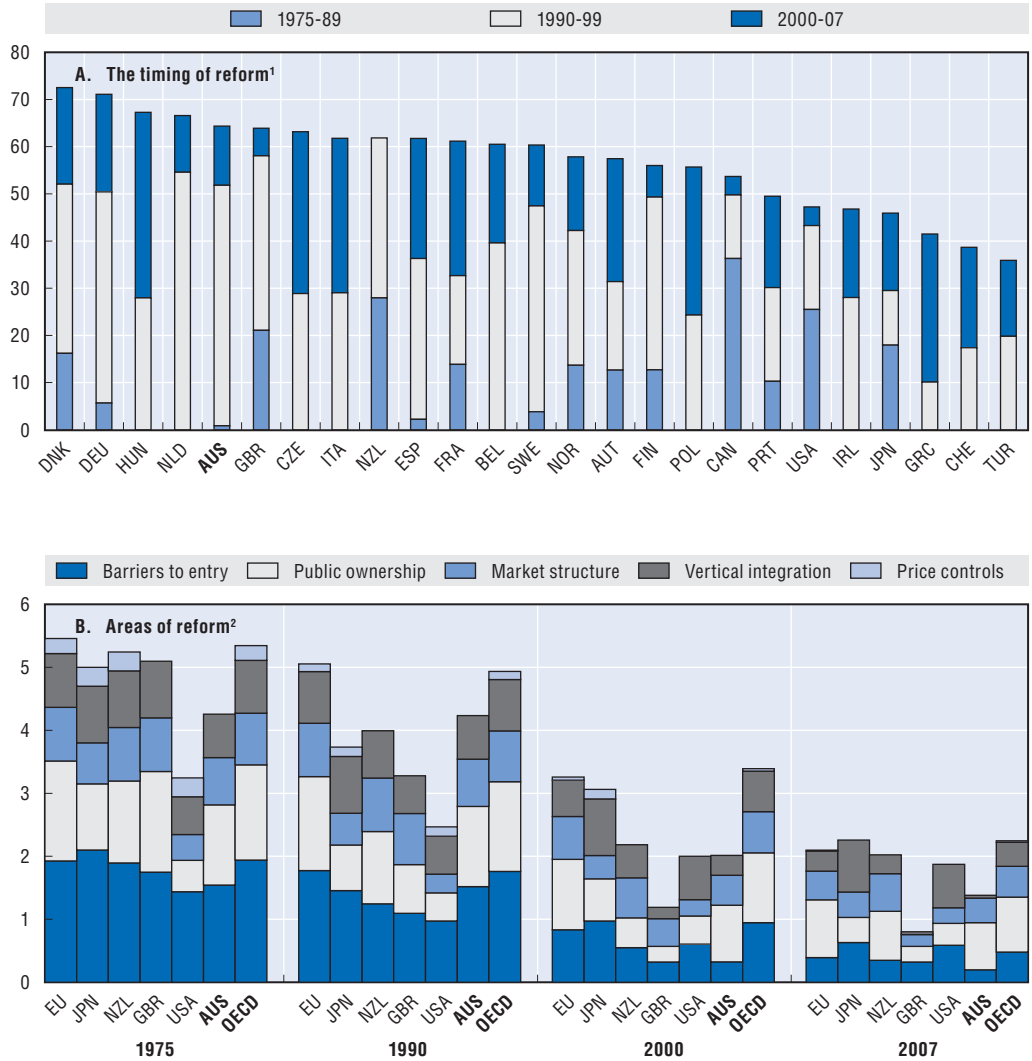
The good monetary and budgetary management and the solid macropolicy framework which have contributed to the positive performance of the Australian economy over past decades and in the current downturn would not have been possible without strong structural foundations. Microeconomic reforms have played a key role in improving Australia's economic prospects over the 1990s, with increased market openness, and competitive forces enhancing relative price flexibility. These favourable policy reforms have also strengthened the adaptability of the Australian economy, allowing it to derive large benefits from globalisation and its proximity to dynamic Asian markets. The following section discusses the contribution of past structural and regulatory reform efforts to economic growth and their implications in terms of economic resilience of the Australian economy.

### *A very vigorous impetus for regulatory reform in the 1990s*

In terms of regulatory reform, Australia was a relatively early adopter of mechanisms and institutions for the oversight of regulatory quality, and the use of RIA. Australia has been at the forefront of using quality regulation instruments for a long time. In terms of stimulating economic competition in economic sectors such as energy, transport and communication, the bulk of the Australian efforts took place during the 1990s when Australia was at the forefront of product market liberalisation (Figure 1.11). The tradables' sectors had already been exposed to international competition during the 1980s, thus revealing inefficiencies in the infrastructure and non-tradables' sectors which amounted to a competitive handicap, and had to be tackled during the 1990s.

Economic policy during the 1990s was driven by a strong recognition of the need for microeconomic reform, with linked efforts in terms of competition and regulation. Under the National Competition Policy (NCP), a broad range of policy initiatives were progressively implemented to liberalise potentially competitive markets, re-regulate and unbundle natural monopoly markets establishing pro-competitive regulation where possible, and privatise some state-owned assets (see below Box 1.7). The anti-competitive

Figure 1.11. **Reform in energy, transport and communication sectors**



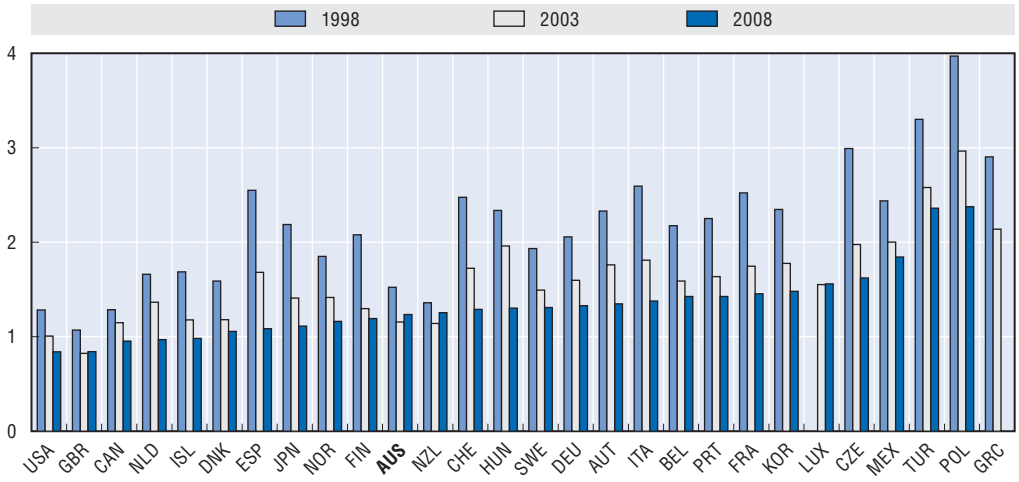

1. Increase in reform effort.
2. 0 to 6 scale from least to most restrictive competition.

*Source: OECD Regulation database.*

provisions of the *Trade Practices Act 1974* were also extended to state-owned enterprises and other previously excluded businesses.

The result of these policy changes was to lower barriers to entry and, to a lesser extent, public ownership in the network sectors (Figure 1.11). This fostered greater private-sector involvement, which increased competition and sharpened incentives to improve productivity through the reform of organisational structures. A rigorous programme of administrative reform was also implemented to cut red tape for business interacting with government, and reduced barriers to entrepreneurship. Therefore, by the end of the 1990s, OECD indicators of economy-wide product market regulation depict Australia as one of the front-running countries in the OECD in terms of the extent to which the regulatory environment was supportive of competition in 1998 (Figure 1.12).

Figure 1.12. **Economy-wide product market regulation**[1]




1. Index scale of 0-6 from least to most restrictive.

*Source: OECD Regulation database.*

As well as improvements in the macropolicy framework, regulatory reforms designed to increase competition may have also improved the resilience of the Australian economy by allowing resources to move more readily between sectors and firms. Where policies encourage strong competition, any slack in demand induces firms to cut profit margins and lower prices, which will help support demand. A competitive environment also facilitates the movement of productive factors, including labour, between sectors in response to changes in relative prices. For these reasons, structural policy settings conducive to high GDP growth generally also trigger swift rebounds after negative shocks.[15] All the cumulated efforts over the years bode well for the resilience of the Australian economy faced with a significant economic crisis, such as the global financial crisis experienced in 2008.

### *The beneficial effects of reform were reflected in an impressive productivity surge over the 1990s*

The regulatory transformation wrought on the Australian product markets over the 1990s has proved extremely beneficial. Together with other micro and macroeconomic reforms, the progressive implementation of the NCP led to improvements in the quality of services, efficiency gains and price cuts and contributed to the surge in productivity in the 1990s. According to the Productivity Commission, the implementation of the NCP resulted in a 2.5% rise in GDP.[16] Much of this GDP increase came through productivity improvements. Price falls in telecommunications and electricity were also found to be of substantial benefit given the importance of these sectors to business and households. Higher GDP increased tax revenues and enhanced the government's capacity to provide social services such as education and health.

The Australian experience provides a prime example of the beneficial impact of regulatory reform on productivity performance (Box 1.2). From the 1970s to the early 1990s, labour productivity growth was relatively volatile and averaged around 1.4% per year. However, over the 1990s cycle (1993-94 to 1998-99), labour productivity growth increased to an annual rate of 3.3% per year, the fastest rate on record. This outpaced labour

productivity growth in the US and narrowed the aggregate labour productivity gap, which peaked at 9% in 1998 (Figure 1.13a). This is close to the "potential frontier", given the size of the Australian economy and its geographical remoteness from markets.

This surge in labour productivity over the 1990s cycle was driven by very strong multifactor productivity growth of 2.3% per year (Figure 1.13b). This was more than a full percentage point per year above the long-run average and one of the strongest MFP accelerations in the OECD area in the 1990s (OECD, 2001). On the other hand, the rate of capital deepening over the 1990s cycle was broadly comparable with previous cycles, confirming that the surge in labour productivity was primarily due to efficiency improvements. Employment also increased over this period, implying that the productivity surge did not come at the expense of increasing under-employment.

At the sectoral level, the productivity surge of the 1990s was reasonably broad-based with all industries except cultural and recreational services enjoying positive MFP growth (Table 1.2). Strong accelerations in MFP growth were recorded in the service industries, particularly wholesale trade but also in communications services, finance and insurance, retail trade, construction, and transport and storage. The contribution from manufacturing, the traditional engine of growth in previous decades, was more mediocre. This was unusual: in the 1980s, service industries explained only one third of market sector productivity growth. In the 1990s, this rose to two thirds.

Explanations for Australia's productivity surge over the 1990s generally point to the same set of factors that have been found to be important in driving productivity growth in cross-country studies (*e.g.*, OECD, 2003). These factors include physical and human

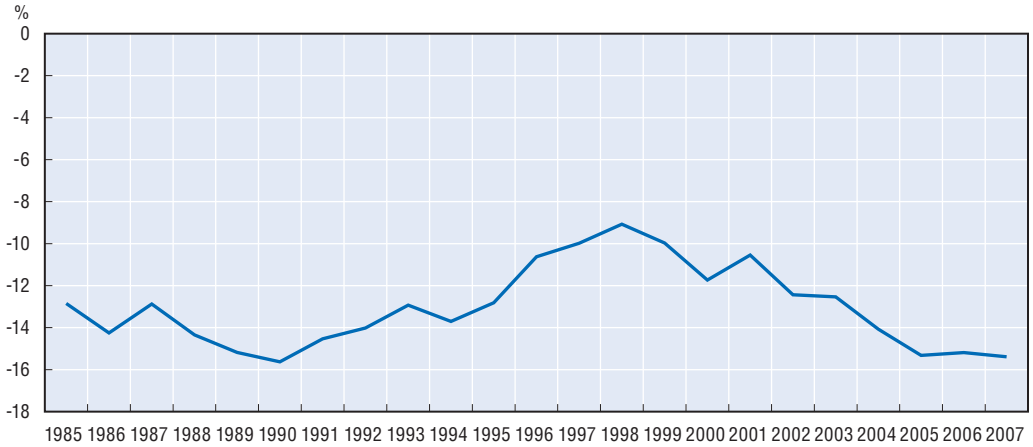
### Box 1.2. **Regulatory reform and its economic benefits**

Over recent years a large literature has emerged to test the influence of policies and institutions on macroeconomic performance. Much of this work has found that regulatory environments that encourage competition have a positive impact on economy-wide productivity in OECD countries even when other potentially important factors, such as human capital and country- and industry-specific effects, are accounted for (Nicoletti and Scarpetta, 2003). The beneficial impact of reform works through different channels depending on the distance of given firms or sectors from the world technological frontier. For firms operating at the frontier, a competitive regulatory environment has been found to foster innovation-based productivity growth (Aghion *et al.*, 2005). For sectors away from the frontier, reforms that encourage competition have been found to have a pronounced impact on productivity by increasing the speed of "catch up" via technological imitation (Arnold *et al.*, 2008; Conway *et al.*, 2006).[1] It would seem that the ability of firms to innovate, adopt new technologies and reorganise productive processes depends to a significant extent on the degree of restrictive regulations in labour and product markets.[2]

1. At the firm level, too much competition for firms operating some distance behind the productivity frontier may have a "discouragement effect" and reduce innovation given an increased entry threat from more productive firms. At the sectoral and economy levels, however, the impact of increased competition on innovation and aggregate productivity is unambiguously positive as weaker incumbents shrink or close and more productive incumbents and new firms innovate (Aghion and Bessonova, 2006).
2. Enhanced product market competition can also contribute to GDP per capita growth by increasing employment (Blanchard and Giavazzi, 2003; Haefke and Edell, 2004; Nicoletti and Scarpetta, 2004). As restrictions are eased and competition increases, firms earn lower product market rents, activity is expanded and employment rates tend to rise. Employment in some large firms, particularly in the network sectors, where previous regulations were conducive to over-manning, may be adversely affected by deregulation.

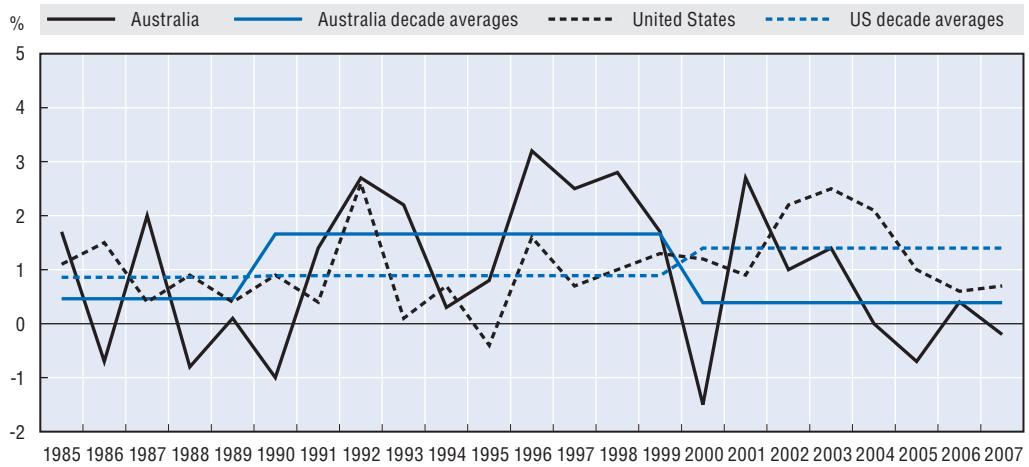
Figure 1.13. **Labour and multi-factor productivity (MFP), Australia versus the United States**

A. The gap in labour productivity




*Source:* OECD estimate.

B. MFP growth rates




*Source:* *OECD Productivity database.*

Table 1.2. **MFP growth by industry over aggregate productivity cycles**

| | 1974-75 to 1981-82 | 1981-82 to 1984-85 | 1984-85 to 1988-89 | 1988-89 to 1993-94 | 1993-94 to 1998-99 | 1998-99 to 2007-08 |
|---|---|---|---|---|---|---|
| Agriculture, forestry and fishing | 3.42 | 9.25 | –0.98 | 3.66 | 4.46 | 3.20 |
| Mining | –3.48 | 1.00 | 4.68 | 2.19 | 0.07 | –2.54 |
| Manufacturing | 2.27 | 1.99 | 1.87 | 0.50 | 1.28 | 0.90 |
| Electricity, gas and water supply | 2.23 | 2.44 | 5.28 | 4.15 | 2.33 | –3.06 |
| Construction | 2.72 | 0.48 | –0.60 | –0.64 | 2.47 | 1.52 |
| Wholesale trade | 0.52 | –1.14 | 0.42 | –1.26 | 5.12 | 1.18 |
| Retail trade | 0.96 | 2.84 | –1.21 | 0.99 | 2.06 | 1.15 |
| Accommodation, cafes and restaurants | –1.18 | –1.26 | –2.88 | –1.65 | 2.28 | 0.87 |
| Transport and storage | 3.46 | 1.39 | 2.49 | 1.69 | 2.38 | 1.59 |
| Communication services | 5.65 | 4.01 | 3.44 | 5.43 | 4.31 | 1.90 |
| Finance and insurance | –2.17 | –1.73 | 1.05 | 2.55 | 3.13 | 1.77 |
| Cultural and recreational services | 0.33 | –0.08 | –2.59 | –0.49 | –1.97 | 0.80 |

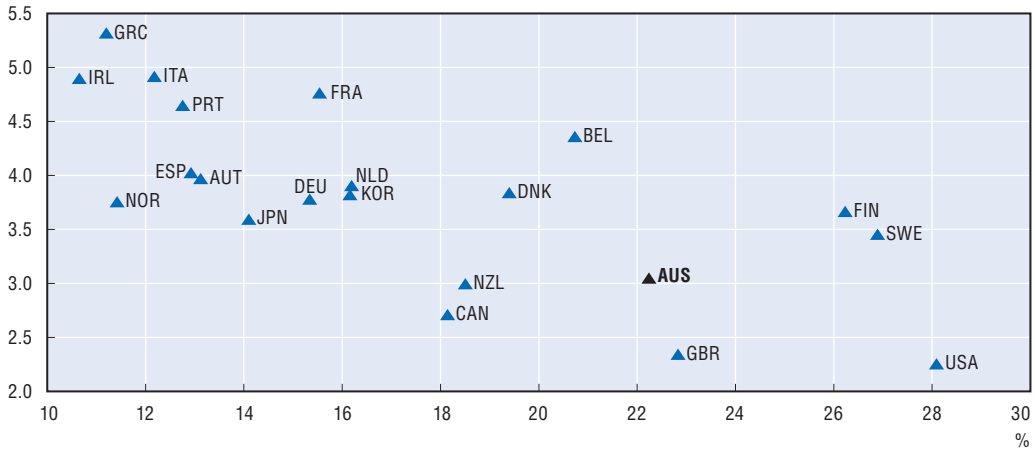
*Sources:* Productivity Commission.

capital accumulation, competition, trade exposure and flexibility in product and labour markets. ICTs and innovation also affect productivity performance, particularly where product and labour markets are flexible. In particular, a range of studies have identified human capital accumulation and ICT investment, along with innovation and R&D, as contributing to higher productivity growth over the 1990s. In general, the international diffusion of technology has been a key driver of Australian productivity growth: the recent Review of the National Innovation System found that 98% of new technologies are sourced from outside the country (Cutler report, 2008). In turn, all of these productivity drivers have, to varying degrees, featured in Australia because of policy changes that have increased trade exposure, competition and product and labour market flexibility.[17]

This is also reflected in ICT investment where Australia has become one of the world's leading adopters and beneficiaries. While such investment accelerated across the OECD over the 1990s, the pace of investment and its impact on growth have differed widely. This raises the question of why Australia was so proficient at ICT adoption compared with most OECD countries. Although there are a number of reasons for cross-country differences in ICT adoption – such as industry specialisation and gaps in workers' skills – differences in the regulatory environment have also been found to have a strong influence on the extent of ICT diffusion across borders (Conway *et al.*, 2006) (Figure 1.14).[18]

Labour market reform has also played an important role in increasing the adaptability of the Australian economy to global technology shocks. International evidence shows that countries with a decentralised bargaining system and less restrictive employment protection legislation are better equipped to innovate in industries characterised by rapidly evolving technologies.

Figure 1.14. **PMR and investment in ICT**




*Source: OECD Regulation database* and *OECD Science, Technology and Industry: Scoreboard.*

The relationship between the timing of policy reforms and technological change made an important contribution to Australia's productivity surge in the 1990s. Australia's reforms increased the extent to which competitive market forces were able to operate during the 1990s when the diffusion of ICT was particularly intense. Australia fully captured the benefits of ICT, both in terms of incorporating them into new vintages of the capital stock and reaping the efficiency gains originating from the changes in the

organisation of production that they allow. The positive impact on productivity growth of the timing of reforms and technological change were amplified by the general diffusion of ICT across all economic and service sectors. As in the United States, Australia's productivity acceleration in the 1990s was particularly strong in service sectors that are intensive users of ICT.[19]

### *A flexible labour market*

The labour market has benefited from a decentralisation of wage bargaining mechanisms in 1991, undertaken during the Hawke-Keating Labour government. This involved moving away from wage increases decided across the board for all industries towards a system fixed at enterprise level with the objective of better aligning wage increases to productivity gains. Enterprise bargaining accelerated over the mid-1990s and the possibility of individual employment contracts was introduced with the *Workplace Relations Act* in 1996. This evolution gradually transformed Australia's industrial relations system from a prescriptive, complex set of rules that were specified in Awards and largely set by a judicial body to a much more flexible system, with many enterprise and individual agreements.

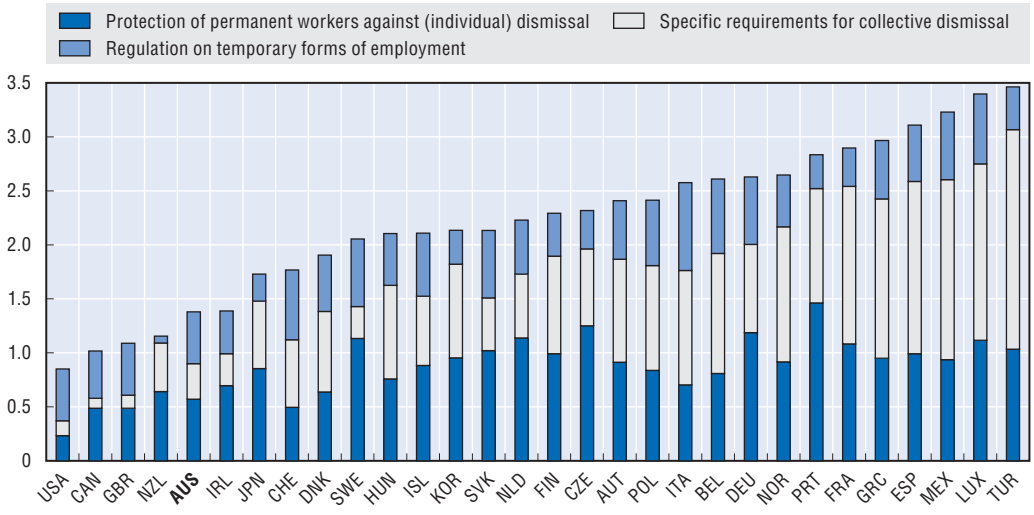
In 2006, the *WorkChoices* labour market reforms were introduced, aimed at further simplifying workplace agreement procedures by forming a single national industrial system, reducing the number of minimum employment conditions set by awards and liberalising unfair dismissal laws for small and medium-size businesses. These measures did not, however, receive broad support in the context of the 2007 Australian Federal election.

Following the election of a new government in 2007, some aspects of the *WorkChoices* reform have subsequently been phased out. In July 2009, a new workplace system that strengthens collective agreements at the firm level was introduced. This reform widens the safety net of minimum employment conditions and restores the right to appeal against unfair dismissal for employees of small and medium-sized businesses.[20] It also continues the process of streamlining awards which began under *WorkChoices*. A new regulatory body, *Fair Work Australia*, will support the new workplace relations laws and monitor their implementation.

While it is premature to assess the cumulative effects of these reforms, recent research on the labour market impact of employment protection has found that overly-strict regulations may reduce job flows, with a negative impact on employment of some groups of workers (notably youth), which could encourage labour market duality and hinder productivity and economic growth.[21] This is an issue of balance and the average level of employment protection is relatively low in Australia in international comparison according to available OECD data (Figure 1.15). One in four employees works under casual employment contracts, which are not covered by employment protection legislation. This is high compared with other OECD countries where nonstandard contracts typically cover less than 5% of workers (Venn, 2009). A low cost of dismissal seems to be one of the primary attractions of casual contracts, even though casuals generally receive a higher hourly rate of pay to compensate them for a lack of job protection and other entitlements.[22]

As well as reforming industrial relations, initiatives to increase labour force participation have also been pursued. Chronic skill shortages prior to the global recession,

Figure 1.15. **The strictness of employment protection legislation, 2008**




*Note:* For France and Portugal, data refer to 2009. The indicator refers to version 3 as defined in the methodology.
*Source:* OECD. To find more about the methodology, see *www.oecd.org/employment/protection*.

in combination with supply pressures from an ageing population, imply that Australia cannot afford to exclude potential workers from the labour market.[23]

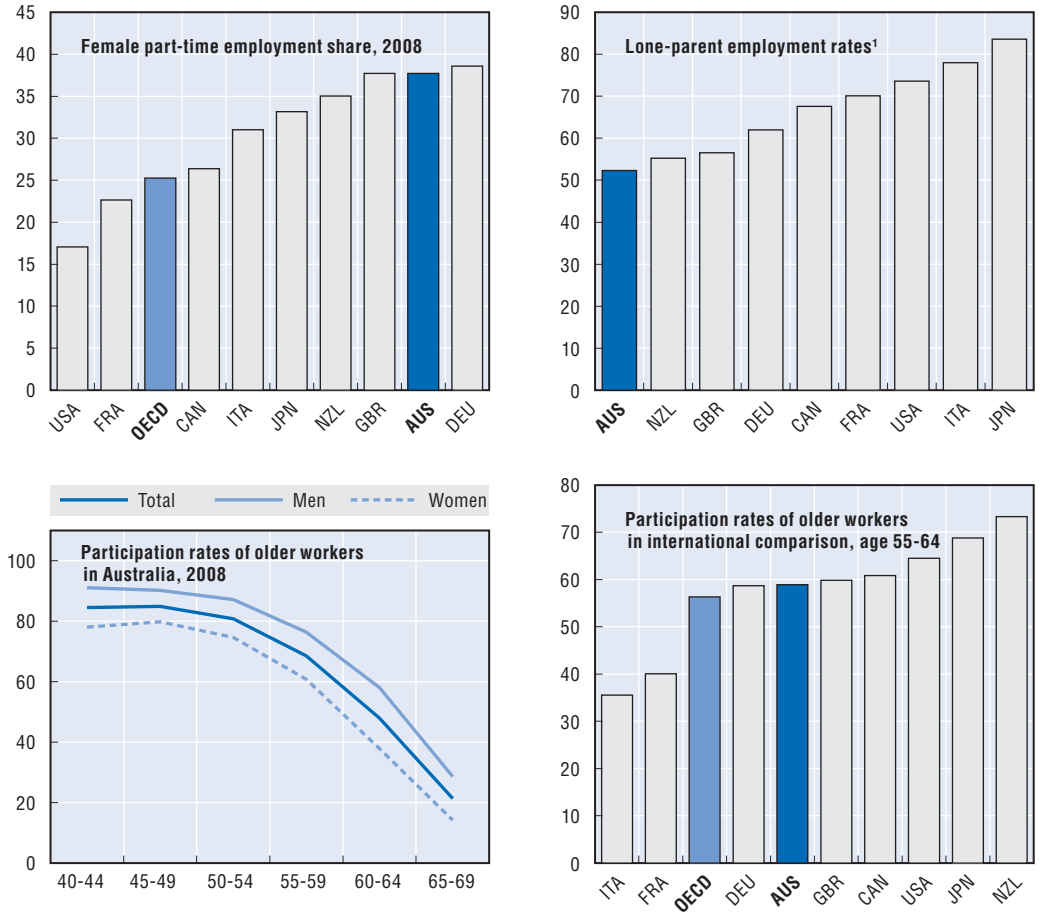
Although Australia's overall participation rate is at a record high and above the OECD average, it can be raised further to levels achieved by the best performing countries (Figure 1.16). The scope for increasing labour supply is greatest among women with families, lone parents, older workers (aged over 55 years), and prime-age people on disability benefits. Encouraging early retirees to stay at work longer would also greatly add to the workforce (OECD, 2008). In 2005-06 the "Welfare to work" reform package included changes to payments and work incentives, as well as workforce participation requirements, aimed at promoting employment for specific groups such as lone parents, disabled people, long-term unemployed and older workers. Although the rate of labour underutilisation has declined since the early 1990s, estimates by the Australian Bureau of Statistics suggest that around one million individuals – approximately 10.3% of the labour force – were unemployed or underemployed in September 2008. This highlights a sizeable number of Australians who would like to work or work more than they currently do.

### *A targeted and well-designed migration policy which benefits labour markets*

Immigration continues to make an important contribution to labour supply and helps to alleviate skill shortages in the labour market. Net overseas migration has risen steadily since the mid-1990s and now makes a larger contribution to population growth than the natural increase (Figure 1.17a). Over the past decade, Australia has sharpened its policy focus on skilled immigration by increasing the size of the Skill Stream within the annual permanent Migration Programme (Figure 1.17b). This increased focus on skills has been accompanied by a refinement of the selection process. To ensure that primary applicants are job-ready upon arrival, the threshold of the English language criterion has been raised and the waiting period for access to the majority of Australian Government benefits and services has been increased from six months to two years.

Figure 1.16. **Labour market indicators**

In per cent, 2008[1]



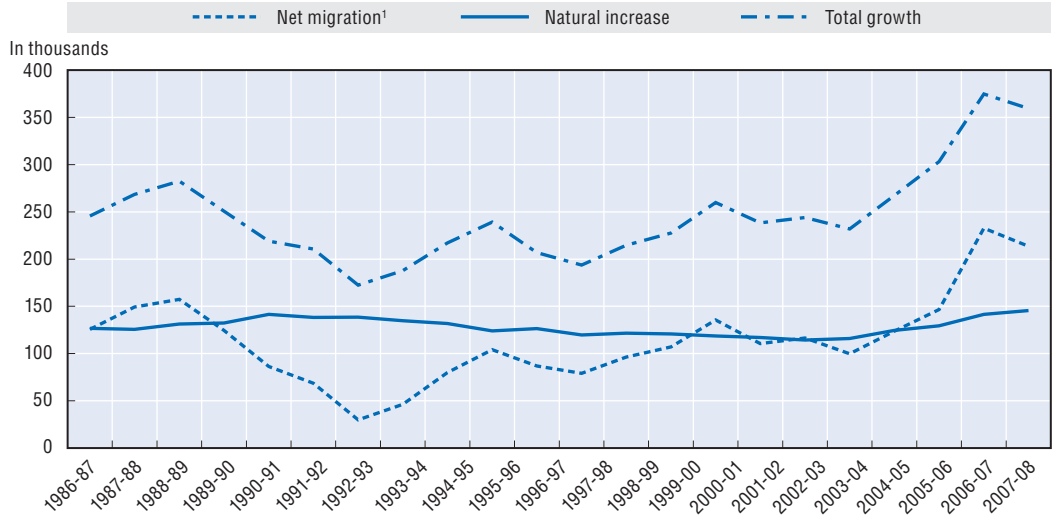

1. 2006 or latest year available for the lone parent employment rates: 2001 for Canada, Germany, Italy and Japan; 2005 for France and the United States. See Chart 3.7 in the *Babies and Bosses Synthesis* for detailed notes.

*Source:* OECD (2007), *Babies and Bosses: Reconciling Work and Family Life*, A Synthesis of Findings for OECD Countries and OECD (2009), *Labour Force Statistics database*.

Overall, Australia's selection programme has tended to improve the general skill level of immigrants and enhancing their labour market outcomes (Productivity Commission, 2006; Liebig, 2007). The human capital endowment of new arrivals has increased over the last decade and the skills structure of the immigrant population, particularly of those from non-OECD countries, is now above that of native-born Australians. This has translated into higher rates of labour market integration, though changes in labour market conditions and income support policy also appear to have been instrumental (OECD, 2008). In international comparison, employment outcomes for immigrants in Australia compares favourably, even after adjusting for better qualification structure of immigrants compared with the native born population. This is particularly the case for immigrant men whereas the labour force participation of immigrant women tends to lag behind. The outcomes of the children of migrants are very favourable compared with other countries. This reflects not only the skilled nature of the immigrant intake, but also the settlement and integration aid given to all non-temporary immigrants (Leibig, 2007).

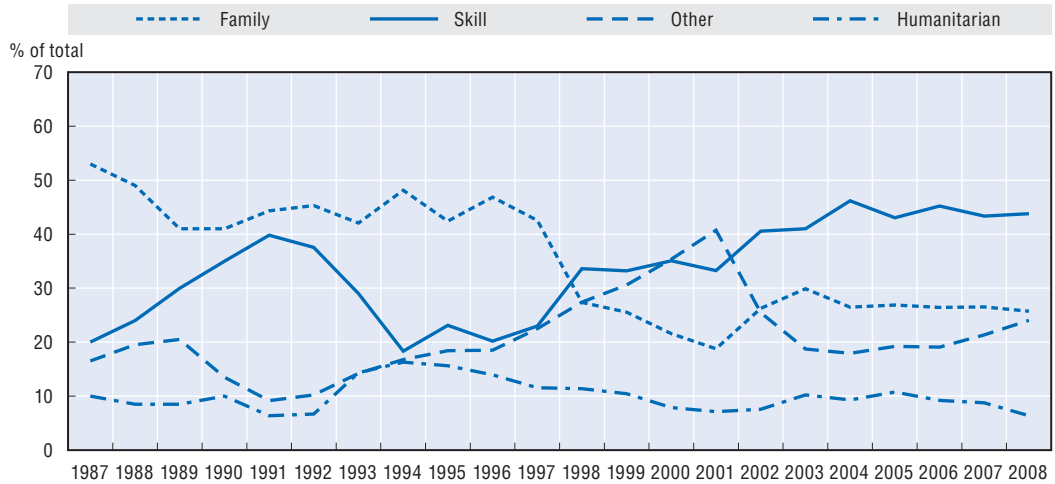
Figure 1.17. **Migration trends**

A. Components of population growth




1. Estimates for net overseas migration contain a break in time series.

B. Permanent arrivals by eligibility criteria




*Source:* DIAC (2007, 2008), *Settler Arrivals*, Department of Immigration and Citizenship; and ABS (2009), Migration, *Australia* (Cat 3412.0), Australian Bureau of Statistics.

Given the skilled nature of the majority of immigrants to Australia, it is important that good use is made of these skills. However, the extent of over qualification is greater for immigrants than native born Australians. Highly qualified immigrants from non-English speaking countries are particularly affected. Ongoing improvements in the effectiveness with which the migration programme meets the demand for skills continue to be an important challenge going forward.

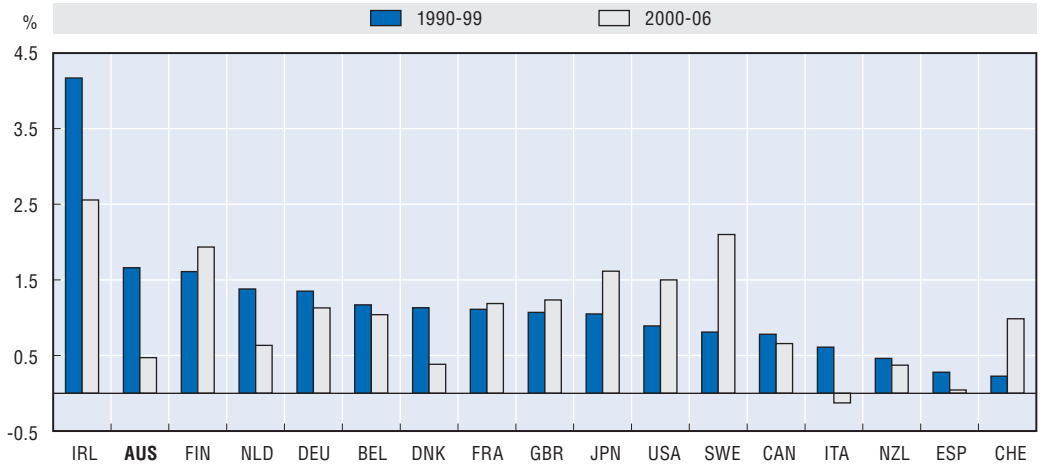
### *Structural economic challenges*

#### *Addressing the slowdown in productivity trends and finding new sources of growth*

Australia's productivity growth has slowed markedly since the record levels achieved in the 1990s with MFP growth falling below its long-run average and actually turning

negative over some of the most recent business cycle. Australia is not alone, as a number of OECD countries experiencing high productivity growth rates in the 1990s have also suffered a slowdown in MFP in the current decade (Figure 1.18). However, this slowdown is particularly marked in Australia compared with other countries.

Figure 1.18. **Australia's MFP slowdown in international comparison**

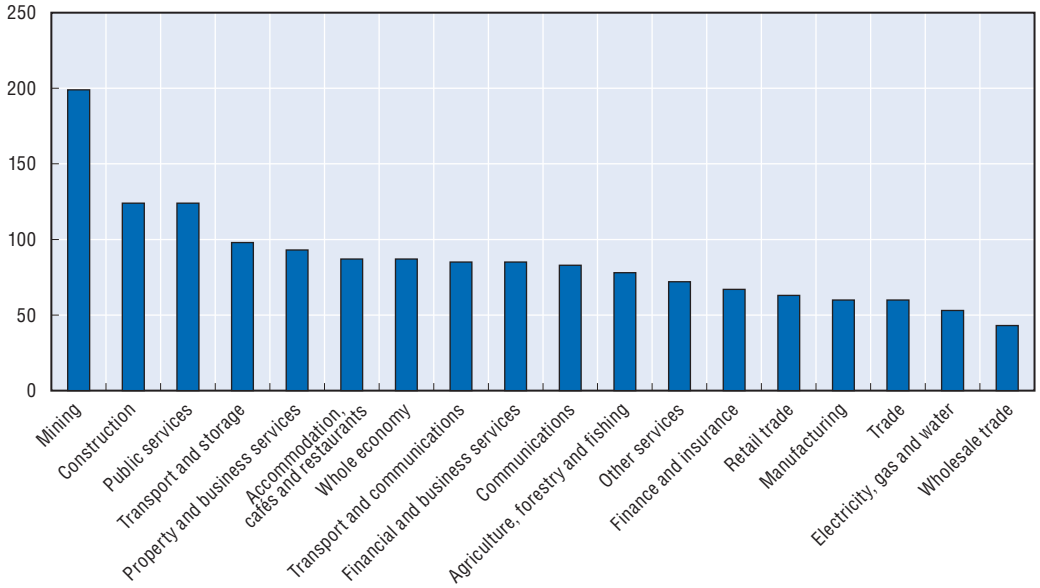



*Source: OECD Productivity database.*

This deceleration in aggregate productivity growth in Australia has lead to a significant increase in the productivity gap *vis-à-vis* the United States over recent years (Figure 1.19). While there is now a sizeable productivity gap at the aggregate level, Australia's productivity performance relative to the US varies widely across industries. Notwithstanding a productivity deterioration in the mining sector, Australia still has a clear advantage over the United States in this sector reflecting Australia's abundant mineral resources (Dolman *et al.*, 2007) (Figure 1.19). Australia's retail and wholesale trade sectors are less than half as productive as their US counterparts, according to recent estimates (Timmer and Ypma, 2006). Given their relative size, substantial catch-up at the aggregate level depends on the extent to which gaps in these industries can be narrowed. Large productivity gaps also remain in other areas such as manufacturing, electricity, gas and water, communications, and finance.

The reasons for Australia's recent productivity slowdown are still not fully apparent at this point in the cycle. It may be the result of a series of short-term shocks that have temporarily depressed productivity growth. For instance, the severe impact of the drought on the agricultural sector was sufficient to subtract 1.3 percentage points from market sector MFP growth in 2006-07 alone (Productivity Commission, 2008). Lower rainfall may also be contributing to the very poor recent productivity performance in the electricity and water sectors as greater effort is required to produce the same output. Significant investment in new capacity in mining and water industries may also be contributing to lower productivity growth during the construction phase. The negative short-run impact of large investment projects can be expected to reverse once new production capacity becomes operational. The pronounced decline in measured productivity in the mining sector may also reflect increased profitability in mining resources with lower yields, in conjunction with longer-term depletion in some of Australia's resources, due to the commodity price boom.[24]

Figure 1.19. **Labour productivity gap *vis-à-vis* the United States by sector, 2003**[1]




1. Index value of 100 implies sectoral productivity equal to that in the United States.

*Source:* Dolman *et al.* (2007).

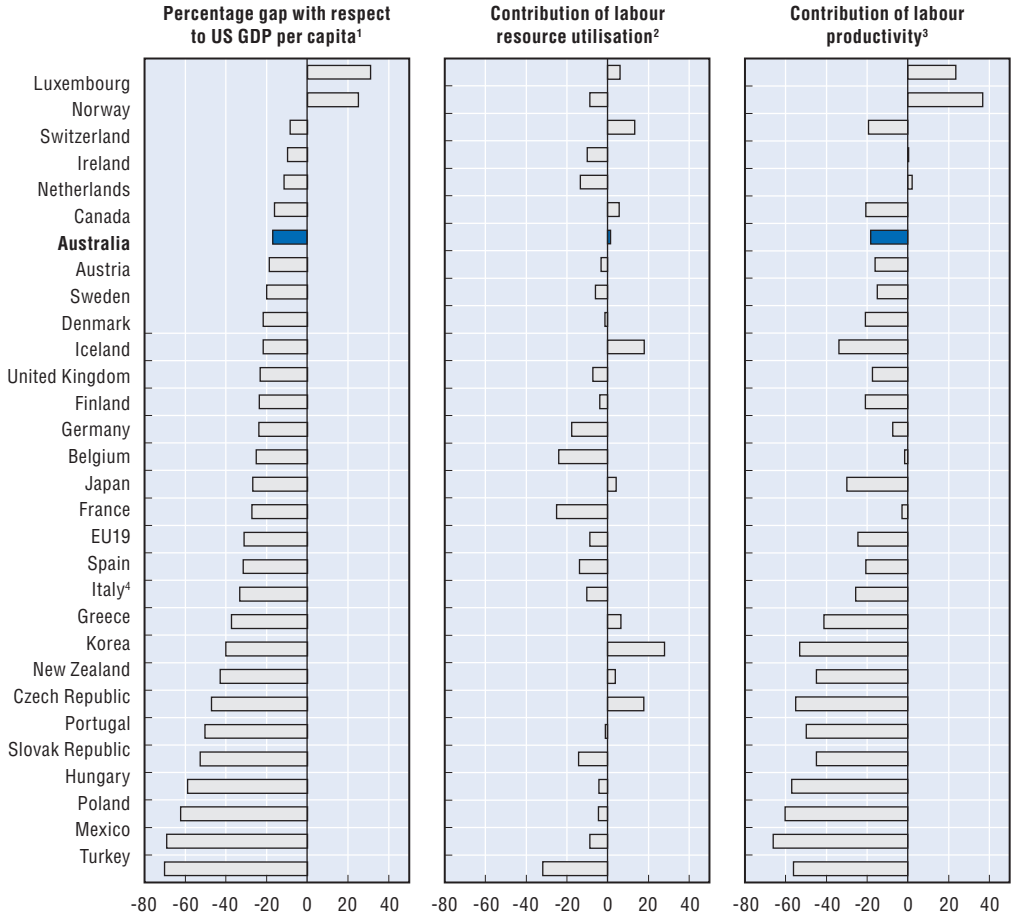
Measurement error may also be a factor explaining some part of Australia's productivity slowdown. For example, official estimates of productivity in the electricity sector do not reconcile with those from more detailed industry-level studies, which tend to show higher and more consistent productivity growth (Lawrence, 2002). Although this highlights the potential for measurement errors, it is unclear why this would be more detrimental over recent years compared with the 1990s.

These one-off factors have clearly played a major role in the slowdown of Australia's productivity growth in this decade. Developments in mining, agriculture and the electricity, water and gas sectors explain around 70% of the decline in multifactor productivity since 2003-04. However, productivity growth in this decade has slowed across all major sectors of the Australian economy, suggesting that more systemic factors may also be at work (Table 1.2). This raises the possibility that the productivity surge of the 1990s represented a level shift in productivity with a catch-up phase rather than an increase in the long-term growth rate. Slowing labour productivity may also be the corollary to some extent of success in increasing labour force participation. Most of the gains from the welfare to work reforms (and of earlier reforms to increase activation requirements on unemployment benefit recipients), are likely to be in pushing low productivity workers into the labour force, thus reducing average level of productivity. Skills shortages may also be an issue.

Terms of trade also no longer offers a buffer for declining productivity trends. Until the onset of the global recession, the impact of falling productivity growth on Australian incomes was offset by large improvements in the terms of trade, reflecting significantly higher prices for commodity exports and somewhat lower prices for manufactured imports. With the global recession putting downward pressure on the terms of trade, persistently low productivity growth are now of increasing concern. Catching up to the global technological frontier in some industries remains an

important challenge. Indeed, with similar rates of labour input, the difference in GDP per capita between Australia and the United States mostly reflects a productivity gap. Given that labour productivity growth has been the primary driver of growth in GDP per capita in Australia for at least the past four decades, this underlies the importance of ongoing reform aimed at boosting productivity (Davis and Rahman, 2006; Diewert and Lawrence, 2006).

Figure 1.20. **The sources of real income differences, 2008**




1. Based on 2008 purchasing power parities. In the case of Luxemburg, the population is augmented by the number of cross-border workers in order to take into account their contribution to GDP.
2. Labour resource utilisation is measured as total number of hours worked per capita.
3. Labour productivity is measured as GDP per hour worked.
4. EU19 is an aggregate covering countries that are members of both the European Union and the OECD. These are the EU15 countries plus Czech Republic, Hungary, Poland and the Slovak Republic.

*Source: OECD, National Accounts database*; *OECD Economic Outlook 86 database;* and OECD (2009), *OECD Employment Outlook*, Paris.

Declining trends in productivity are being seriously considered by the government: the Treasurer has asked the House Standing Committee on Economics in Parliament to conduct an "Inquiry into raising the level of productivity growth in the Australian Economy".[25] This highlights the importance of further policy reforms to improve Australia's productivity performance over the long term. The combination of declining productivity growth and lower terms of trade is an opportunity for Australia to renew its reform efforts with the aim of ensuring that the country is well prepared for recovery in the

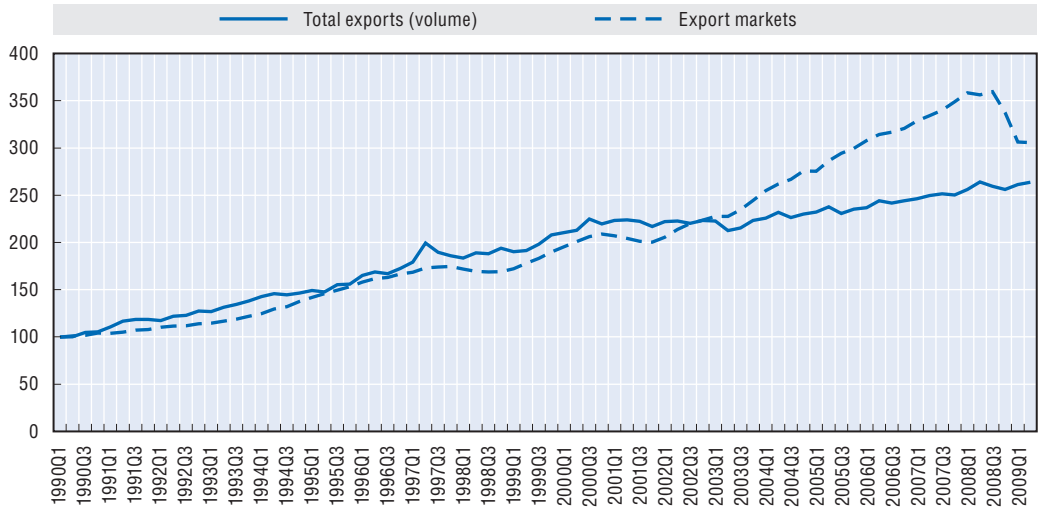
global economy and will continue catching up to the living standards of the most advanced OECD countries. This points to the need for a global approach to reform, including several aspects related to regulatory reform. Some of these are even linked to the unfinished NCP agenda, while others reflect the new and bold initiatives adopted by the current government.

### *Implementing appropriate regulatory frameworks to address infrastructure bottlenecks and core energy and communications activities*

An important long-run policy challenge in Australia is to fully benefit from globalisation and the emergence of China and India as major markets. These markets are already more important for Australian exports than they are for most other countries. However, capacity limits stemming from the drought and persistent bottlenecks in certain infrastructure sectors have prevented Australia from taking full advantage of them (Figure 1.21).[26] In particular, the mining sector saw large price benefits from the terms of trade boom, but infrastructure bottlenecks, coupled with limited capacity investments in the late 1990s and early 2000s, restricted increases in export volumes. Since the beginning of the global economic crisis, exports have however held up well despite the pronounced fall of export markets.

Figure 1.21. **Export markets and export growth**

Exports of goods and services, index 1990 Q1 = 100




*Source: OECD Economic Outlook 86 database.*

Ensuring that infrastructure investment delivers the strongest possible contribution to growth and that it is not misallocated or wasted, requires careful scrutiny of potential projects and a strong policy framework. In the context of the fiscal stimulus, careful and comprehensive project selection procedures can help identify not only which projects will yield the highest return but also those that can be implemented with the shortest lags (OECD, 2009b). With these objectives in mind, the Australian Government established the Building Australia Fund for infrastructure investment in the 2008-09 Budget. Under this structure, infrastructure spending proposals are evaluated by an advisory board – Infrastructure Australia. Performing an assessment across a wide range of project proposals could represent a potential improvement, compared with the previous system of individual ministries assessing a subset of possible investment projects, but this would

also benefit from the relevant cost/benefit analysis to be publicly disclosed. Project evaluation could also benefit from an independent expertise of a body such as the Productivity Commission (OECD, 2008 Survey).

Infrastructure Australia also has a role in advising on regulatory reform in infrastructure sectors and the harmonisation of federal and state rules governing the management of public private partnerships (PPPs). PPPs in Australia have been significantly more effective than traditional methods of public procurement in controlling costs and meeting construction deadlines (Allen Consulting, 2007). However, it is important that the use of PPPs does not interfere with the selection of priority capital investment projects and that they be carefully designed (OECD, 2008a). The relevant criteria for such projects involve efficiency, not the availability of non-public financing, especially since international experience has shown that PPPs can sometimes prove costly to public finances if projects are poorly administered.

Increased public infrastructure spending raises a number of important regulatory issues. The first issue is, what types of infrastructure should be funded by government and what will be left to the private sector. Regulation is a key determinant of this split between public and private infrastructure. Given the often extremely large costs and irreversible nature of infrastructure spending, investment decisions are highly sensitive to the regulatory environment, which has a significant impact on the expected benefits. A regulatory environment that encourages competition where possible and prevents abuse of market power where competition is not feasible, in conjunction with independent regulators and transparent decision-making, supports higher levels of private infrastructure investment. Australia has significantly increased private sector competition in infrastructure sectors under the previous NCP. Nevertheless, not all of these were fully addressed and some unfinished NCP business remains. There would be room for COAG's Agenda to further increase efforts to improve competition in the energy and transport sectors.

For example, in the electricity sector, improvements in the transmission grid and the introduction of a central regulator have reduced market segmentation. However, government ownership of electricity generators and numerous derogations to national rules still limit integration into a national market, impairing efficiency and distorting investment decisions. Nonetheless, progress is being made, including in terms of the reduction of government ownership in NSW. Increased private sector involvement in the electricity sector is also impeded by retail price caps in some states. It is paradoxical to wait until there is effective competition before eliminating price caps when ceilings impede competition by exposing retailers to the risk of wholesale price increases. Retail price caps also undermine the effectiveness of efforts to reduce greenhouse gas (GHG) emissions. More generally, greater certainty about the framework for cutting back GHG emissions is also needed for an expansion of private investment in the energy sector. Greater use of incentive-price regulation in setting network access prices would also increase incentives to invest in cost-saving technology. These issues need to be addressed to encourage the expansion and modernisation required in the electricity sector to meet projected demand increases.

Geographic segmentation is still a feature of some aspects of the transport sector. This inhibits the development of high-performance freight infrastructure, which is crucial given Australia's size, dispersion of population and production centres, and remoteness from

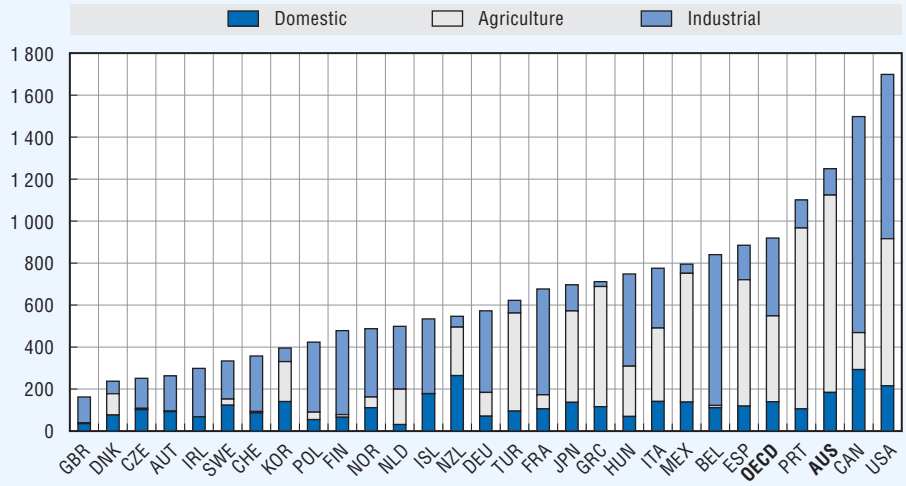
other markets. Although COAG has agreed to speed up the harmonisation of rail safety regulation, state standards for heavy vehicles and access regimes to railway infrastructure in the freight sector also need to be harmonised. In addition, extending the national infrastructure investment programme to ports would help co-ordinate infrastructure investment in transport.

Water is another core issue in terms of infrastructure (Box 1.3). Since 1980, water abstraction in Australia has increased more rapidly than in almost any other OECD country. In large part, this is due to a surge in water use in the agricultural sector. Pressures on water resources appear to be most acute in the Murray-Darling Basin (MDR). Reforms (the Water Act 2007 and Water Amendment Act 2008) were recently adopted to improve the governance of the Murray Darling Basin by transferring important managing powers of the MDB, which were shared between five states, to the federal government. These reforms, which include an AUD 12.9 billion plan, also aim at modernising irrigation infrastructure, buying back water entitlements and strengthening the role of the Australian Competition and Consumer Commission by extending the application of water market rules and water charge rules. These reforms represent a significant step forward, and their full implementation is necessary to ensure sustainable and more efficient water use.

### Box 1.3. **Improving water management in Australia***

Water use by farms now accounts for two-thirds of total consumption with large disparities in water efficiency across farm types. For instance, 45% of the water resources used in agriculture in 2004-05 was consumed in the production of rice and cotton, which accounted for only 16% of agricultural production. Partly as a result of farming such crops that are not well suited to its climate, Australia is the world's biggest exporter of "virtual water" embodied in exports. Per capita water usage in Australia, including for domestic use, is high compared with the OECD average, (Figure 1.22).

Figure 1.22. **Water usage per capita by sector**[1]




1. Data shown for Belgium include Luxembourg. The OECD aggregate excludes the Slovak Republic.

*Source:* Food and Agriculture Organization of the United Nations, *Aquastat database*, accessed September 2008 and OECD (2008), *OECD Economic Outlook: Statistics and Projections* – online database, No. 83, OECD Publishing.

Box 1.3. **Improving water management in Australia*** *(cont.)*

The Murray-Darling Basin accounts for 14% of the country's land area, three-quarters of its irrigated land and over 50% of its water consumption. However, it accounts for only 6% of Australia's water runoff. The steep increase in the quantity of water diverted for consumption in this area has significantly reduced water flow in rivers, impacting on biodiversity, damaging water quality through the proliferation of algae, and increasing salinity. Pressure on water resources has also affected urban areas with water restrictions imposed in 16 of the 24 towns in Australia with more than 50 000 inhabitants and in all of the state capitals apart from Darwin.

The imbalance between water supply and demand is largely due to its low price, which hampers the development of infrastructure that would increase capacity and avoid wastage. The weakness of the market mechanism is also curbing incentives to improve resource allocation and management, as well as the opportunity for those holding water rights to sell any unused water.

Starting in the 1980s, a growing awareness of ecological problems that often stretch beyond state boundaries prompted a number of reforms. COAG's National Water Initiative (NWI), adopted in 2004, was designed to introduce resource management planning in combination with market mechanisms and regulation. The NWI also contains a number of measures aimed at expanding the water market, including reducing barriers to trading water, clarifying and strengthening water entitlements and confirming the separation of water from land ownership. The states are also required to establish a pricing mechanism based on full cost recovery, including environmental costs.

Progress has been made in some of the areas covered by the NWI, including harmonising water regulation across states and the development of water markets in rural areas. However, the implementation of reforms must be accelerated if Australia is to avert persistent water over allocation and further severe environmental degradation. Progress needs to be made in improving the functioning of permanent water entitlement markets, where there are still numerous obstacles. The price of water in urban centres should also reflect its scarcity value and barriers to trade between urban and rural areas should be lifted. In addition, recent reforms to improve the governance of the Murray-Darling Basin and reduce over allocation need to be sped up to ensure sustainable water use.

* Chapter 5 of OECD (2008), on which this box is based, provides a comprehensive review of water policies in Australia.

### *Addressing long-run challenges for fiscal policy*

Fiscal policy has been prudently managed in Australia and public finances are currently well placed compared with other OECD countries. While the outlook of public finances has changed since its publication, the second Intergenerational Report published in 2007 indicated that the federal government net debt position could swell to roughly 30% of GDP by 2046-47. An updated analysis would likely suggest a peak that is now significantly higher, although the fiscal situation has deteriorated much less strongly than in most other OECD countries.

As in virtually all OECD countries, significant issues for fiscal policy include health spending and the impacts of population ageing. The introduction of the Superannuation Guarantee in 1992 – a compulsory occupational pension scheme – has ensured that the direct budgetary impact of population ageing will be limited. In addition, the government set up the Future Fund to meet public sector pension obligations in 2006. This has been

funded from fiscal surpluses and from some of the proceeds from the sale of Telstra.[27] The Future Fund currently has around AUD 60 billion in assets. This is currently expected to grow to AUD 150-160 billion by 2020, only slightly less than the value of the unfunded public sector pension liability.

Only the first of Australia's three pension pillars, the Age Pension, is financed out of general taxation. This is a means-tested benefit that acts as a safety net aimed at alleviating poverty. The government made significant changes to the age pension in the 2009-10 Budget. Reflecting improvements in life expectancy, the age at which the pension is payable will be progressively increased from 65 to 67 years. The rate at which the pension is withdrawn in response to private income was also increased. Offsetting these savings, the rate of the pension was increased from 25% to 27.7% of male earnings. By effectively giving more money to fewer people, the net fiscal impact of these changes is forecast to be broadly zero after ten years, which will help to preserve the financial sustainability of the pension system. In part, these changes were made to alleviate high rates of poverty among pension-aged people. One in four Australian Seniors currently live in poverty, which is the fourth highest old-age poverty rate in the OECD and more than double the OECD average (OECD, 2009a), even if recent decisions have been adopted to reduce the problem.

In contrast to pension provision, long-term fiscal pressures related to healthcare spending, especially in the pharmaceutical sector, are expected to be a major contributor to growth in government spending over future decades. Public healthcare expenditure is expected to grow from 3.8% of GDP in 2006-07 to 7.3% in 2046-47. Although, these pressures are not likely to be more intense than in other OECD countries (Oliveira Martins and de la Maisonneuve, 2006) they will be significant. The 2008-09 Budget established the Health and Hospital Fund to fund capital investment in health infrastructure, including renewal and refurbishment of hospitals and other facilities, equipment and projects. In view of the fiscal pressure stemming from the healthcare side, further improving health system efficiency, as outlined in the current NRA agenda, will offer scope for enhancing human capital, productivity and social cohesion, but may require further analysis beyond the scope of the current report.

From a fiscal standpoint, the important aspect is that while Australia is generally better prepared for the future than many OECD countries, it still has to continue its reform efforts. Australia has already reaped the benefits from its significant investments in regulatory reform in the 1990s. Furthering these efforts will help to strengthen its economic position, facilitate recovery from the crisis, and in turn provide a safer environment to address long-term fiscal and economic challenges. This will be discussed in the next sections.

## The achievements of regulatory reform and competition-oriented reforms to date

Australia owes much of its current economic resilience to its past efforts in terms of regulatory reform, market openness as well as strengthened competition over domestic markets. These have led to a productivity surge over the 1990s, with increased ICT investment and a better adjustment of labour markets. This section will briefly review and discuss salient aspects of the Australian governance and regulatory management apparatus that have contributed to its success.

### *A distinct approach to governance that has fostered remarkable capacity for reform*

Australia's remarkable achievement owes much to a highly sophisticated governance system. Australia is a federal parliamentary democracy and its legal and parliamentary processes are inherited from British traditions. This is described as a "Westminster-based system". In the Australian case, it also has similarities with some aspects of the United States system – for example, a bicameral national Parliament with a House of Representatives elected from single-member electorates and a Senate in which each State has an equal number of representatives. The Prime Minister and Cabinet are selected from the elected members of Parliament by the governing party. Australia is a member of the Commonwealth and the Governor General is the representative of the British Monarch and titular Head of State. The federal structure involves a constant policy dialogue between the Commonwealth and the six States and two Territories[28] (Box 1.4). The State governments broadly operate along similar lines to the federal government. The federal and state governments share responsibilities for the overall body of laws and regulations that govern the domestic economy, citizens, businesses. As a result, regulatory reform in Australia needs to be rooted in a multi-level perspective in order to fully address domestic challenges, which is the case with the current government's strategy.

Box 1.4. **Federalism and the Australian Constitution**

The Australian Constitution established the Commonwealth of Australia* in 1901. The Constitution itself allocates certain powers to the Commonwealth. While some of these are thus exclusive to the Commonwealth, most are concurrent with the six States and two Territories: New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and Northern Territory. Each State has its own constitution, given continuing effect by the Australian Constitution, under which a State Parliament may make laws on any subject of relevance to that particular State (with some exceptions, including that the States cannot impose duties of customs or excise or raise defence forces). The ACT and Northern Territory are largely self-governing through a conferral of power by the Commonwealth Parliament.

The States are bound by the Australian Constitution. As noted, the Australian Constitution does not confine the matters about which the States may make laws. As a consequence, the majority of domestic and criminal matters are regulated primarily by laws made by the States, rather than by laws of the Commonwealth Parliament. However, in cases of conflict between federal and state laws, the federal law prevails.

The Commonwealth Parliament by contrast is confined to making laws within the scope of one or more of the legislative powers given to it by the Australian Constitution. These expressly include taxation, defence, external affairs, interstate and international trade, foreign, trading and financial corporations, marriage and divorce, immigration, bankruptcy and interstate arbitration. The Commonwealth may make a law with respect to a head of power even if that law may also be characterised as a law with respect to another matter that is not within power.

The Australian Constitution has an express mechanism for legislative co-operation between jurisdictions which states that the Commonwealth Parliament may be given power to make laws with respect to: "… matters referred to the parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose parliaments the matter is referred, or which afterward adopt the law" (Subsection 51 (xxxvii)).

Box 1.4. **Federalism and the Australian Constitution** *(cont.)*

This has been used where the states and the Commonwealth have agreed that a multi-jurisdictional approach based on substantive federal law is warranted. There have been various constitutional "referrals" of power by the States in relation to matters of particular national significance, such as the Murray-Darling River Basin (2007-08), terrorism (2002-03), corporations (2001), industrial relations (1996) and family law (1986-90). The referral mechanism has been regarded as particularly effective tool to establish national regulatory schemes involving national regulators.

The Commonwealth and the States work closely to set the terms of any national law based on constitutional referrals. This will typically involve an intergovernmental agreement describing how the arrangement will work, and may include quorum and voting rules by which Ministerial Councils, with representation from the Commonwealth and participating States and Territories, may consider amendments.

Alternatively, States can also collectively implement policy by enacting uniform or complementary laws in their own jurisdictions.

One State may, for example enact a law which is then enacted in the same or similar terms in another jurisdiction or a State may enact a law which is then applied by each of the other participating jurisdictions as a law of that jurisdiction. While this latter approach may tend to reduce scope for non-uniformity (by automatic application of amendments made by the lead jurisdiction), it may also face certain constitutional limitations in relation to national regulators identified by the High Court of Australia (see Chapter 5). This approach may also involve States or Territories conferring functions under their own laws on officers or agencies of other jurisdictions (authorised, where appropriate, by the "receiving" jurisdiction).

* The Australian Federal Government is also referred to as the Commonwealth government of Australia. In this paper the term federal regulation is used interchangeably with Commonwealth regulation.

*Source:* Australian government.

At a supranational level, Australia has forged a strong relationship with New Zealand. This relationship has evolved through intense cultural, social and economic relations under which each country allows access to the other's markets and the free movement of citizens (see Box 1.5).

### *A strategy of co-ordinated efforts to renew the regulatory reform agenda*

Australia has a long and successful history in regulatory reform. Australia's success in weathering the crisis is due to a mix of economic and institutional factors, including trends in international trade, the impact of the recent government stimulus, but also the quality of the regulatory framework, since no major shocks have affected its financial, regulatory or corporate governance systems. This reflects many years of effort, where successive governments have introduced mechanisms of oversight and quality control. It also bodes well for the renewed impetus for reform given by the current government.

### *A renewed impetus at federal level for regulatory reform with a commitment to "continuous improvement"*

The regulatory reform objectives of the present Australian Government were set out by the Prime Minister the Honourable Kevin Rudd, while still in opposition. In an election speech to the National Press Club on 17 April 2007, he identified regulation as an increasingly pervasive obstacle to enterprise and set out an agenda for reducing the burden

### Box 1.5. **Australia and New Zealand economic relations**

A series of formal and informal agreements frame co-operation between Australia and New Zealand, for example:

- The Closer Economic Relations Trade Agreement (CER Agreement) was signed in January 1983 to establish free trade of goods between Australia and New Zealand. The Trans-Tasman Travel Arrangement (TTTA) allows Australians and New Zealanders to travel, live and work in one another's country without restriction. The TTTA is not a binding bilateral treaty. Rather, it is a series of immigration procedures applied by each country and underpinned by joint expressions of political support. The most recent reaffirmation of the TTTA was in 2001 with the introduction of Trans-Tasman social security arrangements.
- The Trans-Tasman Mutual Recognition Arrangement (TTMRA) is a non-treaty agreement between the Australian government, State and Territory governments and the government of New Zealand, under the Trans-Tasman Mutual Recognition Act 1997. It commenced on 1 May 1998. The purpose of the TTMRA is to implement mutual recognition principles relating to the sale of goods and the registration of occupations. It allows (with a few exceptions) that a good that may be legally sold in Australia may be sold in New Zealand, and *vice versa*; and a person registered to practise an occupation in Australia is entitled to practise an equivalent occupation in New Zealand, and *vice versa*, without the need for further testing or examination.
- New Zealand line ministers participate along with Commonwealth and State and Territory ministers in a number of Australian Ministerial Councils that facilitate consultation and joint action on issues such as aboriginal affairs, justice, gender, culture, education, health, energy, environment, local government, procurement, primary industries and workplace relations. New Zealand ministers have full voting rights on matters affecting New Zealand.

*Source: www.mfat.govt.nz/Foreign-Relations/Australia; www.dfat.gov.au/geo/new_zealand.*

of regulation on Australia's business community. He described it as the "third arm of Labour's productivity agenda" (Rudd, 2007, p. 7). The government elected in 2007 made a commitment to strengthen the institutional mechanisms for regulatory management and increase the role of the Productivity Commission in monitoring its progress.

Regulatory reform is given a high political profile, with the Prime Minister creating a new Cabinet portfolio position for Deregulation in 2007, allocating the Honourable Lindsay Tanner MP to the role of Minister for Finance and Deregulation. (For a more detailed agenda of the current government initiatives see Chapter 2.) This is the first time that the Australian Federal Government has had a dedicated cabinet position with responsibility for regulatory reform, and is fully consistent with OECD principles for quality regulation. Oversight and control functions are more effective when they are located at the centre of government and have an active role in driving the achievement of the reform policies. Having a dedicated minister with responsibility for regulatory reform creates a champion inside the Cabinet and helps ensure that ministerial colleagues comply with the regulatory quality processes in preparation for and during the Cabinet process. Having dual responsibilities for the Finance and Deregulation portfolios also helps to draw synergies between budget processes and regulatory processes, under a powerful ministry, which could be compared with the situation of OIRA within OMB in the US.

The current government is trying to achieve more than the marginal gains that come from periodic reviews and reforms. The Minister for Finance and Deregulation is leading efforts to establish a culture that promotes "continuous regulatory improvement" in regulation and prevents backsliding, away from one-off reviews and target-driven reform initiatives. The focus is on "regulation which is outdated, excessively burdensome on business or unfair to consumers". The Minister for Finance and Deregulation also made a commitment of "no net increase in the regulatory burden arising from new Commonwealth Regulation", although not endorsing the notion of "regulatory budgets" which had been initially discussed in the United Kingdom. The Rudd Government has also generally adopted the principles of good regulatory processes and the full recommendations of the previous Banks Taskforce on Reducing the Regulatory Burden on Business (see Box 1.6).

Box 1.6. **The Banks Review: Rethinking Regulation**

The report of the Taskforce on Reducing the Regulatory Burdens on Business (Rethinking Regulation, 2006) was commissioned by the previous government, in response to comments from the business sector, with the Business Council of Australia (BCA) released in May 2005 of a significant document criticising the then existing systemic arrangements for producing regulatory quality at federal level. The business sector was also outlining the implications of a significant increase in the volume of Commonwealth legislation. Gary Banks, the Chairman of the Productivity Commission, was invited to lead a taskforce to "identify actions to address areas of Australian government Regulation that are unnecessarily burdensome, complex, redundant, or duplicate regulations in other jurisdictions".

While the review credited the growth of regulations in Australia to social expectations and general factors including risk aversion at play in all OECD countries, it also found evidence of over reliance by governments on the development of regulatory solutions that had led to a "regulate first ask questions later culture", with less consideration to the broader effects of regulation. The Taskforce also found that the requirements for good regulatory process had not been effectively discharged and recommended changes to strengthen the underlying processes by which regulations are made and administered. The recommendations were derived from six principles of good regulatory process, fully in line with general OECD Principles (see Chapter 2) and made 178 recommendations for reform, which were agreed to in most part by the government.

The emphasis was on the institutional setting and the approach to regulation making, which led to the publication of a new Best practice Regulation Handbook in August 2007. Strong emphasis was also given to compliance with the government's RIS/RIA requirements. These new requirements were to apply to a broad range of regulatory instruments, where there is an expectation of compliance and can include guidelines, negotiated agreements with industry and government and industry-based codes. These recommendations were instrumental in strengthening the regulatory management arrangements at federal level, including the gate-keeper function for regulatory quality.

### *A new and innovative model for federal-state relationships*

The other key feature of the current government efforts is the establishment of a new and innovative model for federal-state relationships. This involves a more co-ordinated approach to national issues, with stronger co-operation across levels of government,

facilitated by the election of the same party in power at both the Commonwealth level and in almost all the states.[29] This effort is conducted in the context of the Council of Australian Governments (COAG), which comprises the first ministers of the Federal and State and Territories' governments, which agreed to a new model of co-operation in 2007. While COAG met on average twice a year prior to the 2007 agreement, there have been over eight COAG meetings between November 2007 and July 2009, with a commitment to further meetings. (For more detail on COAG, see Chapter 3.)

The new policy relies on innovative models of co-operation and incentives between the Commonwealth and the states and builds on historical successes of regulatory and microeconomic reforms of the National Competition Policy (NCP) (see Box 1.7). The programme is defined as a National Reform Agenda (NRA) and it involves a human capital as well as a competition and regulation stream.

The goal of the competition and regulation stream is to facilitate a "National Seamless Economy", through the elimination of internal regulatory barriers to facilitate the transfer of goods, labour and services within the national market. This responds to a priority expressed by the Business Council of Australia (BCA), which had called for reforms to reduce market segmentation caused by regulatory differences between the States and had also been identified as a priority by previous OECD economic surveys (OECD, 2008). The reforms undertaken under COAG have a significant potential in terms of improving the productivity of the Australian economy. According to the Productivity Commission, the competition and regulatory streams of the NRA could increase GDP by 1.7% in the long run and the human capital stream could boost GDP by 8.5 to 9%.

This new model entails new funding arrangements focused on outputs and outcomes, together with a commitment from the Commonwealth to provide incentive payments to drive reforms. These incentive payments will take the form of National Partnership Payments, some of which would reward State efforts for implementing jointly approved reform initiatives as part of Inter-governmental Agreements (IGAs), between the Commonwealth and the Territories. These arrangements build on the core features of the Australian federation which provide the Commonwealth with powers to raise and spend monies and to give grants to the states. (For more detail see Chapter 5.) This specific fiscal imbalance has been used to push the new reforms, as was the case with the NCP. The essence of the reward payments under the National Partnership Payments is to materialise the positive economic externalities from the State efforts, and ensure that they can enjoy some of the shared economic benefits of the effort under way.

A key operational element in this agenda is the Business Regulation and Competition Working Group, co-chaired by the Minister for Finance and Deregulation and the Minister Assisting the Finance Minister on Deregulation, which brings senior officials from central government departments at federal and state level, to advance the regulatory reform agenda, reduce regulatory burdens, and accelerate the reforms agreed under COAG.

### *Building on waves of reforms linking regulation, competition and market openness*

The recent revival of the multi-level agenda under COAG builds on a successful history of past waves of regulatory reform, which have contributed to today's level of productivity. In a sense, the NRA and COAG's new reform agendas can be described as part of a "third wave of reforms". The first wave took place in the 1980s after a period during the 1970s and

early 1980s when Australia endured a long period of slow economic growth. It faced higher rates of inflation and unemployment, and slipped in the international rankings of per capita incomes. This first wave of economic reforms increased Australia's exposure to international markets through the floating of the Australian dollar, the deregulation of financial markets and the (unilateral) reduction and removal of tariffs on protected industries. This wave of reform subsequently created a momentum of competitive pressures and exposed the structural impediments to the creation of national markets. This eventually led to the second wave.

The second wave took place in the early to mid 1990s and involved an extensive programme of microeconomic reform and the implementation of a National Competition Policy (NCP). The NCP significantly increased the exposure of the national economy to competition through a programme of legislative reform and the structural reform of government monopolies undertaken at all levels of government (see Box 1.7). Its conduct has been widely hailed as a model of significant achievement in nationally co-ordinated reform. In addition to the legislative review programme the implementation of NCP included important structural reforms to public monopolies, the introduction of a national access regime to natural monopoly infrastructure facilities, the extension of the *Trade Practices Act* to government business and unincorporated enterprises, the introduction of competitive neutrality principles to government business enterprises, and specific reforms to the energy, water and road transport sectors.

The National Competition Policy also relied on incentive payments to be made by the Commonwealth to the States based on performance, with an external body, the National Competition Council, having responsibility for monitoring the process (see Box 1.7, and Chapters 3 and 4 for more detail).

### Box 1.7. **The National Competition Policy Legislative Programme**

In 1993 a Committee Chaired by Professor Fred Hilmer delivered a landmark report on *National Competition Policy* to the Prime Minister and the heads of all the Australian State and Territory governments. The report identified regulation at all levels of government as the greatest impediment to enhanced competition. It recommended that the governments adopt a guiding principle whereby there should be no regulatory restrictions on competition unless it was in the interest of the public and that governments should be required to demonstrate, for any specific restrictions on competition they were to retain, why it was necessary. To achieve this, it proposed a review to apply the guiding legislative principle to all new and existing regulation. The impacts of restrictions on competition were to be assessed from a national economy-wide perspective (Hilmer, 1993, p. 208).

These principles were accepted and in April 1995 the heads of all Australian governments signed the *Competition Principles Agreement* committing each jurisdiction to implement a programme of review by 1996 and to reform all legislation restricting competition by 2000. The model for the assessment of legislative restrictions was based on the RIS framework including an assessment of the policy problem or issue, a statement of the desired objective, a consideration of regulatory and non-regulatory alternatives, an

Box 1.7. **The National Competition Policy Legislative Programme** *(cont.)*

assessment of the costs and benefits and the incidence of these impacts, consultation with affected groups and an evaluation of implementation issues.*

Significant incentive payments were made by the Commonwealth to the States and Territories based on their performance. Despite the relatively small budget impact of the payments, they proved to have an effective incentive effect on the co-operation by the States and were also able to be used effectively by the States to encourage participation within their own administration. The National Competition Council (NCC) was created as an independent body with responsibility to oversee and report on the performance of review programme by the Commonwealth, States and Territories and to advise the Federal Treasurer regarding eligibility for the incentive payments. The independence and expertise of the NCC was an important feature to maintain the focus of the jurisdictions on the reform agenda.

In 1996 each jurisdiction examined its entire stock of laws for potential restrictions on competition and together identified and scheduled for review around 1 800 pieces of legislation. The legislation was divided into priority and non-priority areas, identifying those likely to have the most significant restrictions on competition. Reviews were undertaken by each jurisdiction according to firm assessment and review criteria. Legislative reviews were to be conducted independently of the agencies administering the acts and regulations and the NCC assisted with reviews that were of a national character. By 2004, nearly three quarters of priority reviews and 90% of non priority areas had been completed consistently with the guiding legislative principles and the legislation was reformed accordingly (Productivity Commission, 2005: 18). Although the programme was considered a great success overall, a few areas continued to fail the NCC's test for an adequate public interest case for retaining competition restrictions. These vary to some extent across jurisdictions, but tended to be focussed in the following areas: pharmacy ownership, agricultural marketing restrictions, liquor laws and taxis (Productivity Commission, 2005, pp. 18-20). Some of these areas are being reformed incrementally, such as agricultural marketing restrictions.

The Productivity Commission (PC) has made estimates of the economic gains from the broader NCP reform initiatives. In 1995 the anticipated benefit from the implementation of NCP was estimated to be a 5.5% increase in GDP, once the effect of the reforms on productivity and prices had been realised in the economy. In 2005, the PC modelled the productivity effect of the price changes over the 1990s in selected infrastructure services where competition reforms were acknowledged as being key drivers, including the energy, water, telecommunications and transport sectors. Notwithstanding that the modelling did not pick up dynamic effects, or impacts post 2000, it concluded that "observed productivity and price changes in the selected infrastructure services have boosted Australia's GDP by 2.5% (or AUD 20 billion), with the implication of a larger total boost to GDP…" (Productivity Commission, 2005:xviii:51).

* The institutional arrangements for competition policy assessment adopted in Australia are explored and adapted for application by other OECD members in OECD (2007), the *Competition Assessment Tool Kit, Version 1.0.*

### *A strong institutional underpinning for regulatory reform*

Australia is in many respects a model among OECD countries for the quality of its institutional underpinning for regulatory reform and for the application of reform strategies. The key features for regulatory management promoted by the OECD are all in place and have been reinforced over time. The core responsibility for the regulatory reform agenda has been consolidated in the Department of Finance and Deregulation. The new

government has endorsed six principles of good regulatory process proposed by the Banks Review (see Box 2.1, Chapter 2).

A new Deregulation Group was created in the Department of Finance and Deregulation, which includes the regulatory oversight and advisory functions of the Office of Best Practice and Regulation which was previously located in the Productivity Commission. In addition, a Deregulation Policy Division was established within the Deregulation Group to ensure attention to the stock of existing regulation and streamlining regulatory burdens, as OBPR is focused on the new regulations and RIA processes. A co-ordination network has been established across all government agencies to promote a consistent approach to regulatory impact analysis.

The institutional setting is designed to ensure the integrity of technical advice. While the OBPR is located within the Ministry of Finance, decisions on the adequacy of regulatory impact analysis statements and compliance with best practice regulation arrangements are made independently by its executive director. The OBPR has been given a stronger role to assist agencies in developing regulatory best practice. A specialised cost-benefit analysis unit provides advice and support. This fosters a common understanding and a quality relationship with sectoral departments and agencies. In the case of climate change, OBPR seconded staff to the new agency to assist in policy development.

The regulatory reform institutional setting is also complemented by strong support and co-ordination performed by the Department of Prime Minister and Cabinet (DPMC), that manages the business flow to Cabinet and ensures that Cabinet processes and rules are followed. In particular, the Cabinet Secretariat has a gate keeping role to check whether the requirements for RIA/RIS have been met. In general, all submissions to Cabinet must be assessed by DPMC, the Treasury and the Department of Finance and Deregulation for financial impacts. The Attorney-General's portfolio has responsibility for assessing constitutional and legal policy issues.

In addition to the institutions presented above, the Productivity Commission (PC) plays an essential role in terms of analysis and advocacy. The reports which are commissioned from the Productivity Commission help to guide the policy while identifying the benefits (see Box 1.9).

### *A thorough application of regulatory tools*

Australia was an early adopter of RIA, as a requirement was introduced for Cabinet proposals back in 1985. This tool has been subsequently strengthened and refined. As a result there is now considerable expertise and experience with the application of RIA. Australia is certainly among the front-runner of OECD countries for the general quality of its impact assessment.

Following consolidation of the RIA requirements, regulatory proposals with material business impact are not authorised to proceed to the Cabinet if they are not deemed adequate by the OBPR. Exceptions can only be granted by the Prime Minister. In cases where a proposal proceeds without an adequate RIS including quantification of compliance costs, it must be subject to a post implementation review within two years. The application of RIS requirements was also expanded to include any rule endorsed by government where there is an expectation of compliance. This gives Australia one of the most far reaching RIA systems of all OECD countries.

Regulatory management is also supported by the development of a whole-of-government policy on consultation, and the alignment of RIA for tax measures with the general requirements. This is worth noting as in several OECD countries, exemptions may exist for taxation. Finally, the move of the OBPR to the Department of Finance should help to give this tool increased authority in the policy process in the future. The other key element to the successful implementation of RIA is the careful allocation of responsibilities between departments and OBPR. The system is also designed to focus efforts on the most complex regulations, with a triage process based on the level of impact. Proposals with medium compliance costs have to be subject to the Business Cost Calculator (see Chapter 2), while only regulatory proposals likely to have a significant impact undergo the full RIA/RIS process. Despite the breadth and thoroughness of the system, there are nonetheless challenges to ensure that RIA is used at the right time to make an appropriate contribution to policy development

The use of RIA for improving the quality of new regulation is complemented by a process of regular reviews to keep the stock of regulation up to date. Automatic commitments to periodic review of legislation are built in at the federal level as most legislative instruments (other than Acts) are subject to a 10 year sunset period.

The stock of legislation in Australia has also benefitted from the extensive review undertaken as part of the National Competition Policy (see Box 1.7). At this stage, the approach to quality regulation is one of the most coherent across OECD countries, since the regulatory stock was systematically checked in terms of its burden effects and anti-competitive impacts at the same time. The PC also plays a significant role in ensuring that the stock of regulation is kept up to date through systematic annual reviews of the regulatory burden in certain sectors. As a result, the system for *ex post* review at federal level is well developed by OECD standards.

The Australian approach differs from several OECD countries at federal level, as it does not rely on global assessments of the administrative burdens or general targets, which have been conducted in Europe using the Standard Cost Model. While the 1996 review of the Small Business Deregulation task force had set out to reduce the cost of paperwork by 50%, the Australian government has not made the measurement and reduction of the burden of paper work its priority. Many administrative burdens are an issue of State responsibility, as much of the day-to-day interaction with business, including licensing, is more likely to occur at state level. Some of the states have taken interesting initiatives in this field, such as Victoria and South Australia. On the whole, a report by the PC (PC, 2008) has concluded that administrative compliance costs of business registration are generally low, even if they vary across jurisdictions.

Finally, another positive aspect is the close integration of ICT into regulatory processes, which helps facilitate government interactions with citizens and business. Australia for example already has a one-stop shop portal for individuals and business, even if its interactive functionality is still in progress. The Taxation Office (ATO) has also introduced an online programme to reduce administrative burdens for clients. Other activities are under way to facilitate online registration and re-use information that has already been submitted to reduce internal administrative costs for agencies. The Management Advisory Committee also performs an internal task of co-ordination and policy coherence facilitating strategic approaches and client-centred service delivery through collaboration across government.

### *A competitive market environment supported by effective enforcement of competition law*

Australia has had an integrated approach to the promotion of market competition. It has used the joint effects of opening to international competition, designing competition

friendly rules, and enforcing competition law. The programme for pro-competitive reforms has made market-based approaches the dominant model for policy making. The Federal Minister for Competition Policy and Consumer Affairs has direct responsibility for competition policy. The Australian Competition and Consumer Commission (ACCC) has the primary responsibility for enforcing the *Trade Practices Act*, which is Australia's national competition law. ACCC has wider responsibilities than many of its peers across OECD countries, as it also has responsibility for consumer protection and sector regulation.

The National Competition Policy programme extended competition law enforcement to unincorporated enterprises and government businesses. Structural reforms were applied to public monopolies and competitive neutrality requirements for significant government enterprises to ensure healthier markets. Sectoral reforms covered electricity, gas, road transport and water. The states also established independent pricing and access regulators to address natural monopoly activities within their boundaries. The National Competition Council had responsibility to assess compliance with the national competition policy agreements and issues related to access to essential facilities.

Further progress is being made. Recent amendments have introduced formal merger clearance procedures and provisions for merger parties to apply directly to the Australian Competition Tribunal. More importantly, criminal sanctions are now authorised against serious or hard-core cartel behaviour. Finally, consumer protection issues are being addressed as part of the COAG reform agenda (see section on Moving Forward).

### *A friendly policy framework for market openness*

Australia has long recognised the importance of maintaining and strengthening the openness of its markets to international competition. While Australia's geographic size and location create specific challenges, the country is fully integrated in world trade, as imports and exports combined represent 42% of GDP. Over half of Australia's exports are with Asian countries, mainly Japan, China, South Korea and India. Two thirds of Australia's trade is with APEC economies. Australia benefits from its proximity to rapidly growing Asian markets, from its favourable position in global value chains and from gains in terms of trade due to rising prices for raw materials and food products. Australia is reaping the gains of all the policies for structural reforms and market openness conducted since the 1980s.

Australia's trade policy is very supportive of international trade negotiations, endorsing the conclusion of the Doha Round taking place under the WTO. It pursues free trade agreements with important trading partners. It has also undertaken significant reforms to improve productivity and competitiveness within its borders.

This is supported by a number of processes which provide for transparency, information dissemination on Australian regulations and thorough regulatory impact assessment procedures. Australian agencies operating in trade related areas promote extensive use of handbook websites and enquiry points, including the Australian Quarantine and Inspection Service, the Food Standards Australia New Zealand and the Australian Customs and Border Security. Generally, broad consultation is organised around issues likely to affect trade. Foreign and international businesses take part mostly through their Australian-based subsidiaries. Standards Australia, the main national standard setting body is committed to transparency and consultation of all parties before preparing technical standards and regulations that affect international market openness. Value for

Money and transparency also applies to public procurement, under the Commonwealth Procurement Guidelines, issued by the Minister of Finance and to all agencies and departments at federal level. A central website lists all the contracts and annual procurement plans awarded through the AusTender website. Finally, the impact on Australia's international capital flows or trade has to be explicitly investigated when conducting a regulatory impact assessment.

Australian Customs and Border Security have also developed new innovative tools to streamline and harmonise customs procedures. For example, in 2007, the Australian Customs and Border Protection Service conducted a time release study to assess performance, and identified 0.3 days of interval between arrival and release for air cargo, and 1.3 days for sea cargo, covering all border-related procedures on behalf of over 40 government agencies. Australia has used relevant tools elaborated in the World Customs Organisation and Australian delays are among the shortest of countries surveyed.

## The challenges for regulatory reform

Australia's economic progress and its ability to weather the crisis owe much to past reform achievements. However, productivity was slowing well before the global financial crisis. According to OECD's indicators of product market regulation, the regulatory environment became slightly *less* conducive to competition in the first half of the recent decade (between 2003 and 2007). Australia is also facing a dynamic global environment as many OECD countries undertake substantive reforms. The net effect that Australia was ranked average in the 2007 Product Market Regulation indicators. The government has already endorsed a new reform agenda focussed on productivity and regulatory reform. However, this is a long-term programme and will require sustained effort.

Under the auspices of COAG, Australia has endorsed a new growth-oriented reform agenda focused on boosting productivity growth and strengthening the economy's long-run growth potential. This includes improvements in the functioning of product and labour markets, as well as reforms to enhance the education system and increase human capital. Many of these policy challenges have important federal and state dimensions and depend upon co-operation between different levels of government. From a competition and regulation perspective, the goal is to face the structural challenges of the Australian economy, and further reduce compliance costs and impediments to business across state jurisdictions while offering more effective social and environmental protection.

### *Policy areas for regulatory reform*

The following discussion highlights a number of policy areas where regulatory reform and the application of quality regulation principles could be expected to make a strong contribution to the economy and society. The policy areas have been analysed in detail as part of the background chapters prepared for the study and available online (see *www.oecd.org/reform*). These are summarised in Part II of this report. This section only presents some key findings. The policy areas highlighted for attention are:

- *Improving the federal-state regulatory framework*. This is a policy area which is very much in progress. The section will present key aspects of the ongoing process.
- *Increase the efficiency of the regulatory management system and strengthen its contribution to policy development*. This includes core aspects of the RIA system, ensuring greater ministerial accountability and obtaining greater engagement from departments.

- *Further strengthen competition enforcement in key sectors and facilitate price competition.* This includes several aspects of competition enforcement in energy, as well as rules related to predatory pricing.
- *Maintain the commitment to free trade for all agencies involved in trade.* This includes several aspects of the border relationships, also in relation to the implementation of the Beale report on biosecurity.

### *Improving the federal-state regulatory framework and building a seamless national economy*

Progress on the ambitious regulatory reform agenda depends crucially on a close co-operation between different levels of government. Regulatory competencies are shared in a number of sectors, and are the exclusive responsibility of the States in some areas. The distribution of regulatory competences across federal and state levels also has implications in terms of competition and market openness. Regulatory overlap, duplication and inconsistencies may prevent Australia from reaping the full benefit of an integrated national market.

The involvement of multiple stakeholders whose interests do not always overlap raises costs for the increasing number of firms that do business in more than one State.[30] After meeting regulatory requirements in their home state, firms wanting to operate across the border incur additional state-specific costs of complying with an alternative set of regulations. This regulatory heterogeneity increases the cost of inter-state trade and investment and acts as a disincentive for firms to expand and reap the benefits of scale economies. While the firms actually facing these costs are not the majority, they tend to be the larger firms operating in dynamic sectors. Regulatory fragmentation also reduces competition and consumer choice.

The new impetus given by the government to the reform of federal-state relationships, through COAG, reflects an ambitious agenda. The importance of reducing overlapping and inconsistent regulations for productivity and competitiveness has now been fully recognised. The agenda for the Competition and Regulatory Reform stream, of special relevance to this review, involves reforms in the areas of energy, transport, infrastructure and planning and climate change. Impediments to regulatory management are addressed through two initiatives. One initiative is designed to promote best practice regulation making and review in the states. The other is focused on regulatory reform of 27 priority areas where overlapping and inconsistent regulatory regimes are impeding economic activity such as occupational health and safety and consumer protection policy. These have been grouped under a broad reform agenda, with strong political momentum, to gather sufficient institutional energy to achieve change. This depends on co-ordinated actions by a number of agencies at state level, as well as State Parliaments passing and amending state laws.

A set of institutional arrangements and innovative financial incentives has been put in place to support the reform efforts at state level, with a system of payments, called National Partnership Payments. These payments will accrue to States that deliver on significant reforms based on the National Partnership Agreements entered into by the Commonwealth and States. The institutional architecture has parallels with the system established under the previous NCP agenda:

- An independent body, the COAG Reform Council (CRC), is charged with monitoring progress, giving advice to the Commonwealth which in turn makes payments.

- All payments are centrally processed by the Australian Treasury and paid to the State treasuries. This empowers central agencies and ministries at state level and transforms them as drivers for change in their own jurisdiction.
- The National Partnership payments that the Commonwealth has agreed to provide to jurisdictions that deliver on nationally significant reforms. Decisions on these payments are made by the Federal Government following advice from the CRC on progress against agreed milestones.

Many OECD countries have some form of co-ordination mechanism to manage relations across levels of government. However, none has the level of sophistication and policy coherence as the one currently established in Australia. This represents a major step forward in driving improvements in this area.

Australia uses a number of legislative co-operation mechanisms to implement reforms. These include the possibility of the referrals of powers, which are particularly effective tools to establish national regulatory schemes, where the Commonwealth and the States work closely to set the terms of a Commonwealth law based on referral of state powers. Other legal frameworks for national legislation include mirror schemes, where one state enacts a law, which will be adopted in the same or similar terms by other jurisdictions.

While COAG is a key policy priority for Australian Commonwealth and state governments, it is also facing hurdles and challenges. With good intentions and strong policy tools, the Australian authorities have rightly put the COAG reform agenda at the forefront of their reform priorities. What is at stake is the engine to future growth, and future gains in productivity.[31] However, this is a challenging task, as it faces a number of hurdles. It is too early to identify cracks in the system. Nonetheless, some commentators have raised concerns in terms of whether the entire programme will be delivered within the forecast timetable. For example, Western Australia has expressed reluctance to adopt the nationally uniform OHS rules. This demonstrates the level of commitment that is required from all the States in order to achieve a common goal. The Productivity Commission (PC) has acknowledged that COAG's reform agenda, if realised, will help in creating a seamless national economy. However, the PC also noted that "the difficulty arises in converting those principles to actionable, practical rules and regulations to be implemented at an individual business level. Too often "the ball is dropped" with reforms, and the intended results of more uniform regulations do not materialise at the business level".[32] The challenge is to implement reforms, with full benefits at the business level.

The government should be commended for its intention, the design of the process and the impetus given to the reform agenda. Given the level of ambition and push, significant results can be expected. An increasing awareness of the complexity of the COAG institutional structure, which includes up to 40 ministerial councils, led to the appointment of Allan Hawke, former Defence Department Secretary, on 2 July 2009, to review the structure of ministerial councils and report back to COAG in November 2009.

### *Increase the efficiency of the regulatory management system and strengthen its contribution to policy development*

Australia has a mature system for managing regulatory reform at the Federal level, which is well equipped, with strong institutions, well established processes and a strong professional culture in the administration. In terms of regulatory impact analysis, the Australian system at the federal level rates highly among OECD countries in terms of the

overall design of its processes. However, its relevance as a tool for policy development can still be strengthened. Further commitment to the RIA process could be obtained through greater ministerial involvement and endorsement. Consultation on RIA could be made more effective, if the RIAs were to be published when permitted in a draft format as a consultation document on regulatory proposals.

Rather than focusing on targets, Australia has an ambition to promote culture change to ensure continuous improvement in regulation. The goal for Australia is to maintain a culture and find a way to commit the various departments and agencies at federal level to the achievement of better regulation. There are opportunities to draw and expand on the planned system of ministerial partnerships. These are projects agreed between the Minister for Finance and Deregulation and ministerial counterparts, designed to reduce regulatory burdens. Among the partnerships now underway, is a project to simplify product disclosure statements for financial services and another is to improve the assessment of health technology.

The government has announced a Review of Pre-2008 Commonwealth Subordinate Legislation, with a focus on business regulation, which is a welcome step to improve the stock of regulations. The government could also provide guidance to agencies and ministries to ensure that scheduled post-implementation reviews will be fully effective.

Australia makes comprehensive use of ICT to improve service delivery. This is a priority and has a number of high-level initiatives, following a review of the Australian Government's use of ICT, and the setting up of a Business Process Transformation Committee. A forum of Departmental Secretaries and Agency heads, the Management Advisory Committee, chaired by the Head of the Department of Prime Minister and Cabinet promotes policy coherence and a strategic approach to service delivery. Some very innovative tools have been developed, such as Standard Business Reporting, which is expected to cut the cost of Australian businesses by AUD 795 million per year when fully operational in 2010. Other initiatives are geared towards reducing the burden of tax compliance and establishing a seamless single online registration system (see Chapter 2 for more detail).

However, there is scope for improving the use of the Internet by regulators. A study of the Productivity Commission in its Benchmarking of Australian Business Regulation found that about 60% of regulators provided information and application forms online, but fewer than 20% receive applications forms online or allow some form of interactive exchange online. Many of these are State regulators, and resolving this issue requires a joint approach by the states and the Commonwealth.

### *Further strengthen competition enforcement in key sectors and facilitate price competition*

The substantive content of Australia's competition law has been subject to major review in the last six years. Most of the amendments recommended in the Dawson Review and in a subsequent Senate Committee review have been implemented. Some are recent, such as the cartel reforms. Australian competition law is thus now in a transition period and it will be some time before proper assessment can be made of the advances. Nonetheless, some of the changes have raised particular questions. The priority given in Australia in the last 10-15 years to anti-cartel law and enforcement is in line with international trends. Whether the recent amendments achieve the right balance will

become evident as they are implemented. Penalties for breach have been low by international standards, but this may now start to change since civil penalties were increased and criminal sanctions were introduced for serious cartel conduct. The 10 year maximum jail term is a clear signal that the legislature expects custodial sentences to be imposed. The scope and effectiveness of the prohibition against misuse of market power may be even less clear now than it was before the recent amendments. To some extent, this reflects the significant influence of small business "politics" in Australian competition law. The TPA now includes a prohibition aimed at predatory pricing that could curb discounting by large corporations. Replacing a market power criterion with a market share threshold invites inefficient outcomes, offering protection of the interests of smaller firms but potentially resulting in higher costs to the consumer. The new prohibition risks creating uncertainty, but the current government has been thwarted in the Parliament in its attempts to address these concerns. The government should take advantage of future opportunities to remove at least the market share aspect of the "Birdsville amendment".

Some aspects of the National Competition Policy, could merit revisiting. The access regime, which is intended to promote efficient use of essential infrastructure in the context of market competition, is subject to some criticism. The system requires applications for declaration to the National Competition Council. Over the years, over 40 applications have been made in sectors such as rail, airports, water and sewage services. Contested actions are mostly about access to railway lines. Some of the disputes have been time consuming, as there is no deadline for NCC to act. Litigation may also be used as a way of gaming the system. This led the government to announce an intention to revise aspects of the access regime procedures in April 2009, possibly considering the introduction of binding time limits for regulatory decisions.

Competition related issues have been prominent in the policy debate in some sectors, such as telecommunications (see Chapter 4 on competition for further detail on the recent issue of the national broadband network). Issues also exist in some gas and electricity markets in Australia, where public ownership and remaining price controls may be hindering competition in some states.

A few areas remained unreformed after the National Competition Policy legislative reviews programme, including exemptions and special regimes.[33] The additional efficiency benefit of removing these remaining constraints justifies giving them adequate consideration. However, this can also entail significant political costs. These special-interest protections are common in other OECD jurisdictions, of course, where they have also proven difficult to remove (see Chapter 4 for more detail).

### *Maintain the commitment to free trade, facilitating FDI and reducing specific industry assistance programmes*

Australia's approach to free trade encompasses a number of agencies and processes which contribute to maintaining healthy and open international trade flows, which are vital for the future of the Australian economy. Economic policies are generally open. Strong enforcement of competition policy also contributes to the openness of the Australian market. Transparent and thorough consultation processes, also enable transparent involvement of stakeholders, domestic and foreign, in the regulatory process. Review mechanisms help to offer effective redress opportunities. There remain some areas for improvement. While border procedures are generally trade friendly, positive results obtained by customs are not always equally matched by other border agencies. This is the

case in particular of quarantine inspections, which have been subject to consistent concern among Australia's trading partners over the years.

Since 2001, and following the UK foot and mouth disease outbreak, Australia has applied mandated border inspection targets of 100% for all international air and sea vessels, mail and sea passengers and of 81% for air passengers. While the level of risks has been reduced, these provisions have remained unchanged until recently.

In February 2007, the government launched a major review of Australia's quarantine and biosecurity systems, known as the Beale review (see Box 1.8). This review can be considered as a model for consultation arrangements. In its preliminary response, the Australian Government agreed in principle with all 84 recommendations and outlined the actions that would follow. As one of its conclusions, the review recommended a move away from mandated inspection targets in favour of a risk-based approach. It is considered that quarantine inspection based on risk-assessment would considerably reduce the burden of border controls for importing businesses, while improving the controls' efficiency. In response to these developments, a system was trialled by the Australian Quarantine and Inspection Service (AQIS) in order to move towards this approach. In September 2009, the government officially announced a series of measures ensuring the implementation of these reforms, making sure that the necessary resources will be available. While, it is too early to assess the full impact of these measures, they represent a positive signal which follows a thoroughly managed process.

In relation to foreign investment, Australia's policy is generally open, although investments are subject to a screening process which raises some concerns about its transparency and predictability. The level of foreign investment is relatively high, as the stock of inward direct investment represented close to 33% of GDP in 2008. However, foreign equity restrictions remain in certain sectors and foreign purchases of Australian

Box 1.8. **The *Beale Review* on Quarantine and Biosecurity**

An independent Panel of experts, appointed by the Minister for Agriculture, Fisheries and Forestry, was asked to review the appropriateness, effectiveness and efficiency of current arrangements, including public communication processes and governance and institutional arrangements, and to produce a report (*One Biosecurity: A Working Partnership,* also known as the *Beale Report*, from the name of the Panel's Chair), consulting in the process with relevant domestic and international stakeholders. The Panel first prepared and released an Issues Paper in order to prompt discussion and attract submissions and comments from all interested stakeholders. It received around 220 written submissions from a wide range of interested parties, including overseas submissions, and organised over 170 meetings with domestic and international stakeholders, both individuals and representatives of organisations. The Panel also sought information from Australia's trading partners on their arrangements for managing biosecurity risks and held discussions with government officials and business representatives in New Zealand, North America, Europe, and representatives from other WTO members. A dedicated website (*www.quarantinebiosecurityreview.gov.au*) offered online support to the process: reference documents used during the review were made available on the site, alongside with copies of all the submissions. The Australian response to the review was released publicly upon publication of the review, and is available on the website of the Department of Agriculture, Fisheries and Forestry.

businesses or real estate are subject to a screening process to ensure that such investment is not contrary to the "national interest". In particular, 49% equity ceilings currently exist in three sectors: international aviation, federally-leased airports and domestic shipping. While restrictions were removed for the media sector in 2007, that sector is considered to remain sensitive and investments are subject to prior approval, irrespective of size. Recent attention has focused on investments by foreign state-owned enterprises and sovereign wealth funds. A focal area in this regard has been potential investment in the raw materials sector. Although business proposals have been very rarely rejected, some investors raised concerns in relation to transparency, time delays, and lack of clarity concerning reasons for decisions.

The government has reacted, issuing a set of transparency principles in February 2008, in order to allay the concerns around the sensitivity of the investment decisions. Some liberalisation measures were implemented in September 2009, with the threshold for investment screening for non US investments raised to AUD 219 million. This is expected to exempt a fifth of the applications from screening. In addition, foreign investors can now establish new businesses (Greenfield investment) in Australia without government review. Foreign-owned firms operating in Australia may participate in these programmes. This policy is quite rare among countries, particularly in the context of measures taken in relation to the recent economic and financial crisis, as noted by the joint WTO-OECD-UNCTAD report to the G20 (14 September 2009).

### *Moving forward*

Australia is to be commended for its innovative and proactive approach to regulatory reform. While it is too early to assess the results of the current efforts, reforms are clearly supported at a high political level on the basis of a clearly articulated programme. The issue is now how to move forward this agenda of reform, to "make reform happen", maintaining momentum and overcoming the challenges of implementation

### *Creating and maintaining momentum for reform*

The challenge for Australia is to create and maintain momentum for reform. Australia has a history of significant but periodic reform efforts. Fortunately, the country has been able to draw upon the benefits from past reforms, to sell the benefits of future ones. There is also a potential for reform fatigue which could lower the incentives for continuous improvement. Efforts tend to fade if the necessary impetus is not given. This is particularly true for an endeavour, as ambitious and as complex as the COAG reforms involving the States as well as the Commonwealth. Reward payments to the States and Territories upon completion of reforms can provide the momentum needed.

The long-term goal of the Commonwealth government is to break out of a cycle of periodic reform programmes and to embed a commitment to good regulatory management in the culture of the public administration. Despite the clear strengths of the COAG reform programme, pragmatically it will be difficult to maintain the sharpness of the incentives and political leadership that has driven these reforms, particularly after the last incentive payments are made in 2013. Potential future fiscal constraints (as discussed in Chapter 1) may reduce the capacity to the Commonwealth Government to fund reform in the States and political attention will also be drawn away to more immediate demands. The challenge for Australia is not so much in a refinement of tools for regulatory management, which are well developed by OECD standards, but to promote continuous improvements in

regulatory design and to embed a commitment in the culture of State and Federal administrations to develop regulation that is efficient, effective and in the national interest.

### *Strengthening institutional capacities to promote reform at all levels*

The Australian system includes several focal points to promote and monitor reform efforts. These include the Ministry of Finance, with its Deregulation Group including OBPR, the PC, as a general body charged with analytical and advocacy functions. New bodies have been put in place, with the COAG Reform Council (CRC), and the BRCWG. While a review of Ministerial councils and co-ordination is currently underway, it is important to establish an institutional framework that will ensure continuity and focus reform efforts.

The structure of COAG, including through the use of working groups and well structured secretariats, provides a unique opportunity which needs to be maintained and consolidated. The working groups that were established in December 2007 were instrumental in advancing the COAG reform agenda, and particularly the BRCWG. As a mechanism for co-ordination, the BRCWG has proven itself as one of the most useful mechanisms of the COAG architecture, building on the strength of its constituency.

Identifying champions of reform within State and Territory Governments could also reinforce current reform efforts, and could help could help strengthen leadership within Ministerial Councils. COAG could continue to use the BRCWG to drive implementation of reform and to identify and promote new areas of reform, or alternatively it could establish another body for this purpose. In either case, there is a need to ensure that there is an ongoing process for identifying and referring new areas of regulatory policy suitable for national reform according to an evaluation of the potential economic benefits. This could continue to reflect advice from the PC.

Benchmarking could also be used to further consolidate at state level. Existing benchmarking programmes, including that currently being undertaken by the PC, in response to a request by COAG, are useful. Continual benchmarking of business regulation could help deliver the benefits of innovation across jurisdictions and assess progress in addressing challenges. This could be institutionalised with a fixed timetable providing jurisdictions with clear timelines for action. This could, for example, facilitate an increased diffusion of online services for licence applications, which tend to currently lag behind in a number of jurisdictions.

Developing criteria to compare the arrangements in place within States can assist in determining which features of reform models are best suited to the States' public management arrangements and identify future reform priorities and further beneficial reforms to improve regulatory quality. Data production and analysis could in turn help identify implementation challenges at the State level and spearhead action.

Besides benchmarking, the sharing of information can also help to foster good regulatory practice. The example of other countries shows that using common fora for sharing best practice at state level can also facilitate more consistent programme implementation and contribute to strengthened capacity. Moreover, to raise awareness of cross-jurisdictional issues, Commonwealth and State agencies responsible for regulatory policy could bring together regulators and staff from different jurisdictions for joint training sessions. The creation of networks of regulators will be increasingly necessary to share regulatory knowledge across jurisdictions and across regulatory fields within

jurisdictions. The ANZSOG model of networked intergovernmental learning and research may provide a model for enhancement and emulation in this regard.

### *Developing a common approach to communication and advocacy*

Communication and advocacy are also critical to achieve change. The Minister of Finance and Deregulation plays a key role to lead the government efforts. A number of institutions play a leading role in communicating and advocating the positive welfare outcome of reforms.

The PC plays a very strong and universally acknowledged role in terms of advocacy on a broad range of economic topics. For example, the PC provides an assessment to COAG of the economic impacts and benefits of the reform agenda and it supports the CRC in the collection of performance data to monitor and measure progress in respect of the National Partnership Agreement implementation. COAG, through the Commonwealth Treasurer, has also asked the Commission to review particular regulatory frameworks. In its assessment of the performance of the States against the implementation plan of the seamless national economy, the CRC may ask the Commonwealth Government to refer matters for review to the Commission when it considers that further analysis of policy issues is necessary to assess whether the reforms that have been undertaken are adequate. The Commission also stages an annual high-level roundtable to discuss important policy issues.

In terms of competition, the Australian Competition and Consumer Commission is an independent authority, with a wide range of roles and responsibilities, which focus on enforcement, fair trading and consumer protection, but which exclude an explicit mandate in terms of advocacy. The National Competition Council, which was established at the time of the NCP, played a role in policy formulation and monitoring in the early years following the implementation of the Hilmer reforms, but its role is now more limited.

The PC's role in terms of advocacy is paralleled in some cases at state level. The best example is the Victorian Competition and Efficiency Commission (VCEC) which conducts public inquiries and reviews as a platform for regular engagement with stakeholders. Other states have established platforms for consultation and engagement, but they may not be supported by similar bodies operating at arms' length from state governments.

The excellent analytical work of the PC, and its diffusion to a wide audience could be complemented by a continuing policy narrative on the benefits of regulatory reform together with examples. This policy narrative should help to promote greater engagement by the business sector and more ownership of the regulatory policy goals within government. Building a broader constituency within government to support regulatory reform will strengthen the resilience of the regulatory policy agenda over time and beyond the current crisis. Potential roles for other parts of government include external scrutiny of agencies, as a source of advice of new reform opportunities and the consideration of complaints directly from business and citizens.

### *Changing culture and the approach to regulation*

Besides advocacy and communication, cultural change is a key ingredient for success. Australia has a strong track record already in adopting innovative approaches in pursuit of regulatory improvement. Australia was one of the "first-movers" internationally in putting in place strong institutional settings to support a rigorous Regulation Impact Analysis (RIA) framework, with the introduction of RIA processes from around the mid-1980s. Given the

### Box 1.9. **The Australian Productivity Commission**

The PC was created by an Act of Parliament in 1998, replacing three standing economic research and advice agencies: the Bureau of Industry Economics, the Economic Planning Advisory Commission and the Industry Commission (IC). The IC had been created in 1989 and evolved from an earlier institution, the Industries Assistance Commission, which had replaced in 1974 the previous Tariff Board, itself established in 1922. These institutions also had statutory independence and transparent processes. This history has also promoted the continued expertise of the PC in trade economics.

The Australian Productivity Commission (PC) is a major source of innovative policy advice and analysis and is unique among OECD members for its standing function. Its charter is to improve the productivity and economic performance of the economy, taking into account the interests of the community as a whole, having regard to environmental, regional and social dimensions; not just the interests of particular industries or groups. The PC is an advocate for reform and an authoritative source of advice on reform opportunities and strategies for policy implementation. Importantly, the scope of the Commission's work covers all sectors of the economy, including the public and private sectors and Commonwealth as well as State and Territory responsibility.

In the conduct of its reviews the Commission operates independently under the powers of its own legislation and its independence is formalised by law. The large majority of inquiries and studies undertaken by the PC have a regulatory dimension. Key factors that have been vital to the success of the PC in achieving its goals are a strong analytical tradition, independent commissioners, skilled staff and transparent processes. The Chairman and the Commissioners are appointed by the Governor General. The PC has 180 professional and support staff. The processes of inquiry are public allowing the opportunity for the participation of interested individuals and groups, and the final inquiry reports must be tabled in Parliament within 25 sitting days of the government receiving the report.

The PC has four main outputs:

- Public inquiries and research studies requested by the Australian government.
- Performance monitoring and benchmarking and other government services to government bodies.
- Competitive neutrality complaints and advice.
- Supporting research and annual reporting on productivity performance, industry assistance and regulation.

The outputs are delivered through published Commission inquiry and research reports, staff research papers, public conferences and seminars. The PC produces an annual reporting series (the "blue book") on the performance of government services.

The PC provides modelling of the economic costs and benefits of alternative policy options and it may make recommendations on any matter that it considers relevant. The range of topics is wide, covering rural and regional aspects, network industries, various sectors such as automobiles, gambling, textiles, pharmaceuticals, as well as performance benchmarking of Australian regulation and annual reviews on the burdens on business from the stock of Australian government regulation (see list of PC reports at *www.pc.gov.au*).

maturity of Australia's institutional and analytical regulatory settings, and their close congruence with OECD best practice, the recognition by the current government that Australia is at or close to the limits of achieving additional gains to regulatory quality through a further tightening of existing process or pursuing minor technical enhancements is well-based.

Building on the strong base provided by current, well-established regulatory processes in Australia, the pursuit of substantive cultural change is a logical next step in further developing settings for regulatory management in the interests of improved regulatory quality and, ultimately, enhanced productivity and international competitiveness.

At the broadest level, the nature of the cultural change envisaged by the government is reflected in its stated ambition to move beyond the episodic regulatory reform efforts of the past and establish a self-sustaining approach that promotes continuous improvement in regulation and prevents backsliding. While this ambition is laudable, the challenges that will arise in moving regulatory management onto a "next generation" cultural footing should not be underestimated. In delivering substantive cultural change that will genuinely underwrite meaningful and sustainable enhancements in the quality of regulation and its management, there are a number of practical issues that must be addressed.

Resolving issues such as how to ensure that regulatory policy considerations are genuinely and substantively taken into account from the outset of the policy development process and how to ensure more effective and substantive engagement by Ministers in considering the better regulation implications of policy proposals will be central in this regard. Some specific policy interventions can help, including incentives, training and sharing of best practice. However, approaches based on ensuring that Ministers and their departments are clearly accountable for the quality of regulation in their portfolio are likely to be far more pervasive in influencing culture and regulatory behaviour more generally.

The logic of this approach also extends to inter-jurisdictional matters where the policy challenge is to develop effective mechanisms to ensure that, in framing regulation within their own jurisdictions, the States and Territories pay close regard to the national interest – that national regulatory policy considerations become an integral element of the decision-making process. If successful, this will prove a more potent and sustainable approach to advancing and extending the reform focus beyond "cleaning up" the inter-jurisdictional inconsistencies and other problems of the past than one that continues to rely on the Commonwealth providing ongoing financial incentives to motivate reform.

The arrangements that have been established in the context of COAG provide useful opportunities to meet and discuss common topics among peers, exchanging information and confronting local practices. Benchmarking like that undertaken by the PC and the business community can also facilitate common learning and change. But ultimately, effective cultural change in this context will mean that the federal and state and territory governments work co-operatively in the regulation of national markets, as all governments recognise that there are shared long-term benefits in doing so.

## Conclusion

Australia has many successes to share with the rest of OECD countries in terms of its experience with regulatory reform and promoting competition. The waves of reforms of the 1980s and 1990s have brought unprecedented change and prosperity in the Australian economy, which itself is a demonstration of the widely understood benefits of reforms.

However, other countries are also making progress in the dynamic field of regulatory reform, making it a priority agenda across OECD and APEC. Even if Australian productivity has increased, it still remains below the US level. Even accounting for the difference in terms of location and size of the domestic market, there is always scope for further progress.

The process and institutional framework established to support the reform of – federal-state regulations bodes well for the future. Australia has also weathered the crisis more successfully than any other OECD country. At the same time the crisis has taken its toll on the economy and public finances. The room for manoeuvre that existed two years ago to launch the COAG process would probably not repeat itself today. This underlines the historic opportunity represented by the current effort. However, this was also dependent on external factors, such as the synchronisation of political cycles at state and federal levels. With an ambitious agenda, this is an opportunity to be seized. It will be important to demonstrate early gains from this process, to justify the energy and resources that have been invested.

The institutional capacity that has been created is an investment for the future. Having regard to the success of the current initiatives, additional ambitions for the future could be framed to achieve further reform. Some of the elements built into the architecture, such as the CRC, the reviews by the PC, and the Better Regulation and Competition Working Group, have potential well beyond the current process.

However, time is important and political cycles are short. This calls for quick and visible results to convince stakeholders. While the government carries its own share of the commitment, success also depends on the commitments of the States. Business and the wider community also have a role to play in the debate, making the case for change, and convincing those who are reticent of the advantages of moving forward in the national interest.

Australia demonstrates world class practices for regulatory reform and is in many respects a success story. Many of the mechanisms and features that exist at state level are more developed than even in a number of OECD countries. At the same time, unlike North America and Europe, Australia is not part of a large regional market, which limits economies of scale as well as the capacity to absorb external shocks. Foreign trade and FDI are crucial to its prosperity. Therefore there is a need to continue building exemplary regulatory frameworks that serve to ensure stability and policy consistency. Beyond the economic dimension, sound regulatory practices and transparency help to strengthen governance and maintain trust. This is important for citizens, investors and represents one of Australia's most valuable intangible assets to support a resilient economy and to foster sustainable growth.

### *Notes*

1. The wage share in the mining sector is around 17% compared with a national average of around 54% (McKissack *et al.*, 2008).

2. For example, in the second quarter of 2009, Chinese iron ore imports rose by 41% y/y in volume terms, copper imports rose by 140%, coal imports increased by 300% and aluminium imports rose by nearly 400%. These increases are extremely strong by historical standards and import volume growth for most commodity products will soften in the second half of the year as the restocking process ends and domestic liquidity growth slows. However, the recovery in China will most likely continue to pick up speed, implying robust growth in imports over the medium term.

3. Such as bank losses totalling 5% of annual GDP in the early 1990s, the collapse of HIH Insurance in 2001 and a AUD 360 million loss due to unauthorised foreign currency trading at National Australia Bank in 2004.

4. Membership of the Council of Financial Regulators is: the Reserve Bank of Australia (Chair), APRA, the Australian Securities and Investments Commission (ASIC) and the Australian Treasury.

5. For instance, the non-conforming housing loan market in Australia (the closest equivalent to the sub-prime market in the United States) accounted for only around 1% of the mortgage market in mid 2007, compared with around 13% in the United States. Moreover, "negative amortisation" loans, where the balance could rise at first, became common in the United States but have not been part of the Australian mortgage market. Low-doc loans exist in Australia but they are less common. And in contrast to common practice in the United States, low-doc didn't mean providing no documentation at all. No-deposit mortgages are also less common in Australia than they were in the United States over the boom period.

6. These supply-side constraints, which have affected the availability of building land for instance, have contributed to a relatively high level of Australian housing price in international comparisons.

7. The exchange rate performance in the current crisis has been different to those previous episodes. After a sharp initial downward adjustment, the AUD strongly picked up. This reflects the global nature of the downturn with comparatively favourable prospects for the Australian economy.

8. In formal terms, the objectives of monetary policy, as laid out in the *Reserve Bank Act (1959)*, are to contribute to: the stability of the currency of Australia; the maintenance of full employment in Australia; and the economic prosperity and welfare of the people of Australia.

9. Australia informally adopted an inflation targeting framework in the early 1990's which was formally adopted in 1996.

10. Liu (2007), using an SVAR model to identify shocks to the Australian economy, finds that the stabilising effect of monetary policy is more pronounced after the introduction of inflation targeting. Dungey and Pagan (2000) also conclude that monetary policy has operated in a counter-cyclical fashion and worked to reduce output growth during expansions and stimulate output during contractions.

11. Although its export basket is now far more diversified across products and destinations than in the past, this is consistent with the view that Australia is still a small open economy and vulnerable to swings in international commodity prices. For example, Liu (2007) finds that over half of the business cycle forecast errors in an SVAR model of the Australian economy are attributable to shocks emanating from the foreign sector. Using a New Keynesian dynamic stochastic general equilibrium model, Nimark (2007) also concludes that foreign shocks explain over half of the variance in output. Dungey and Pagan (2000) find that international financial linkages are very important in modelling the Australian economy. On the other hand, an SVAR model by Brischetto and Voss (1999) reveals that only around 5% of output forecast errors come from exogenous foreign factors.

12. Using an SVAR model, Liu (2007) provides empirical support for the assertion that the timing of international shocks has played a role in offsetting domestic disturbances and contributed to Australia's relatively stable growth path.

13. Belkar *et al.* (2008).

14. Belkar *et al.* (2008).

15. For OECD evidence, see Duval *et al.* (2007). Empirical support is also provided by Kent *et al.* (2005) who found a role for product and labour market flexibility in explaining a decline in aggregate output volatility among a panel of 20 OECD countries.

16. The Commissions analysis excluded the effects of some parts of the NCP such as extending the reach of the Trade Practices Act and the Legislation Review Programme, which would have yielded additional gains.

17. See Parham (2003) for an excellent survey of this literature.

18. There are a number of reasons why this might be the case. In a competitive environment with low barriers to entry the incentive to invest in ICT so as to increase productivity and retain market share may be stronger than in a more restrictive regulatory environment where incumbents are sheltered from competitive processes. In addition, the costs of adjusting the capital stock and firm structure and reorganising the production process, all of which are necessary if new technology is

to be successfully integrated, will tend to be lower in a competitive environment. Finally, as pointed out by Alesina *et al*, (2005) in the context of general-purpose fixed investment, a competitive environment puts downward pressure on the cost of ICT, thereby promoting its diffusion. Conway *et al.* (2006) provide rigorous model-based evidence of a link between product market regulation and ICT adoption.

19. The Australian experience also underlines the fact that it was not necessary to produce ICT in order to reap some of its productivity benefits. Unlike the United States, Australia had no significant IT production sector.
20. Exemptions will, however, be maintained for workers with less than one year's service in firms having fewer than 15 employees and for those with less than six months service in firms having 15 or more employees.
21. For *e.g.* Haltiwanger *et al*., 2008; Kahn, 2007; OECD, 2004; Bassanini *et al*., 2009.
22. The use of casual contracts is highest in industries such as retail trade (42% of employees are casual), accommodation and food services (65%) and arts and recreational services (38%) where employers need flexibility to rapidly adjust to changing customer demand (Australian Bureau of Statistics, 2008).
23. Australian Government, 2002 and 2007; Productivity Commission, 2005.
24. For example, Productivity Commission (2008) reports that oil and gas reserves in Bass Strait and the Bonaparte Gulf have become depleted this decade.
25. The review was ongoing at the time of drafting this report.
26. A sizable appreciation of the currency has also played a role (Andrews and Arculus, 2008).
27. The Future Fund currently also owns 17% of Telstra that is still publically-owned.
28. These are the Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria, Western Australia.
29. Western Australian govt is a liberal government.
30. The number of firms doing business throughout Australia rose by more than 70% between 2003 and June 2007 (ABS, 2007).
31. AFR, 23 July 2009, Productivity key to recovery. AFR 1 September 2009, pp. 60-61, drive to boost productivity.
32. Productivity Commission (2009), p. XXV.
33. These concern taxis, pharmacies and liner shipping.

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PART II

# Regulatory Reform

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*Chapter 2*

# Regulatory Governance

*This chapter is a summary of the background report* government Capacity to Assure High Quality Regulation in Australia *available at* www.oecd.org/regreform. *It focuses on the regulatory management and reform arrangements that are in place at the federal level of government in Australia, drawing on the good practices embedded in the 2005* OECD Guiding Principles for Regulatory Quality and Performance. *The chapter includes an assessment of: the effectiveness of institutional arrangements and tools for promoting regulatory quality; the design of regulatory reform policy; the use of* ex ante *and* ex post *impact assessment; systematic transparency and public consultation measures, and; measures to reduce regulatory burdens including the integration of ICT. Australia has well embedded regulatory management arrangements in these areas and a history of successful reform. Future challenges include ensuring that Ministers and their departments embrace a culture of "continuous improvement" in rule making and enforcement.*

## The administrative and legal environment for regulatory reform in Australia

Australia is a democratic federation of six States and two Territories that inherited its legal and parliamentary processes from British traditions. The Australian Federal Government is also referred to as the Commonwealth government of Australia and the term federal regulation is used interchangeably with Commonwealth regulation. Regulation is made at the Federal level as well as by the States and territories (The "States") in the form of legislation and subordinate legislation and at a local government level as regulations and by-laws.

Australia has a long and successful history of regulatory reform, but there is no room for complacency. The challenges wrought by the global financial crisis have increased the pressure on governments to focus on short-term issues and increased the risk that longer term reform strategies are given less attention. Yet it is the long-term policy initiatives designed to build more efficient and effective regulatory frameworks that are required to underpin the resilience and flexibility of the economy to respond to external economic shocks. More than ever Australia needs to ensure that its regulatory management systems are efficient and effective and capable of delivering innovation. Innovation is required in the way that regulation is designed and performs to ensure that it supports innovation in the economy.

Australia's recent reform history demonstrates a bipartisan commitment to increasing the effectiveness of systemic quality measures and recognition that systems for regulatory management are necessary to manage the flow of regulation. There have been large scale reform strategies such as the National Competition Policy which have been effective in delivering results, as well as significant periodic reviews of regulatory sectors and of the systems for managing the stock and flow of regulation. Successive governments have introduced robust institutional measures of oversight and quality control usually in response to periodic reviews of regulatory performance. These reviews have provided insights and identified areas for improvement in the regulatory management frameworks: they have helped to highlight the gap between the ambitions of existing regulatory management practices and what is delivered in practice, and improvements have been made particularly to the standards of analysis for new regulatory proposals.

In Australia at the present time, however, the current government is trying to achieve more than the marginal gains from periodic reviews and reforms. Its ambition is to establish a culture that promotes continuous improvement in regulation and prevents backsliding. This approach has considerable merit. It seems to be the appropriate strategic goal to achieve progressive improvements to the efficiency and effectiveness of regulation, and given the foundations that are in place it appears to be achievable. A number of regulatory management issues that appear intractable in other OECD countries are being managed well in Australia. Many of the pre-conditions for successful regulatory reform have already been put in place. There is a strong culture of professional commitment among staff in the public administration, a highly skilled and professional public

administration with experience of working with regulatory reform in government and a strong and well embedded institutional framework.

In many respects Australia is a model framework among OECD countries for the application of regulatory reform strategies. With a few exceptions the key features for regulatory management that are promoted by OECD have been adopted and reinforced over time, and a number of novel approaches have also been developed. But the experience of Australia also demonstrates that constant and renewed efforts are necessary to deliver results.

## Recent and current regulatory reform initiatives

Australia has a relatively long experience in the application of regulatory management systems to improve regulatory quality supported by institutional arrangements. Among OECD countries Australia was a very early adopter of institutions for the oversight of regulatory quality and the use of Regulatory Impact Analysis (RIA). For example, in 1985 Australia was already one of only eight OECD countries with a formal requirement for regulatory impact analysis (OECD, 1997; 2007). In 1995, the impact assessment procedures were extended to cover regulatory instruments with a national application when the Council of Australian Governments (COAG) formally agreed to a consistent approach requiring that a regulatory impact statement was to be prepared as part of the development of all national standards (COAG, 1995).

In 1996, the Commonwealth Government commissioned the *Small Business Deregulation Taskforce* made up of representatives from the business sector to review and report on measures to "*reduce the compliance and paperwork burden on small business by 50%*".[1] Hampered by the absence at that time of any effective methodology to measure the cumulative compliance burden, the taskforce recommendations focused on better processes, and an increased political profile for regulatory management.

### *The National Competition Policy Legislative Review Programme*

The National Competition Policy (NCP) legislative review programme stands out as the one of the most important regulatory reform initiatives in Australia's history (see Box 1.7). The programme delivered important economic benefits to Australia and it has been promoted by the OECD to its members as a model approach. Under the NCP programme each jurisdiction examined their entire stock of laws for potential restrictions on competition and together identified and scheduled for review around 1 800 pieces of legislation. (For an overview of the competition reforms, see Box 4.1 in Chapter 4).

Important institutional features of the NCP have subsequently been adapted as the basis for the current COAG national reform agenda. These include the use of incentive payments from the Commonwealth to the States and the role of the COAG Reform Council to oversee and advise the Commonwealth on the progress of reforms.

### *The advocacy role of the Australian Productivity Commission*

The Australian Productivity Commission (PC) is a unique example of a policy advocacy body among OECD governments in terms of its independence, staffing size, economic expertise, stability and the breadth of policy issues it considers. It has a role in researching and advocating the benefits of regulation reform, as well as monitoring and advising on regulation and undertaking benchmarking in specific sectors. The PC has been an

important part of the institutional architecture for regulatory reform in Australia and it provides a model with many features that could usefully be emulated outside Australia in other OECD countries (see Box 1.9).

### *The Banks Review – Rethinking Regulation*

There is a record of mature economic debate among stakeholders in Australia which recognises the contribution of systemic regulatory reform to sustained economic development and has contributed to mainstreaming regulatory management principles and promoting their development. In 2006 the government commissioned Gary Banks, the Chairman of the Productivity Commission to lead a Taskforce to "identify actions to address areas of Australian Government Regulation that are unnecessarily burdensome, complex, redundant, or duplicate regulations in other jurisdictions" (Rethinking Regulation, 2006, p. i). This was motivated in part by a 2005 Business Council of Australia (BCA) report which criticised the effectiveness of existing arrangements for the management of regulatory quality, and suggested a trend to increasing regulation potentially undermining Australia's competitive advantage. The BCA had proposed an action plan with three steps: to improve regulatory management processes through better RIA and institutional arrangements; clean up the stock of regulation, and; address overlapping and inconsistent regulation among the layers of government (Business Council of Australia, 2005).

The Banks review found that there was too much regulation imposing an unnecessary cost on business remarking upon a rising phenomenon of risk aversion in society and an over reliance by governments on the development of regulatory solutions that had led to a "regulate first ask questions later culture". Furthermore regulatory silos meant that the broader effects of regulation were rarely taken into account. This concurred with the views of the BCA that the requirements for good regulatory process had not been effectively discharged and that unless the underlying reasons for regulatory failures were addressed the regulatory problems would simply re-emerge.

The recommendations of the Banks Review set in place a new phase of reform initiatives with an emphasis on improving the institutions and processes that promote good regulation. The government endorsed six principles of good regulatory process and these were reflected in an improved version of its official Best Practice Regulation Handbook. Important process changes adopted on the recommendation of the Banks Review were a requirement for a higher level of analysis in RIS and improved gate keeping arrangements that would prevent a regulatory proposal from proceeding to Cabinet if an adequate RIS has not been prepared. The existing Office of Regulation Reform was renamed the Office of Best Practice Regulation (OBPR) reflecting a new focus to assist agencies to develop regulatory best practice, and a specialised cost-benefit analysis unit was created in the OBPR to provide advice and support to agencies preparing RIS.

## Mechanisms to promote regulatory reform within the public administration

### *Current institutional arrangements and regulatory policy settings*

The regulatory reform objectives of the present Australian Government were set out by the Prime Minister the Honourable Kevin Rudd, while still in opposition. The election platform reflected a view that despite the long history of regulatory reform initiatives, they had not been sufficient to deliver a material reduction in the regulatory burden on

Box 2.1. **Principles of good regulatory process**

The government adopted the following six principles in good regulatory practice recommended by the Taskforce on Reducing the Regulatory Burden on Business (Banks Review):

- governments should not act to address "problems" through regulation unless a case for action has been clearly established. This should include evaluating and explaining why existing measures are not sufficient to deal with the issue.
- A range of feasible policy options – including self-regulatory and co-regulatory approaches – need to be assessed within a cost-benefit framework (including analysis of compliance costs and, where relevant, risk).
- Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted.
- Effective guidance should be provided to regulators and regulated parties to ensure that the policy intent of the regulation is clear, as well as what is needed to be compliant.
- Mechanisms such as sunset clauses or periodic reviews need to be built in to legislation to ensure that regulation remains relevant and effective over time.
- There needs to be effective consultation with regulated parties at the key stages of regulation making and administration.

*Source:* Rethinking Regulation (2006), p. v; Australian government 2007.

business. The new government took office in November 2007, and immediately created a new Cabinet portfolio position of Minister for Finance and Deregulation as a champion inside the Cabinet to help ensure that Ministerial colleagues comply with regulatory quality processes in preparation for and during the Cabinet process. The responsibility for deregulation was assigned to the portfolio of the Finance Minister so that the two functions could impose a complimentary discipline on departments from the centre of government: finance being responsible for budget policy advice and process, and; the deregulation portfolio being responsible for regulatory efficiency. A new Deregulation Group was created in the Department of Finance and Deregulation, the regulatory oversight and advisory functions of the OBPR were relocated from the PC to this group, and a new Deregulation Policy Division was also established in the department.

The new Minister for Deregulation the Honourable Lindsay Tanner, outlined the ambition of the government's deregulation agenda to achieve culture change among regulators, introducing "a culture of 'continuous improvement' in regulatory activity… in which government is always looking for opportunities to streamline regulatory processes… in the same way manufacturers seek to continuously refine production processes" (Tanner, 2008). Important new elements that the government emphasised about its deregulation agenda were: the goal of continuous improvement, as distinct from one-off reviews and target-driven reform programmes; an emphasis on deregulation focusing on regulation which is outdated, excessively burdensome on business or unfair to consumers; and, a commitment that there will be no net increase in the regulatory burden arising from new Commonwealth Regulation (Tanner, 2008a).

Protection from political influence and the authority to exercise independent judgement and hold departments to account on the analysis of their regulatory proposals is an important part of the role of bodies responsible for the oversight of the quality of regulatory proposals

Box 2.2. **Key policy initiatives of the Federal Labour Party to improve business regulation April 2007**

The federal Labour party election policy on business regulation reform included the following key initiatives:

- a commitment to working in partnership with the States and territories to harmonise regulations in key areas;
- enhancing the accountability of federal and state governments for harmonising regulation by commissioning the Productivity Commission (PC) to estimate the costs and benefits of harmonisation;
- provision of financial incentives to reward State and Territory governments that implement reforms based on the model used for National Competition Policy;
- a commitment to a rigorous Regulation Impact Statement (RIS) process to protect businesses from new, unnecessary regulation and the establishment of a small business advisory council to review and comment on regulatory impact statements;
- introduction of a "one in, one out" principle so that proposals for new regulations are accompanied by proposals to remove existing regulation;
- introduction, where possible, of a common commencement date for new regulation, to provide greater certainty for business; and
- measures to address compliance burdens for small business in relation to the Goods and Services Tax (GST).

*Source:* Rudd, K. The Honourable (2007), "Facing the Future", address to the National Press Club, Parliament House Canberra, 17 April.

(OECD, 2002, p. 90). When the OBPR was located in the PC, it operated under the general statutory independence that applies to the functions of the Commission. The OBPR lost this statutory independence when relocated within the Department of Finance and Deregulation, but of its independent capacity to undertake a technical assessment of the adequacy of the analysis in RIS was endorsed in statements by the Minister for Finance and Deregulation to the Australian Parliament. (Tanner, 2008b, p. 1 890) Furthermore, it gained a closer relationship to the processes of Cabinet and the development of policy proposals. The Deregulation Policy Division took on the new function of evaluating the policy merits of regulatory proposals reflecting the government's focus on deregulation. Overall the institutional capacity for managing regulatory policy has been significantly strengthened as well as the development of a number of new regulatory management initiatives.

Specific deregulation initiatives include a requirement on Ministers to quantify the regulatory burden of new regulatory activities in Cabinet proposals. Ministers are required when proposing new regulation to consider regulations that can be removed in accordance with the "one in one out" principle. From 1 January 2009 departments were required to notify the Department of Finance and Deregulation in advance of all proposals for new or amending regulation, in addition to the requirement to publish annual regulatory plans. Other initiatives include the development of a central register of the commencement dates of all new regulation to reduce search costs for business. The Department of Finance and Deregulation identified 200 pieces of redundant regulation through a stock take in 2008. Almost 60 regulations had been removed by mid 2009, and a *Removal of Regulation Omnibus Bill* was in preparation for consideration by Parliament later in 2009.

The Minister for Finance and Deregulation has initiated *Better Regulation Ministerial Partnerships* to identify and develop improved regulatory outcomes across portfolio responsibilities. Partnerships have been commenced with the Minister for Financial Services, Superannuation and Corporate Law to simplify the regulation of financial disclosure, and with the Minister for Health and Aging to streamline the timeliness of the approval of new health technology.

In 2009, the government commenced a review of all pre-2008 Commonwealth subordinate legislation registered on the Federal Register of Legislative Instruments with a particular focus on reforming business regulation. The aim of the review is to document regulations that impose net costs on business and identify scope to improve regulatory efficiency. The Department of Finance and Deregulation also plans to use this stocktake to enhance cultural change in the way that portfolios manage their regulatory stock.

The Minister for Finance and Deregulation will make bi-annual reports to Cabinet on progress with the better regulation agenda. The first of these reports was delivered in April 2009. The government has agreed to undertake further better regulation initiatives including the enhanced use of consultation green papers to better identify the regulatory impacts from significant regulatory proposals, more formal arrangements for the conduct of Ministerial partnerships, updates to the guidance on preparing RIS, and a requirement that agencies lodge a preliminary assessment of all regulatory proposals with the Department of Finance and Deregulation.

The policy division also provides secretariat and policy support to the COAG Business Regulation and Competition Working Group (BRCWG) which is responsible for driving the delivery of the national deregulation priorities of COAG.[2] These are contained in a COAG *National Partnership Agreement to Deliver a Seamless National Economy* and include national regulatory reforms in 27 priority areas, eight areas of competition reform, and improvements to regulatory management in all jurisdictions.

Departments have been notified of their deregulatory obligations including the requirement to consider regulatory offsets when considering new regulatory proposals in a *Guidance Note on Advancing the Deregulation Agenda*. A key challenge for the future is establishing a mechanism for the assessment of a baseline measurement of regulatory costs, against which the Minister for Finance and Deregulation can report to Cabinet on the government's commitment to no net increase in the regulatory burden.

The OECD and other sources have described the difficulties of providing incentives for regulatory agencies and departments not to add to the stock of the regulation. This is one of the reasons why the use of targets and the Standard Cost Model (SCM) were developed; as a way to provide leverage to facilitate the reduction of administrative burdens. Where other OECD governments have had a goal of no net increase in the burden of regulation these have been confined to administrative burdens, which is a relatively narrow class of costs imposed by regulation. The Department of Finance and Deregulation is testing the concept of regulatory budgeting with a pilot within its own department and in the Department of Innovation, Industry Science and Research. There is little practical experience of regulatory budgets as they have not been implemented by any OECD government. The requirement for regulatory offsets and the "one in one out" principle is not of its own likely to have a material effect on the growth of regulation.

The structure of the policy division and its separation from the technical functions of the OBPR make it well placed to act as an advocacy body for the deregulatory policy agenda.

A major part of the challenge is to maintain the momentum for the deregulation policy agenda and communicate its aims and its successes to the business community and citizens. But within government it cannot achieve the policy goals on its own as these changes have to occur within the agencies who regulate. The Australian Government has not set the kind of burden reduction targets commonly used in Europe although it is a feature in some Australian States. Given the technical constraints on regulatory budgets, it will be a challenge to establish clear incentives for agencies to meet the government's overall policy commitment to no net increase in regulatory burden. It will require the allocation of clear responsibilities with Ministers and departments to ensure they identify and implement reforms that reduce the burden of regulation within their portfolios, and conscientiously examine any new regulatory initiatives to ascertain that it imposes the least regulatory burden necessary to achieve policy objectives.

The *Report of the Taskforce on Reducing Regulatory Burdens on Business* noted that a number of key elements of good practice needed to be more widely implemented across regulatory agencies and that a more balanced incentive structure was required to encourage regulators to take a risk-based approach. Particular areas of concern were identified with consultation procedures, the provision of information on enforcement and compliance requirements, processes for dealing with complaints and the time frames for responses. The Taskforce recommended the development of a code of conduct for each regulator, and the reporting against a wider range of performance indicators. These were to include details of efforts to reduce the compliance burden on business and better regulation practices (Regulation Taskforce, 2006, p. 163). Not all of these elements appear to have been implemented. In 2007, the Commonwealth Auditor-General also noted a need for the improvement in the performance and culture among regulators, including the systematic application of risk-based management procedures. It has produced practice material reflecting examples from well performing regulatory agencies.

While not widespread, there are clear cases where regulators have already taken the initiative to report on better regulation initiatives. For example, the Australian Securities and Investment Commission (ASIC), the national corporate regulator, produces a number of guidance documents under the banner of Better Regulation to communicate their practices to regulated business and other stakeholders. These include an *ASIC Service Charter*, and a statement on *ASIC Better Regulation Initiatives* published in 2006. The service charter includes a list of performance indicators including timeframes for acting on requests and responding to requests. ASIC publishes a report on its performance against these indicators annually on its website. The *Better Regulation Initiatives* identifies the organisation's aims for reducing the regulatory burden on business including: improving transparency and consultation, analysing impacts, making regulation easier to understand, reducing duplication and streamlining processes.[3]

An example of the promotion of cultural change among regulators that may be worthy of emulation is the United Kingdom *Regulatory Enforcement and Sanctions Act 2008*[4] *which* imposes a general obligation on regulators *not to impose or maintain unnecessary regulatory burdens*. A regulator covered by the Act is required to publish an annual statement advising how they plan to avoid imposing additional unnecessary burdens, and how they have removed any unnecessary burdens. In addition the UK requires Departments and agencies to prepare and publish annual "simplification plans" which detail how the department plans to achieve the government's better regulation requirements.

### *Risk and regulatory policy*

The topic of risk and regulatory policy is notable in the context of promoting culture change at an agency level and changing the behaviour of regulators. The Taskforce on Reducing Regulatory Burdens on Business identified an "increasing risk aversion in many spheres of life" as a major contributor to excessive and costly regulation in Australia. Increasingly OECD countries are working on improving the way that risk is managed by regulators to reduce the costs of regulation and increase its effectiveness.

The OBPR Best Practice Regulation Handbook gives clear guidance on the importance of a risk analysis to determining the need for regulation and designing a proportionate regulatory response. It notes that the achievement of zero risk is neither an appropriate nor technically feasible goal of government intervention, and that the aim of the RIS is to transparently identify the tradeoffs. However, there is scope for further discussion in the handbook of the topics of managing and communicating risk and developing risk-based compliance strategies. This latter aspect has been considered by a number of other OECD countries and within some sub-jurisdictions in Australia. As it is directly concerned with how regulators organise their business and allocate their resources among alternative regulatory demands it is an important potential contributor to improving regulatory efficiency and promoting culture change.

### *Controlling regulation inside government*

Mechanisms for managing and tracking reform inside the administration are needed to keep reform on schedule and to avoid a recurrence of over-regulation. It is often difficult for ministries to reform themselves, given countervailing pressures, and maintaining consistency and systematic approaches across the entire administration is necessary if reform is to be broad-based. The Australian Public Service Commission (APSC) conducts annual surveys of public sector agencies and in 2008, all agencies responded that they had taken specific actions to improve their efficiency and/or effectiveness. The most common initiatives were through: enhanced ICT capability or greater use of technological solutions; improved financial arrangements (*e.g.* improved internal budget and/or procurement processes); improved governance and accountability arrangements within the agency; and organisational restructuring or realignment of priorities to better meet the needs of the Australian Government (APSC, 2008).

In 2007 the Australian Government developed a policy to reduce red tape in government with the aim of dispelling myths which lead administrators to believe that they must follow more onerous internal regulatory requirements than are in fact in place. It also developed a principles-based framework for the design and review of internal requirements in government and the scrutiny of new requirements, similar to the RIS requirements. Agencies are expected to review administrative requirements to ensure that they continue to meet their objectives efficiently according to a 3-5 year timetable for internal departmental requirements and a 5-10 year timetable for whole-of-government requirements.

The government's policy on reducing red tape is a significant step forward in extending systematic and rational analysis to internal processes. However, the policy could be improved through supplementing the process-based approach with targeted initiatives to highlight and resolve major specific issues, and developing a better understanding of the extent of the problem of excessive internal regulation and the origin of so-called myths.

Furthermore, it is not clear that the oversight responsibility for the implementation of the reviews has been established as originally envisaged, suggesting that a central agency should be given responsibility for monitoring and reporting on the application of the policy by departments.

## Administrative capacities for making new regulations of high quality, transparency

### *The Cabinet process*

The Federal Cabinet plays a vital role in maintaining and co-ordinating the quality of regulatory policy in the Australian Government. The Cabinet process is the product of well respected convention and practice and, though not supported by legislation, the Cabinet administrative arrangements are often stricter than in other countries. The deliberations of the Federal Cabinet are one of the key mechanisms for the consideration of policies that have a regulatory impact and its processes reinforce the broader regulatory quality control measures of the RIS process. Cabinet submissions on significant regulatory proposals are circulated for formal co-ordination comments over a minimum five day "consideration period". The submission must identify whether there is agreement among relevant departments and agencies for the proposal. A submission brought to Cabinet or its committees by a Minister must include a clear recommendation and accompanying justification for the recommendation including an assessment of the regulatory impacts. Where the impacts are considered significant, a RIS is required to include a quantified cost-benefit analysis. Details must also be included about the proposed implementation of the regulatory policy, its financial implications, and impacts on small business, regional Australia and families. Where the requirements for the preparation of a RIS have not been met, the Cabinet Secretariat has a gate keeping role of ensuring that regulatory proposals do not proceed for deliberation by Cabinet.

### *Transparency of procedures for making new laws and regulations*

Transparent and consistent processes for making and implementing legislation are fundamental to ensuring confidence in the legislative process and to safeguarding opportunities to participate in the formulation of laws. Like the Cabinet process, the legislative process reinforces the requirement for early consideration of the feasibility of non-legislative options, as well as whether there "might be alternative approaches which would permit simpler legislation". The *Legislation Handbook* gives guidance to consider whether a policy could be better implemented by legislation drafted in general principles than "black-letter" provisions. The handbook directs departments to undertake consultation within and outside government when considering the preparation of legislation. It also reiterates the requirement for the early development of a RIS, when preparing any request for policy approval of a legislative bid that may have an impact on business.

The final RIS is tabled in Parliament in the explanatory material of a Bill. This clearly aids the transparency of the regulatory process, but it can also lead to some confusion when the government's decision does not correspond with the design of the regulatory option that has been assessed by the original RIS. As the role of the RIS is to assist decision makers to evaluate the merits of alternative regulatory proposals, it seems perfectly appropriate that on occasion the government would make decisions that do not directly follow the conclusions of the RIS. However, it does suggest the need for improved

communication on the contribution of the RIS to the decision process, as well as an argument for a less conclusive format of the RIS in cases where the government is considering among different regulatory approaches.

### *Transparency in the implementation of regulation: communication*

All Federal Bills are subjected to the scrutiny of both houses of Parliament as well as by relevant Parliamentary committees and the Senate Standing Committee for the Scrutiny of Bills, which has a general focus on the rights of individuals and the Parliament. Bills introduced to Parliament are published in hard copy and on the Parliament's website. The Commonwealth *Legislative Instruments Act* 2005 provides mechanisms for the scrutiny of laws made under a delegated power of Parliament. A legislative instrument must be registered on the Federal Register of Legislative Instruments to be enforceable, and individuals that rely on information on the register which is later proved to be wrong are at no disadvantage.[5] Unless exempted legislative instruments are subject to a ten year sunsetting period. The Act requires explanatory statements to be registered on the Federal Register of Legislative Instruments and tabled in the Parliament with the legislative instrument. A rule maker is required to report in the explanatory memorandum on what consultation they undertook when making a rule. Primary laws and subordinate legislation are accessible at no cost from a searchable database on the ComLaw website maintained by the Attorney General's Department.[6]

### *Plain language*

The Australian government has two professional legal drafting offices. The Office of the Parliamentary Counsel (OPC) is responsible for drafting all government Bills and government amendments to Bills. The Office of Legislative Drafting and Publishing (OLDP) drafts all regulations, proclamations and Rules of Court. The Offices also consult with the Office of International Law within the Attorney-General's department to confirm that legislative proposals are consistent with Australia's international obligations on trade and investment and other matters. The need for clarity and comprehensibility in the law appears to be very well understood and incorporated in the Australian system. Since the 1980s the OPC has promoted the use of "plain English".

### *Transparency as dialogue with affected groups: Use of public consultation*

Effective consultation is the key to ensuring that the interests of citizens and business are taken into account in the development and design of regulation. The Australian Government adopted a whole-of-government policy on consultation in 2006. The policy is included in the *Best Practice Regulation Handbook* and sets out seven principles for best practice consultation to be followed by agencies when developing regulation.[7] The policy is intended to cover all aspects of regulation including "from the policy proposals/'ideas' stage, through to post implementation reviews" (Australian Government, 2007, p. 5) (see Box 2.3). Key aspects include the obligation to release a policy options paper, or "green paper" for regulatory proposals of major significance, and the use of exposure drafts to refine how regulation will work in practice.

A business consultation website provides a facility for government agencies to link to current consultation activities (*www.consultation.business.gov.au*). Businesses and individuals are invited to register themselves and identify their areas of policy interest. Departments are also required to publish and maintain on their website an Annual

Box 2.3. **Australian government best practice consultation principles**

The Australian government adopted a whole-of-government policy on consultation in 2006. The policy sets out the seven principles which agencies are required to follow when developing regulation:

*Continuity* – Consultation should be a continuous process that starts early in the policy development process.

*Targeting* – Consultation should be widely based to ensure it captures the diversity of stakeholders affected by the proposed changes. This includes state, territory and local governments as appropriate and relevant Australian government departments and agencies.

*Appropriate timeliness* – Consultation should start when policy objectives and options are being identified. Throughout the consultation process, stakeholders should be given sufficient time to provide considered responses.

*Accessibility* – Stakeholder groups should be informed of proposed consultation and be provided with information about proposals through a range of means appropriate to these groups.

*Transparency* – Policy agencies need to explain clearly the objectives of the consultation process and the regulation policy framework within which consultations will take place, and provide feedback on how they have taken consultation responses into consideration.

*Consistency and flexibility* – Consistent consultation procedures can make it easier for stakeholders to participate. However, this must be balanced with the need for consultation arrangements to be designed to suit the circumstances of the particular proposal under consideration.

*Evaluation and review* – Policy agencies should evaluate consultation processes and continue to examine ways of making them more effective.

*Source:* Australian government (2007), p. 4.

Regulatory Plan (ARP) including details of regulatory changes affecting business from the previous financial year and information about activities planned for the next year. The ARP is required to include a timetable, contact details of a responsible officer and planned consultation opportunities that business can participate in. All Commonwealth Departments have complied with the requirement for an ARP however a detailed audit of the extent to which the plans are comprehensive, including feedback on user satisfaction would be beneficial to verify how complete and useful the information contained in the plans is to business and the public. The *Legislative Instruments Act 2003* has a reference to the need for consultation with business on proposed rules. However, the Act leaves considerable discretion to the rule maker to decide whether consultation is required, and what form it should take.

Other consultation initiatives appear illustrative of a culture of consultation on policy development. In April 2008, the Prime Minister convened an *Australia 2020 Summit*, bringing together more than 1 000 Australians to "debate the best ideas from the community" on how to "shape a long-term strategy for the future of the nation".[8] The Federal Cabinet regularly holds Community Cabinet Meetings in various locations across Australia to give local people an opportunity to meet Cabinet members and discuss issues. In November 2008 the inaugural Australian Council of Local Government meeting provided the opportunity for consultation and collaboration through a meeting in Canberra with the

Mayors of Australia's 609 local governments. Recent prominent policy reviews in the areas of tax policy, greenhouse gas abatement, aviation and energy policy have also been identified as exemplifying broad consultation practices. These include the use of "green papers" to expose policy options for discussion issues of policy and open processes which invite submissions from all interested stakeholders.[9]

Further examples of consultation practices include targeted and regular discussions in stakeholder forums established by Ministers or agencies (for example the Board of Taxation, National Tax Liaison Group, Gas Market Leaders Group and the Automotive Industry Innovation Council) and public information provided directly through agency websites. In the period December 2007 to April 2009, the Federal Government released five Green Papers on issues ranging from the Carbon Pollution Reduction Scheme to Financial Services and Credit Reform. Several White Papers were also issued and significant consultation has also been undertaken through other discussion papers, including the extensive consultation undertaken as part of the Australia's Future Tax System Review and in the development of the Fair Work Australia legislation.

Reflecting a commitment on the part of the APSC to obtain better information on the effectiveness of government policies on consultation is an annual survey on the extent to which federal public service agencies conduct formal consultation on the development of policy and programmes. The survey results suggest that consultation is an important part of the practice of government agencies and this is reinforced by the evidence of consultation practices concerning specific policy areas. However, it also suggests that in the past there has not been widespread appreciation and full compliance with the RIS requirements to consult with affected groups on the development of regulation.

### *Transparency in the implementation of regulation: Compliance, enforcement and appeals*

The consideration of appropriate compliance strategies and the cost of implementation are required to be evaluated as part of the RIS procedures for new regulation. Australian regulators use a variety of compliance "tools" including significant sanctions such as pecuniary penalties and jail. Some regulators also have considerable discretion concerning remedies for which they may seek orders in relevant courts/tribunals which can include injunctions, remedial orders and the payment of damages and/or compensation.

The Commonwealth Attorney-General's Department has published *The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* to assist regulatory agencies to design their compliance activities to be accessible, efficient, and afford procedural fairness.[10] The Australian Government's general approach is to require regulatory agencies to provide a strong justification for the need to exercise coercive powers. New coercive powers will only be granted to regulatory agencies if they are accompanied by suitable safeguards, including guidelines for the implementation of powers, adequate training for staff exercising coercive powers and appropriate internal controls (for example, limiting the class of persons who may exercise powers). The Attorney-General's Department also encourages regulatory agencies to consider the use of civil penalties as an alternative means of ensuring compliance with legislative provisions where criminal punishment is not merited for contravention of a regulatory requirement; and in cases where corporations are being penalised.

### *Public redress and the judicial system*

A feature of regulatory justice is the existence of clear, fair and efficient procedures to appeal administrative decisions and regulations. The Administrative Appeals Tribunal provides independent merits review of a wide range of administrative decisions made by Australian Government ministers, departments, agencies, authorities and other tribunals. Most Commonwealth decision making is also subject to judicial review. A person who is aggrieved by an administrative decision made under a Commonwealth law may apply to the Federal Magistrates Court or Federal Court for review of that decision under the *Administrative Decisions (Judicial Review Act)* 1977.

The Australian Federal Court does not have responsibility for reviewing regulations, but is able to overturn decisions (including regulatory decisions) made under regulations and may also hold regulations invalid if they do not fall within the statutory power under which they were allegedly made. Judicial review of decisions made by officers of the Commonwealth is also available in the Federal Court. The High Court decides disputes about the meaning of the Constitution, for example, whether an Act passed by the Commonwealth Parliament is within the legislative powers of the Commonwealth.

### *Choice of policy instruments: Regulations and alternatives*

Critical to the administrative capacity for good regulation is the ability to choose the most efficient and effective tool, whether regulatory or non-regulatory, to meet a policy objective. The Australian *Best Practice Regulation Handbook* requires that the RIS for a regulatory proposal must include consideration of a range of regulatory and non-regulatory alternatives. It provides guidance and identifies the strengths and weaknesses of a range of alternative approaches, including examples of where they could be applied. In all cases where new regulation is being considered, self-regulation is required to be examined in a RIS. The training for departments provided by the OBPR includes discussion of the range of alternative instruments and their application.

The Australian Government has co-operative and/or self-regulatory arrangements with a number of non-government bodies across a range of sectors and industries. Regulators may refer to and mandate compliance with documents prepared by third parties such as national or international standards prepared through *Standards Australia*. There is also a preference for the use of consumer organisations to undertake an assessment of products and provide information to educate consumers to make informed choices.

The evidence of the use of co-regulation, self-regulation and education suggest that Australia does not overly use prescriptive regulation. However, as part of the government's plan to promote a culture of continuous improvement to regulation, innovation in the design and implementation of regulatory systems is an important goal for the Australian government. Key areas are responsiveness to the demands for new regulatory approaches that reduce barriers and entry costs and allow entrepreneurial products to come to market more quickly. This suggests the need for the development by regulators of more client focused approaches, in addition to the development of alternative regulatory approaches.

### *Understanding regulatory effects: The use of Regulatory Impact Analysis*

Australia was early among OECD countries to adopt RIA in 1985. Successive governments have progressively strengthened the requirements for RIA and its application to regulatory instruments. The following assessment against best practice is based on

OECD experience of the most important areas for government attention in the development and application of RIA and suggests that Australia is advanced among OECD countries in the design of its RIA system.

*Maximise political commitment to RIA*. The government has made a policy commitment to the use of RIA to assess the costs and benefits of all regulatory proposals coming before Cabinet. The elevation of the regulatory reform portfolio to Cabinet provides a very clear political message that the government takes the RIA requirements seriously and expects that the requirements will be complied with by Departments and regulatory agencies. This is among the strongest possible expressions of political commitment for the RIA process and helps to create a culture of compliance among Departments, which in turn assists the work of the OBPR in promoting further active compliance by agencies. Despite its strength, it does not guarantee that the requirements will always be followed faithfully. A further expression of political support, which already applies in some jurisdictions in Australia, would be an obligation on Ministers to "certify" that the RIA assesses the likely impacts of the proposed rule (see policy options).

*Allocate responsibilities for RIA programme elements carefully*. In Australia the careful allocation of RIA responsibilities is well integrated in the system for RIA which is intended to ensure "that ultimate responsibility for regulatory quality rests with individual ministers, departments and agencies, boards, statutory authorities and regulators". (Australia Government, 2007) The OBPR has the dual role of providing advice and training on the preparation of RIA and assessing the quality of the RIA that is prepared according to specific criteria. The RIA process is carefully "staged" to assist its effectiveness in improving the regulatory proposals prepared by agencies. Agencies are responsible for a preliminary assessment of all regulatory proposals to identify the expected level of impact, consult early with the OBPR on regulatory proposals and use annual regulatory plans to forecast forthcoming regulatory proposals. Agencies are also required to use the Business Cost Calculator (BCC) to calculate an estimate of the compliance costs of regulation for business. For regulatory proposals of major significance, departments and agencies are required to prepare a "green paper" as the basis for consultation on the policy options. If the RIA process is not followed, the regulatory proposal is not meant to proceed to Cabinet, although the Prime Minister may grant an exemption in exceptional circumstances, and the proposals are then required to be subject to a post implementation review in one to two years.

*Train the regulators*. The revised *OBPR Handbook* provides ready guidance for regulators on the preparation of RIA, including the analysis that is required and step-by-step instruction on the matters that should be taken into consideration. The guidance is of high-quality and covers a number of useful topics. The BCC is a standardised process for assessing the compliance costs for business of any policy proposal. The OBPR provides formal training to policy officers that are involved in preparing regulatory proposals for the Australian Government, COAG, Ministerial Councils and national standard setting bodies.

*Use a consistent but flexible analytical method*. There is a commitment to promoting the use of cost-benefit analysis as the preferred analytical method in the RIA. The *OBPR Handbook* states the requirement that the RIS will include a comprehensive assessment of the costs and benefits of each feasible policy option. It is expected that the benefits to the community of the recommended option will exceed the costs and will also have greater net benefits than each of the possible alternative policy options. The level and detail of the

analysis is required to be proportionate to the magnitude of the policy problem and its potential impacts. At a minimum the analysis is required to reflect an attempt at quantifying all significant costs and benefits and all medium and significant business compliance costs. A failure to provide an adequate analysis of the costs and benefits of feasible policy options is one of the seven elements of an RIS that the OBPR uses to make a judgement as to the adequacy of the RIS.

*Target RIA efforts.* The Commonwealth Government system has a number of checks and balances to ensure that the efforts that are applied to RIA are proportionate to their potential to improve the quality of regulatory proposals. In one respect the application of RIA to regulatory instruments is very broad. RIA is intended to apply to the full range of policy instruments including laws, subordinate legislative instruments, and quasi regulation (which can include any government policy where there is an expectation of compliance). However, there is a general principle that where a RIA is prepared the level of analysis is required to be proportionate to the magnitude of the policy impact expected from the regulatory proposal. There is also a type of triage process based on a three tiered assessment system to determine the level of impact of a regulatory policy proposal.

*Develop and implement data collection strategies*. The requirement for good data to inform regulatory analysis is addressed in a number of areas in the *OBPR Handbook*. The *Handbook* directs regulators to commence consultation early in the process "to improve the quality of the solution adopted", and provides guidance on the kinds of groups that may be affected. Guidance on the valuation of intangible impacts is also provided as well as a practical checklist for regulators to work through the types of compliance tasks that a regulatory proposal may entail and consider the associated costs. The BCC guides users to detail the following information about the regulatory options under consideration and to provide supporting evidence for all information (see Box 2.4).

*Integrate RIA with the policy making process, beginning as early as possible.* All OECD countries find the integration of RIA in the policy process to be the most significant challenge and as such it requires considerable support and clear guidance. The improved gate keeping arrangements for RIA combined with the mechanisms that the OBPR has put in place to consult with agencies early in the development of regulatory options provide a clear incentive for agencies to integrate RIA early in the policy process. After nearly 25 years of experience in using the RIA methodology for the design and development of regulation at the federal level there is a wide appreciation of the application of the techniques of RIA. Nonetheless there are still methodological challenges, such as estimating the benefits of regulation, and with the use of risk assessment tools. Furthermore, as is the case in all OECD countries, the use of RIA does not trump politics. There is some scepticism over the effectiveness of the RIA process among business groups who cited examples of recent regulatory proposals that were difficult to justify on the merits of a cost-benefit assessment.

*Communicate the results.* The Commonwealth Government RIA processes do not formally require that the draft RIA be released prior to its consideration by the decision maker. However, the obligation to consult on the preparation of the RIA and to use the RIA analytical framework should test the assumptions and evidence that is the basis for the regulatory proposal. After a decision is made the RIS or BCC report is made public, either with the explanatory memorandum on the CommLaw website when the regulation is tabled in Parliament, or when the regulation is announced. Cabinet confidentiality is

### Box 2.4. **What is the Business Cost Calculator?**

The BCC is an IT-based tool designed to assist policy officers in estimating the business compliance costs of various policy options. It provides an automated and standard process for quantifying compliance costs of regulation on business using an activity-based costing methodology. Compliance costs are defined as the direct costs to businesses of performing the various tasks associated with complying with government regulation. The BCC has nine categories of compliance tasks for which compliance costs are incurred by business. As a first step, users are asked to provide a description of the problem and the potential policy options for addressing that problem. The Quickscan function of the BCC is then used to indicate whether or not any of the proposed options will impose compliance costs in any of the nine cost categories.

Where users indicate that at least some options will involve compliance costs, the calculator then assists in quantifying these costs. Users are asked to detail:

- the number of businesses affected by each option;
- the tasks that business will have to complete to be compliant with the regulation;
- whether the task is an internal cost or an outsourced cost;
- whether the task is a start-up or ongoing cost;
- how long each task will take to complete;
- how often each task will need to be undertaken;
- the associated labour and other costs; and
- supporting evidence for all information.

From this information, the BCC will provide an estimate of the compliance costs associated with each option. The BCC data can be displayed, printed and downloaded to other applications in a range of reports. A key report is the "BCC report", which is required to be provided to the OBPR to confirm that the best practice regulation requirements have been met. It is this report that is sent to the decision maker and made public.

*Source:* Australian government (2007), p. 26.

obviously an impediment to releasing draft RIA before legislative proposals are determined, but it is not clear why RIA prepared for draft subordinate legislative instruments would not be required to be released for public consultation.

*Involve the public extensively*. The *OBPR Handbook* set out procedures for consultation and the RIA is required to include a consultation statement which documents what processes of consultation were followed, who the main affected parties are, what their views are and how these have been taken into account. The consultation model outlined in the *OBPR Handbook* and the requirement to demonstrate in the RIA the consultation that was undertaken appear best practice and there is clear evidence of good practice on significant policy issues. However, it may be that consultation practices vary across departments and are not as broadly applied as the guidelines require, which suggests that further consistency in processes could be promoted.

*Apply RIA to existing as well as new regulations*. Australia has a good record on the use of RIA for *ex post* review of legislation. The NCP legislative review programme was an extensive review of the entire stock of legislation to verify that it did not impose restrictions on competition. All legislative instruments are subject to "sunsetting" ten years after the date they are made, and if remade would be subject to the RIA processes.

Acts of Parliament are not subject to a formal requirement for sunset or reviews, but a number of Acts include review provisions. There is a general policy that all regulation not subject to sunset or statutory review provision will be reviewed every five years commencing in 2012. The *OBPR Handbook* directs regulators to include in the RIS a review strategy that will allow the regulatory proposal to be assessed after it has been in place for some time (Australian Government, 2007, p. 92).

### *Overall assessment*

Measured against each of the above best practice principles, Australia rates highly among OECD countries on the design and performance of its RIA procedures. The reforms to the RIA system in 2006 implemented significant improvements addressing the issues of coverage, compliance assessment and improving consultation. However, there are a few remaining areas where improvements could be made. Certification of each RIA by the proposing Minister would add greater authority to the RIA process. The OBPR could potentially receive notice, in an electronic form of the preliminary assessment undertaken for all regulatory proposals to better track its application to regulations not proceeding to Cabinet, but without becoming overburdened. RIA training could usefully be extended to Ministerial offices to assist in guiding policy development. The OBPR should extend its reporting on RIS to include information on compliance with the obligation to quantify the costs and benefits of regulatory proposals. Consultation on RIA could be improved if a two-stage approach were taken that required the RIS to be published in a draft format as a consultation document on regulatory proposals. Also where RIA is prepared for subordinate regulation the publication of RIA could be mandatory for a prescribed time period prior to the regulation being made, which would be consistent with the requirements of other jurisdictions in Australia.

## Building regulatory agencies

The Australian Government has a policy preference to curb the unnecessary proliferation of government bodies, and has in place well developed Governance arrangements to ensure consistency of administration and the performance and accountability of statutory authorities where there are persuasive reasons to form a body. A governance policy document released in 2005 outlines principles for the most appropriate structure and governance arrangements for Australian Government bodies. Most Commonwealth agencies, including Commonwealth Government regulators, are subject to a statutory governance framework in the form of the *Financial Management and Accountability Act* 1997 (FMA Act) or the *Commonwealth Authorities and Companies Act* 1997 (CAC Act).[11] The government also promotes transparency by publishing a comprehensive list of *Australian Government Bodies and Governance Relationships* which provides details of all statutory and non-statutory bodies, companies, incorporated associations and trusts that the Australian Government controls or has an interest in at a formal level, including through holding shares or an ability to appoint directors.

Individual ministers may use Statements of Expectations (SOEs) with bodies within their portfolios to clarify the expectations of portfolio bodies where the minister has a role in providing direction. The agency would then respond by outlining how it proposes to meet the expectations of government in a Statement of Intent (SOIs), including the identification of key performance indicators agreed with the relevant minister. The SOE are public to provide accountability in the use of the Minister's power and are required to be

framed in terms that do not compromise the legislated functions and independence of the statutory agency.

The regulatory quality management practices of the Australian government, including the requirement for the preparation of RIS, have wide application to regulators and the instruments that they use, in the same way that they apply to government departments. The independence of regulators is preserved through their enabling legislation, but at the same time the statement of expectations issued by ministers can give transparent guidance regarding government policy without coming into conflict with the statutory objectives of the agency. The consistent financial management and reporting frameworks established by the CAC Act and the FMA Act provide accountability to the Parliament, and ensure probity and certainty of budget practices.

## Improving the stock of existing regulations and reducing burdens

### *Revisions of existing regulations and keeping regulations up to date*

Australia has a number of relevant strategies to review and update the stock of regulation on a systematic basis. The programme for the NCP review of legislation was comprehensive and updated most of the regulatory stock that contained restrictions on competition over several years. Legislative instruments are automatically scheduled to sunset ten years after being made and 2013 will be the first year that Commonwealth legislative instruments will cease under the sunsetting provisions. The government has given a policy commitment to review regulation not otherwise scheduled for review every five years, commencing in 2012. However, the detail on how these reviews will be conducted still need to be determined and careful planning in advance of that date will be necessary if they are to be effective.

The PC regularly receives terms of reference to conduct inquiries and review areas of government policy, and each terms of reference invariably involves an examination of the regulatory conditions that prevail. In February 2007 the PC was given the additional specific task of conducting systematic annual reviews of the regulatory burden applying to certain sectors from the stock of Commonwealth regulation. This programme of review of regulatory burdens operates on an ongoing five year cycle. The review process is designed to ensure that all Australian Government regulations affecting the sectors are efficient and effective, and to recommend improvements that lead to net benefits to business and the community, without compromising underlying policy goals. Following each review the government responds to the recommendations of the PC reports, and reforms the regulatory arrangements as appropriate.

### *Measuring and reducing administrative burdens*

Following the 1996 review of the Small Business Deregulation Taskforce which set out to reduce the compliance and paperwork burden on business by 50%, the Australian Government has not made the measurement and reduction of the burden of paper work a high priority focus of its regulation reform programme. The fact that the 1996 review was not able to identify a robust measure of the total regulatory burden probably discouraged the subsequent use of targets for these exercises. It is notable that the outcome of that review was a strengthening of the *ex ante* processes for minimising the burden of new regulation. The administrative burden imposed by Commonwealth regulation is assessed *ex ante* in the RIS process and in the analytical steps that are required to be followed in the

use of the BCC which, unlike the SCM, guides the analyst to consider the total compliance costs for all business for any regulatory proposal.

Australia has adopted its own unique programme for the *ex post* measurement of the administrative burden across jurisdictions. In 2006 COAG agreed that all governments would aim to adopt a common framework for benchmarking, measuring and reporting the regulatory burden on business. The PC was asked to undertake a two-stage study on performance benchmarking to establish the feasibility of benchmarking the regulatory burdens across jurisdictions and to report on the quality and the quantity of Australian business regulation (PC, 2008a) and the administrative compliance costs of business registrations (PC, 2008b). The quality and quantity measures are intended to help compare the performance of the regulatory regimes in the different jurisdictions and assist governments to identify areas for improvement. The first report provides a "snap shot" of the current regulatory environment across the Australian jurisdictions using broad measures of the stock and flow of regulation and regulatory activities, and good regulatory processes as a proxy for the quality of regulation, rather than any measures of specific regulations.

The second report on the administrative compliance costs of business regulations concluded that the total costs of complying with business registration requirements is generally low, but widely variable across jurisdictions, both for generic business registrations and industry specific registrations. The time costs of registrations were low across all jurisdictions and fees and charges represent the most significant costs to business[12] (PC, 2008b, p. xvii). The government has subsequently requested the PC to benchmark the regulatory burden of occupational health and safety regulation and food safety regulation.[13] It is notable that these benchmarking exercises provide data for the comparison of jurisdictions and to inform other reviews of regulation; they do not include any specific recommendations for reform. This contrasts with some other OECD countries that have used the burden measurement exercise to set a baseline for achieving a reduction in the regulatory burden.

### *Integrating ICT into the regulatory process*

There is a trend in most OECD countries to integrate ICT mechanisms into the regulatory process to facilitate transactions within and between government bodies and between government bodies and business and citizens. The federal government has made the use of ICT to improve service delivery and reduce administrative burdens a priority and has developed several complementary initiatives. The government is implementing a new model for the effective and efficient use of ICT within the Australian Government following a major review in 2008.[14] The government also established a Business Process Transformation Committee (BPTC) in 2007 to co-ordinate the redesign and reform of agency business processes through the use of ICT to improve service delivery. The *Australian Government Online Service Point Programme* is introducing common standardised business processes to improve access to information, messages and services on government websites.[15] The government is also testing a number of online consultation mechanisms to develop a consistent, cost effective and efficient approach for Australians to communicate with government. The trials are testing issues around registration and participation, the use of blogs and different methods of moderation to online consultation.[16] An aim of the improved online consultation is to support the regulatory reform agenda, by allowing the community to comment on regulatory costs.

These strategies are not a complete account of activities being undertaken by the federal government in this fast moving area. The initiatives described indicate that the federal government is actively promoting the efficient use of ICT and its integration in the improvement of business processes (see Box 2.5). One of the drivers for this is to reduce the burden of regulation on business and citizens, but mostly it is part of an overall ambition to improve the responsiveness, efficiency and citizen focus of the Australian Public Service using the tools that are provided by ICT. However, benchmarking by the PC of the use of the Internet by regulators to provide and receive information from business found that there is considerable room for improvement among Commonwealth and State regulators. More than 60% of regulators provide information and application forms online, but fewer than 20% receive application forms online or allow business details or licences to be updated or renewed online (PC, 2008a, pp. 69-73).

### Box 2.5. **Examples of Australian reforms to streamline reporting requirements for business and reduce compliance costs**

**Standard Business Reporting (SBR)** will reduce the reporting burden by making it faster, cheaper and easier for business to report their financial information to Australian state and territory governments. SBR will remove unnecessary and duplicated information from government forms; utilise business software to automatically pre-fill government forms; adopt a common reporting language based on international standards and best practice; make financial reporting to government a by-product of natural business processes; provide an electronic interface to enable business to report to government agencies directly from their accounting software, which will provide validation and confirm receipt of reports; and provide business with a single secure online sign-on to the agencies involved. It is expected to save Australian business AUD 795 million per year when fully operational in 2010.

**A "one-stop shop" portal for individuals and business:**

The website *www.australia.gov.au* is an online entry point where the public can access Australian government information, messages and services. Planned updates will allow users to personalise their view and browsing options through an optional online account. A single sign-on function will allow people to simplify the process of accessing agency services and undertaking online transactions and not have to remember multiple websites, usernames and passwords.

The website *www.business.gov.au* is an online tool and information resource that encompasses information from all three levels of government and reduces business compliance costs. It includes delivery of a range of free products and services for business, including syndication of content to third party websites and the use of Smart Forms to make it easier for business to transact online. *Business.gov.au* hosts a consultative forum for business and government representatives twice a year to provide an update on its activities, and to encourage the use of information technology to reduce business compliance costs.

**A seamless, single online registration system**. The Australian Business Number (ABN) and Business Names Registration Project will enable businesses to apply for their business name and ABN online at the same time leading to significant savings in time and registration fees for businesses operating in more than one state. The system will also provide an interface for improved interactions between business and government, placing information needed by business operators in one place. The specific objectives of the project include:

- improving service delivery by making national business registration available online 24/7;

Box 2.5. **Examples of Australian reforms to streamline reporting requirements for business and reduce compliance costs** *(cont.)*

- increasing business knowledge and certainty by providing all licences, registrations, permits and business assistance tools across the three tiers of government in one place;
- improving awareness about the rights conferred by business names in comparison to trademarks, reducing the time and cost in fulfilling regulatory obligations through streamlined application processes and electronic form filling;
- improving interactions between business and governments throughout the business lifecycle through a dedicated workspace, enabling businesses to fill, lodge, pay and track transactions as well as subscribe for tailored notifications relevant to their business; and
- increasing the common utilisation of the ABN for other registrations to enable pre-filling of forms, telling government once about changes to details, as well as increasing consumer confidence through improved identification of businesses.

*Source:* Australian government (2009).

## Conclusions and recommendations for action

### *General assessment of strengths and weaknesses*

Australia has a long history of implementing regulatory reform and introducing improvements to its regulatory management arrangements. Successive Australian governments have progressively strengthened the regulatory management arrangements in Australia and it already has in place many of the tools, institutions and policies that the OECD recommends for improving regulatory quality.

The current Australian government has promoted its regulatory policy agenda under the heading of "Deregulation", under a firm political commitment to the reform task, and with a target of no net increase in the regulatory burden. The explicit policy aim is to reduce impediments to Australia's long-term productivity growth by reducing the regulatory burden on Australian businesses, non-profit organisations and consumers. Deregulation as it is used by the Australian Government is not a mantra that dictates that regulation is not to be used. It is a banner intended to promote support for reforms that lead to better designed regulation and the removal of regulation where it is not in the public interest and alternative non regulatory means can achieve the policy goals more effectively. The challenge for Australia is to bring about a change in the culture of regulation; to move from a history of periodic reviews and incremental reforms to an embedded programme of continuous improvement in regulation.

Ambitious aspirations are necessary to implement change across a range of institutional settings. Bringing about cultural change to government administration is a long-term challenge requiring commitment on many fronts. Reversing the flow of the proliferation of regulations seems to go against the natural inclination of government administration. Governments are usually much more effective at increasing the stock of regulation than reducing it.

A bold strategic agenda appears to be appropriate for Australia, which has established a strong foundation for embarking on regulatory improvement. Australia has formalised procedures for making regulation within government and ensuring the legal quality of the rules that are made. Its regulatory institutions and governance arrangements are also

established according to formalised procedures that are enshrined in law and in informal governance arrangements that are clear and respected by elected governments. It has a strong culture of professional commitment in the administration, a broad acceptance of the need for reform to achieve better regulatory outcomes and a well-trained and skilled administration with experience in the use of regulatory quality tools like RIA.

The Australian system for regulatory management is particularly strong in RIA and its institutional arrangements. The frameworks for *ex ante* evaluation of regulatory proposals through an assessment of business costs, RIA and the use of "green papers", are well developed and supported by comprehensive guidance and training. The gatekeeper functions for RIA are rigorous and provide clear incentives to agencies to commence an evaluation of the implications of regulatory proposals early in the policy development process. The machinery of government changes to the Department of Finance and Deregulation bring the OBPR closer to the Cabinet processes, enabling firmer oversight of the technical quality of the RIA, and establishing a policy function in the DPD that is resourced to assess and improve regulatory proposals from agencies and concentrate on bringing about the culture change that the government seeks.

In terms of *ex post* reviews, the Productivity Commission (PC) is an effective policy institution that provides guidance to the government on policy options and also challenges the merits of current regulatory arrangements and government practices. The tradition of using the PC in this way is strengthened with further references to the PC to review the regulatory burden on specific sectors and benchmark regulatory arrangements.

These represent solid foundations where there are opportunities to make improvements to the Australian system, even if many of these appear to be at the margin of current activities. Compared with some OECD countries however, consultation processes may leave scope for some improvement. Opportunities may exist for greater involvement of the public and stakeholder groups in the development of regulatory proposals, and the scrutiny of the analysis that underpins the preparation of RIA. Despite the very detailed RIA processes, there continues to be an issue with ensuring the early integration of the tools and processes for the evaluation of the need for regulation and of the identification of non regulatory alternatives in the policy development processes. This indicates a need for greater Ministerial accountability in the use of RIA. *Ex post* reviews of the stock of regulation could also benefit from more systematic approaches through structured review processes.

Strategies may need to be adjusted if culture change is to be promoted and implemented across government. Further efforts are required to encourage the promotion of innovation in regulatory practices by regulators to achieve regulatory objectives in ways that are more efficient and reduce costs to business, and to streamline regulatory approvals processes, lower ongoing compliance cost and impose lower barriers to entry for innovative products and services. Related to this, there is scope for improvement in the way regulators use risk assessment and risk management tools in the design of regulation and the development of regulatory compliance and enforcement strategies.

The role of the body with responsibility for deregulation policy is still evolving as the government puts its different policy strategies into operation. This development period offers opportunities for identifying how to best use existing resources to put policy aims into practice. A key challenge is to identify strategies for interacting with sectoral regulatory bodies and agencies to stimulate a change in regulatory culture. Technical

constraints may prevent the one-in one-out rule and regulatory budgets from being fully effective. Nevertheless, tools and approaches are needed to manage the flow and stock of regulation. Additional mechanisms will have to be designed to promote and monitor regulatory reform activities within agencies.

The key challenge, in Australia as well as across OECD countries, is to maintain the momentum of the reform agenda in the wake of the financial crisis. The recovery from the economic effects of the crisis will require economies to be flexible and innovative, and it will be increasingly important that they are not overburdened by unnecessary regulatory impediments that prevent businesses from responding to market opportunities when they emerge. Producing further evidence of the benefits of regulatory policy is a key challenge as part of the recovery programmes in Australia and beyond. These policies require broad support from citizens and business to sustain momentum for reform in the face of often concerted opposition. To do this effectively, the policy message has to be well delivered and understood.

Australia is in a privileged position compared with the majority of OECD countries. It has already started to mobilise its forces to ensure significant advances. While it can learn from some OECD countries, it will also surely serve as an example and a model to which many countries can refer. Yet, in this context, it can also benefit from a broader reference to best practice where OECD countries have experienced and developed alternative tools and approaches. This leaves room for a number of recommendations which are submitted for the consideration of the Australia authorities to aid and encourage their efforts.

## Policy options for consideration

This section identifies measures based on international consensus on good regulatory practice and on concrete experience in OECD countries that are likely to improve the arrangements for managing regulatory quality in Australia. They are derived from the recommendations and policy framework of the 1997 OECD *Report to Ministers on Regulatory Reform*, the 2005 *OECD Guiding Principles for Regulatory Quality and Performance,* and experiences of OECD countries.

- ***Expand the framework for the accountability of Ministers, and regulatory authorities for the delivery of the regulatory reform agenda***

The 2005 OECD *Guiding Principles for Regulatory Quality and Performance* emphasise the need to encourage better regulation at all levels of government and establish programmes of regulatory reform with clear objectives and frameworks for implementation. This requires clear frameworks for accountability to ensure that commitments will be translated into concrete policy actions. The Australian Government's objective of instigating culture change, promoting innovation and identifying widespread reductions in regulatory burdens will require Ministers to be more accountable and transparent as to how they will achieve the government's deregulation policy goals.

Clearer accountability for these goals will be required, possibly with a commitment at Ministerial level. An effective way to improve the deregulatory focus and accountability across government could be through requiring proposing Ministers to agree to the RIS which is passed to the Office of Best Practice Regulation for assessment. Further, when Ministers issue a Statement of Expectations to regulatory agencies within their portfolio concerning policy priorities for the agency, they could usefully request advice on how agencies will deliver on aspects of the government's deregulation agenda, including in

relation to continuous regulatory improvement. Regulatory agencies would report progress, in their corresponding Statements of Intent and in Annual Reports.

Combined with the promotion of the deregulation agenda outside government, this should create a kind of virtuous cycle to promote and assess the level of demonstrable change that occurs within government.

- ***Continued advocacy and communication of the benefits of regulatory reform***

The OECD principles state that governments should "articulate reform goals, strategies and benefits clearly to the public". Australia has a coherent policy on regulatory reform, built on the endorsement of the principles of good regulatory process, the NCP guiding legislative principle, a "whole-of-government" policy on consultation, and a broad requirement for RIS and *ex post* review of regulations. The policy has been endorsed through Ministerial statements and speeches. There would, however, be benefit in the government developing and drawing on a set of issues and arguments, using language and examples relevant and accessible to the broader community to build understanding and support the benefits of regulatory reform and the government's deregulation agenda.

Communicating the benefits of reform to business and citizens is vital. Australia already benefits from the excellent analytical work of the PC, and its diffusion to a wide audience, which could be complemented by a continuing policy narrative on the benefits of regulatory reform together with examples. This policy narrative should help to promote greater engagement by the business sector and more ownership of the regulatory policy goals within government. Building a broader constituency within government to support regulatory reform will strengthen the resilience of the regulatory policy agenda over time and beyond the current crisis. Potential roles for other parts of government include external scrutiny of agencies, as a source of advice of new reform opportunities and the consideration of complaints directly from business and citizens. For example, the UK NAO also uses external experts on its review teams to look at the performance of regulators and the conduct of RIS.

- ***Expand guidance on stakeholder engagement***

The OECD principles promote consultation with affected or potentially interested parties at the earliest possible stage of developing and reviewing regulations.

The assessment of the Australian Government's consultation practice is generally positive, with efforts to promote the use of the Internet and blogosphere to solicit public comments. However, there is a challenge to maintaining a sustained commitment to effective consultation as an input to policy development. Building on the strengths of the current arrangements, there is scope to provide more extensive guidance to departments and agencies on the use of consultation practices drawing on examples from other OECD countries. The Best Practice Regulation Handbook's consultation guidelines could be updated to encourage agencies to take into account these guidelines when developing their own agency's consultation practices, and to publish information to stakeholders concerning these practices.

The government-wide policy on consultation could be better targeted if improved information on the extent of the use of consultation practices were available. The current APSC survey methodology provides a potentially useful source of information on the effectiveness of the government-wide policy on consultation. The survey methodology could readily be extended to collect more detailed information on the actual use of

practices by agencies. It could also provide insights into views of officials of effective practices for improving consultation on RIA.

- ***Develop a more systematic and transparent approach to reducing the burden of regulation***

The OECD principles recommend that countries minimise the aggregate regulatory burden on those affected as an explicit objective to lessen administrative costs for citizens and businesses, and as part of a policy stimulating efficiency. Countries are also invited to measure the aggregate burdens, while also taking account of the benefits of regulation. As a result, many OECD countries have embarked on programmes to reduce administrative burdens, with significant efforts towards measurement in a large set of European countries.

Australia has a long history with regulatory reform, and has had a functioning RIA system for several decades. This may have lessened the interest as well as the energy for burden reduction as the focus has been on developing well designed regulations. There may also be some scepticism concerning the value of targets as a goal, noting potential shortcomings in terms of the short-term focus, and potential to concentrate on areas that are not necessarily of the most relevance to business.

The argument could be made that Australia could benefit from developing a more systematic and transparent approach to reducing the burden of regulation. The challenge remains to identify a mechanism that can reduce the stock and manage the flow of regulation. A structured approach to reviewing the stock of regulation is required that clearly places portfolio responsibility with Ministers and agencies, and applies ongoing incentives to manage the growth in the regulatory burden. This could build on existing ministerial partnerships for specific burden reduction initiatives. It should also be complemented by explicit references to the need for burden reduction in the "statement of expectation letters" addressed by Ministers to agency heads, as set out in the first recommendation.

While limitations to the use of target-based approaches exist, there is now considerable experience among OECD countries on the design and implementation of these programmes which could be used to develop a tailored approach to the identification of burden reduction in Australia. This could apply in a limited way, for example to only those sectors where it would be most likely to deliver benefits, and to combine burden reduction incentives with the use of ICT to improve government processes. Australia has the opportunity to examine comparative information collected by the OECD on international experience as well as the performance of examples in the Australian states that have adopted such strategies to develop its own adaptive programme including the use of measurement tools, targets and time frames to reduce burdens.

International experience suggests that the following issues should be taken into account when considering an administrative burden reduction programme. The costs of establishing an accurate measurement of the baseline administrative burden can be considerable, both for government and for the private sector which is the key source of information on administrative burden. However, information about the overall costs of regulation is important to regulators, parliament and citizens for focussing and monitoring efforts, and can also be collected in cost-effective ways, taking advantage of the existing economic and statistical apparatus. An economically robust approach for burden reduction should also account for the cost of any additional burden imposed within government. If targets are to be considered, they should be net of the burden of new regulation.

Governments need to ensure that they maintain an appropriate balance in the use of resources for other substantive reform initiatives when a special focus is given to the measurement and reduction of administrative costs. Clear guidance would be required on the types of reforms that should be pursued and methods for achieving burden reduction. OECD countries have also found it useful to have private sector representation on an oversight body to monitor progress with burden reduction programmes, and to identify optimal areas for burden reduction.

There appears to be considerable potential in the use of regulatory budgets to control the aggregate regulatory burden. However, as there is relatively limited practical experience with this means of burden reduction, a cautious approach is warranted. There would be merit in undertaking widespread consultation on the design of regulatory budgeting in Australia taking account of the views of business, citizens and departments. Examination of the policy process would expose some of the technical challenges, stimulate new ideas and help to build a commitment to the process if the government does choose to proceed with regulatory budgeting.

The government's relatively new policy on reducing red tape inside government is sound in principle, but should be supported by a review schedule and regular reports on compliance and of the result of the reviews by agencies. It is likely that some experimentation in processes among agencies will occur which could usefully inform changes to the policy over time.

- ***Strengthen the contribution of RIA to policy development and extend the monitoring and reporting on the quality of RIA processes***

The OECD principles promote the use of performance-based assessment of the effectiveness of regulatory tools and institutions. The OBPR already publishes useful information about the quality of the RIA processes, but provides no information about the success of the RIS process in generating better policy outcomes. This could include incidences where regulatory proposals that were under consideration were amended and improved through the requirement to analyse the impacts as well as the identification of new regulatory proposals that benefitted the community. The OBPR should transparently report on compliance by agencies with the obligation to quantify the costs and benefits of regulatory proposals. These performance reports will be important as the enhanced requirements of the RIA system have only been in place since 2007.

Assessed against OECD principles, the Australian RIS process is very good, but there are potential improvements at the margin that could strengthen the process further. Improved contribution of the RIA process to policy development could be promoted by establishing greater accountability at Ministerial level for the use of RIA. As mentioned above, requiring proposing Ministers to agree to the RIS which is provided to the Office of Best Practice Regulation for assessment would not only increase accountability but it would also add greater authority to the RIA process. Further, Australia could assess the opportunity for the Australian National Audit Office to periodically review the quality of RIS. The OBPR could potentially receive electronic notice of the preliminary assessment undertaken for all regulatory proposals to better track its application to regulations not proceeding to Cabinet, without becoming overburdened. RIA training could usefully be extended to Ministerial offices to assist in guiding policy development.

Consultation on RIA could be more effective if a two stage approach were taken that required the RIS to be published in a draft format as a consultation document on regulatory

proposals. Where RIA is prepared for subordinate regulation, the publication of RIA could be mandatory for a prescribed time period prior to the regulation being made to allow public input to the quality of the analysis in the RIS. This would be consistent with the requirements of Australian State jurisdictions.

In Australia regulatory policy is set out in policy documents and informal guidance. The government has given a commitment to follow the existing arrangements which appear to achieve a high level of compliance in practice. In the future a move towards more formal requirements would promote transparency, stronger safeguard and more accountability. The establishment of statutory standards for regulatory quality is a means of providing political support for regulatory policy and promoting continued compliance. For example, other jurisdictions within Australia have a statutory requirement that RIA must be prepared for subordinate legislation and made public prior to the regulation being made.

- ***Use scheduled reviews of regulation to promote continuous improvements to regulation***

The OECD principles call on countries to review regulations against the principles of good regulation, from the point of view of those affected rather than of the regulator, and to update regulation through automatic review procedures and sun-setting.

In Australia, sunsetting arrangements and scheduled five yearly reviews of regulation are the primary means to keep the stock of federal regulation up to date. The government should systematically specify the general terms of reference that would apply to the five year periodic review of legislation and publish a schedule to require departments and stakeholders to begin preparing for the post-implementation reviews, including organising and collecting the data in advance that will be necessary to review outcomes. The OBPR should use the opportunity before the rolling five yearly reviews commence to undertake its own evaluation of the legislation/regulation to be reviewed. The OBPR should also provide guidance to the agencies responsible for the reviews on how extensive the review of particular regulation should be based on its significance. The principle of proportionate analysis already exists in the guidance in the *Best Practice Regulation Handbook* but specific guidance on other matters such as an assessment of the need for independence of the reviewer and the consideration of related policy issues, should be determined by the OBPR in consultation with the agencies concerned. Further guidance could be reflected in a future update to the Commonwealth Government's *Best Practice Regulation Handbook*.

To gain better effect from the Ministerial partnerships model, it would be worthwhile to publicise the kind of support and services the Department of Finance and Deregulation is able to provide. Potentially this could include expertise in regulatory analysis, stakeholder management, and Cabinet support for subsequent policy initiatives.

- ***Expand the use of risk-based strategies in the development of regulation and compliance strategies building on existing practices by agencies***

The OECD Principles promote the use of risk assessment and risk management options in RIA. The *Best Practice Regulation Handbook* provides good solid guidance on the assessment of risk when considering a regulatory proposal. There is scope to extend this to the design and implementation of compliance and enforcement strategies. A small group of OECD countries have produced guidelines which could provide a model starting point for expanding the guidelines on risk assessment and management. However, experience suggests that the guidance should be developed in close consultation with regulators to

accommodate existing departmental arrangements where they already reflect a culture and practice of effective risk assessment, management and communication.

The Australian government aims to promote innovation and continuous improvement as part of the deregulatory policy agenda. This will require regulators to take account of the features of firms as well as the circumstances of the market when designing regulation. A case by case approach is necessary, but the government should share lessons among regulators about good performance and innovation in regulatory products, and consider how to provide incentives for the identification of innovative solutions so that flexibility and outcome oriented approaches are systematically favoured in the regulatory design. This could build on the transfer of good existing practices from a number of sectoral agencies in charge of prudential and safety regulation.

- ***Strengthen the quantitative underpinnings for evidence-based decision making***

The OECD Principles acknowledge that "Good Regulation should… *ii)* have a sound legal and empirical basis". RIA requires a sound empirical and statistical base, with appropriate data for assessing economic and welfare effects of the intended regulations.

As part of the activities to improve the capacity of agencies to assess the costs and benefits of regulatory proposals, the OBPR could raise the awareness of the availability of data derived through the course of the administrative activities of government agencies. This could include making a case for maintaining and distributing this information to other government agencies to improve the information about the impacts of regulation. This could include a study to identify if there are any legal or administrative barriers to sharing data between levels of government and research institutions.

## *Notes*

1. Terms of Reference. Time For Business, Report of the Small Business Deregulation Task Force, November 1996, Commonwealth of Australia, *www.daf.gov.au/reports_documents/pdf/time_for_business.pdf* (p. vii).
2. The role of the Business Regulation and Competition Working Group (BRCWG) in respect to COAG working group is discussed in Chapter 3.
3. More information is available from the ASIC website: *www.asic.gov.au/asic/ASIC.NSF/byHeadline/Better%20regulation*.
4. The Act is available at *www.opsi.gov.uk/acts/acts2008/pdf/ukpga_20080013_en.pdf*. Further information about the intended effect of the legislation can be found at the BRE website *www.berr.gov.uk/whatwedo/bre/inspection-enforcement/implementing-principles/sanctions-bills/page44047.html*.
5. The Australian Government has advised that in the future a similar arrangement will also apply to legislation published on the ComLaw website under the *Evidence Amendment Act* 2008.
6. *www.comlaw.gov.au*
7. The principles have also been endorsed by COAG and incorporated as Appendix F in the COAG *Best Practice Regulation: A Guide for Ministerial Councils and Standard Setting Bodies* (COAG, 2007).
8. *www.australia2020.gov.au/about/index.cfm*
9. Further details on the consultation processes of these reviews are available through the following web links: The Australia's Future Tax System Review (the "Henry Tax Review") *http://taxreview.treasury.gov.au/Content/Content.aspx?doc=html/home.htm* the Carbon Pollution Reduction Scheme Green Paper, *www.climatechange.gov.au/greenpaper/index.html* the Aviation Green Paper *www.infrastructure.gov.au/aviation/nap/index.aspx* and the Energy White Paper *www.ret.gov.au/energy/facts/white_paper/Pages/default.aspx*.
10. *The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* is available at *www.ag.gov.au/crimlaw*.

11. See *Financial Management and Accountability Act 1997; Commonwealth Authorities and Companies Act 1997;* A comparison table which sets out the key differences between the Acts may be found at Appendix E of the *Governance Arrangements for Australian Government Bodies* document.
12. Childcare registration was the exception where delays associated with police checks is an issue.
13. See *www.pc.gov.au/projects/study/regulationbenchmarking/stage2*.
14. See Ministerial Media Release *www.financeminister.gov.au/media/2008/mr_372008.html*.
15. *www.australia.gov.au*.
16. The online consultation trials were a recommendation of the June 2008 Consulting with Government Online report: *www.finance.gov.au/publications/consulting-with-government-online/index.html*.

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*Chapter 3*

# Multi-level Regulatory Governance – Commonwealth-State Relationships

*This chapter is a summary of the background report* Multi-level Regulatory Capacity in Australia *available at* www.oecd.org/regreform. *It discusses the design of the Australian program of national reform intended to improve productivity and create a seamless national economy. Particular focus is given to the co-ordinating arrangements of COAG, and the importance of effective working arrangements between the Commonwealth and the States, including the use of financial incentives to facilitate and reward reform efforts. The adoption of arrangements for effective regulatory management systems by the States is also examined.*

## Introduction

The Federal ("Commonwealth"[1]), State and Territory governments of Australia are engaged in a significant programme of co-ordinated national reform to improve the productivity of the national economy. The Commonwealth, States and Territories have agreed on a reform agenda focusing on competition, regulatory reform and human capital. This has involved significant changes to the management of Federal and State and Territory financial relations to give the States and Territories ("States") more autonomy and accountability for the delivery of services to citizens in key service delivery areas under a new intergovernmental agreement for funding arrangements, including financial incentives to facilitate or reward reforms.[2]

The Council of Australian Governments (COAG) is the main forum for the development and implementation of inter jurisdictional policy, comprising the Australian Prime Minister as its chair, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association (ALGA). It was established in May 1992 out of a shared agenda aimed at advancing microeconomic reform and reducing the economic costs of duplication and overlap which subsequently led to the historic National Competition Principles agreement, signed by COAG in 1995 (Hollander, 2006).

Regulation reform is at the core of the current COAG reform agenda,[3] and of efforts to improve national productivity. The reform programme involves actions to improve the quality of the stock and flow of regulation within the governments of the States and the Commonwealth, and to promote regulatory harmonisation and the removal of regulatory overlap and duplication at a national level. The reforms also aim to preserve regulatory competitiveness and innovation among the States where this is beneficial to the national economy. The progress of the reforms and the continuing quality of service delivery by jurisdictions are monitored by the COAG Reform Council (CRC), an independent body that produces ongoing reports on the outcomes of the initiative. The Commonwealth has agreed to provide "reward" payments to the States based on the advice of the CRC on the delivery of reforms in specified areas.

Since 2007 the implementation of the COAG reform agenda has been boosted by new Commonwealth leadership and new working arrangements at COAG, including the use of working groups of senior State officials chaired by a Commonwealth Minister, to identify areas for reform and develop implementation plans. At the sub-national level, the COAG reform agenda has stimulated States to strengthen regulatory policies, institutions and tools to facilitate effective implementation of reform.

Throughout 2009 COAG has maintained the momentum of the reform agenda, acknowledging the important role of further microeconomic and regulatory reform to enhance Australia's productivity and competitiveness, raise potential growth rates and living standards, and better enable Australia to deal with difficult international economic effects of the global economic and financial crisis. The full outcomes of the COAG reforms will not be known until 2013, but significant progress is being made on nationally-uniform

occupational health and safety laws to reduce employers' costs; a national licensing system for specified occupations to improve flexibility and reduce licence costs; and, a single Commonwealth managed consumer credit system, reducing regulation and enhancing consumer protection.

## The Australian Federation and COAG co-ordination

Prior to the introduction of COAG in 1992, Financial Premiers' Conferences served as the peak intergovernmental forum through which the Commonwealth, the States and the Territories discussed issues of national concern, but these were mainly driven by the Commonwealth with limited opportunity for the States to have input. In contrast, COAG meetings have been characterised by a high degree of collaborative efforts by State, Territory and Commonwealth political leadership as well as agency officials, who participate in COAG decision making through heads of government meetings, Ministerial Councils and working groups.

Under the auspices of COAG, Ministerial Councils and fora facilitate consultation and co-operation between the Australian Government and State and Territory Governments in specific policy areas and take joint action in the resolution of issues that arise between governments. In particular, Ministerial Councils develop policy reforms for consideration by COAG, and oversee the implementation of policy reforms agreed by COAG. New Zealand participates in those meetings that are of relevance to New Zealand affairs. Agreements forged by Ministerial Councils often translate into laws and regulations designed to implement reform commitments.

Forty-five Ministerial Councils existed prior to the establishment of COAG. Yet, communication between Ministerial Councils and heads of government was perceived as being ineffective. In 1993 COAG undertook a reform of Ministerial Councils, focusing on rationalising and streamlining Ministerial Councils to facilitate a more integrated approach in their work and a more strategic view of the policy issues dealt. Further reforms of Ministerial Councils included: clear guidelines for the establishment of Ministerial Councils; representation of local government when local government interests are at stake; annual reporting of Ministerial Councils to COAG on key issues and outcomes; regular review by Ministerial Councils of their own functions, and; good practice regulatory principles. These principles include a requirement for regulatory impact analysis and the consideration of alternatives to regulation by Ministerial Councils (see Box 3.1 for a timeline of COAG action toward strengthening the work of Ministerial Councils).

In October 2006, the States established a Council for the Australian Federation (CAF), comprising all the State Premiers and Territory Chief Ministers. The CAF aims to facilitate COAG based agreements with the Commonwealth by working towards a common position among the States, as well as common learning and sharing of experience across States (CAF, 2006). The CAF provides a forum for dialogue between States and Territories and contributes to the COAG reform agenda through sponsoring policy analysis, collecting best practice policies, and contributing to the policy agenda.

## The COAG national reform agenda

The momentum for the COAG reform agenda grew from the need to address the challenges of an aging population, and competition from developing countries by improving workforce participation and economic productivity. Initially developed in 2006 as the

Box 3.1. **Timeline of COAG actions toward rationalising and strengthening the work of Ministerial Councils**

*December 1992:* Agreement on the need to review the number, scope and distribution of Ministerial Councils, as well as their working protocols.

*June 1993:* Agreement on the need to rationalise Ministerial Councils to improve quality of policy development.

*April 1995:* Adoption of "Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies". (Includes guidance on RIA and best practice regulation.)

*November 2000:* Launch of the first review of Ministerial Councils.

*June 2001*: Agreement on streamlining of Ministerial Councils; adoption of "Guidelines for the Creation of New Ministerial Councils".

*June 2004:* Agreement on changes to a "Broad Protocol and General Principles for the Operation of Ministerial Councils"; regular reporting and information flow by Ministerial Councils on key issues and outcomes; regular review by Ministerial Councils of their own functions.

*February 2005:* Commitment to good practice regulatory principles, including the extension of these principles to Ministerial Councils.

*October 2007:* Adoption of the "Best Practice Regulation Guide for Ministerial Councils and Standard-Setting Bodies", replacing the Principles and Guidelines adopted in 1995 and amended in November 1997 and June 2004.

*March 2008:* Review of "Guidelines for the Creation of New Ministerial Councils".

*July 2009:* Agreement on the second review of Ministerial Councils.

*Source: www.coag.gov.au.*

National Reform Agenda, it comprised three streams focussing on competition, regulatory reform and human capital (PC, 2006a). The competition stream involved reforms in the areas of energy, transport, infrastructure and planning and climate change. The regulatory reform stream comprised two distinct sets of initiatives. The first was designed to promote best practice regulation making and review across the Commonwealth and the States. The second focused on reducing the regulatory burden in "hot spots" where overlapping and inconsistent regulatory regimes were identified as impeding economic activity. The human capital stream covered three areas – health education and training and work incentives.

The election of a new Commonwealth Government in November 2007 brought new momentum to the reform agenda, supporting a more co-ordinated approach to national issues and a more co-operative style of interaction across the federation. COAG capitalised on the political economy opportunity afforded by the fact that the same political party now held office at the Commonwealth and in all the State Governments. Leadership from the newly elected Commonwealth Government was instrumental in establishing more effective working arrangements at COAG. In its meeting of 20 December 2007, COAG identified seven areas for its 2008 work agenda: health and ageing; productivity agenda, including education, skills, training and early childhood; climate change and water; infrastructure; business regulation and competition; housing; and Indigenous reform. A working group was established for each area overseen by a Commonwealth Minister, with deputies nominated by the States at a senior departmental level to focus on developing reform proposals and service

delivery objectives, outcomes and outputs underpinned by new federal fiscal arrangements. The working groups' key strengths included: a clear and focused agenda; strong political leadership; high-level Commonwealth and State officials with direct knowledge and experience of specific issues and reform areas and; well funded and strong secretariats.

COAG also agreed to begin changing the nature of Commonwealth-State funding arrangements with a greater focus on outputs and outcomes, underpinned by a commitment from the Commonwealth Government to provide incentive payments to drive reforms.[4] In 2008, COAG agreed to an expansion of the reform agenda to boost productivity, increase workforce participation and mobility and deliver better services to the community.[5] Bringing a new emphasis on "co-operative federalism" the Commonwealth government sought to remove impediments to co-ordinated reform inherent in the system of intergovernmental financial transfers. Historically the States have transferred most of their taxing powers to the Commonwealth. As a result the States now receive most of their funding through the Commonwealth from the redistribution of all revenue collected through the Goods and Services Tax (GST)[6] and the payment of Specific Purpose Payments (SPPs) made to fund specific areas. Over time there had been a proliferation of SPPs which were used by the Commonwealth to set aspects of state policy. In the 2006-07 financial year more than 90 distinct SPPs were used giving the Commonwealth significant control over state policies and programmes, reducing state budget flexibility and setting up overlapping responsibilities with inherent incentives for cost and blame shifting between jurisdictions (Twomey *et al.*, 2007).

In November 2008, COAG agreed to a new Intergovernmental Agreement on Federal Financial Relations (IGA) to "reduce Commonwealth prescriptions on service delivery by the States, providing them with increased flexibility in the way they deliver services to the Australian people".[7] The IGA provides the basis of an agreement by the Commonwealth and States to expand the productive capacity of the economy through collaboration on policy development and service delivery and the implementation of social and economic reforms of national importance. It involves a major rationalisation of the number of payments made by the Commonwealth to the States and the withdrawal by the Commonwealth from involvement in the delivery of services by the States without a reduction in total Commonwealth funding for these activities.

The new financial arrangements commenced on 1 January 2009. Instead of receiving over 90 separate payments which could only be spent in a specified area, the payments have been rationalised to five broad areas – health, affordable housing, early childhood and schools, vocational education and training, and disability services.[8] Under the IGA the SPPs are distributed among the States on an equal per capita basis phased in over five years.[9] For each payment area a mutually agreed *National Agreement* clarifies the roles and responsibilities that will guide the Commonwealth and States in the delivery of services across the relevant sectors and covers the objectives, outcomes, outputs and performance indicators for each SPP. The performance of all governments in achieving mutually-agreed outcomes and benchmarks specified in each SPP will be monitored by the independent CRC and publicly reported on an annual basis. The CRC will also undertake a comparative analysis of the performance of governments in meeting the objectives of the National Agreements.

The independence the CRC is established by a COAG decision. It is a non-statutory body composed of a chairperson, a deputy chairperson, four councillors and an executive

### Box 3.2. **Legislative co-operation in the Australian Federation**

In Australia rule making powers are distributed between the Commonwealth, six States and two Territories: New South Wales, (NSW) Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory (ACT) and Northern Territory, but there are robust frameworks for legislative co-operation where a multi-jurisdictional approach is needed.*

The Australian Constitution established the Commonwealth of Australia,in 1901 and allocates certain powers to the Commonwealth. Each of the States are sovereign and have their own constitution under which a State Parliament may make laws on any subject of relevance to that particular State, with the exception that the States cannot impose duties of customs or excise or raise defence forces. The ACT and Northern Territory are largely self governing through a conferral of power by the Commonwealth Parliament.

Section 51 (xxxvii) of the Australian Constitution provides expressly for legislative co-operation in the Australian Federation by providing, in effect, that States may "refer" additional law making power to the Commonwealth Parliament. Constitutional referrals generally take one of two forms: **Text based referrals** give the Commonwealth the necessary power to enact the text of a particular Bill, as well as a separate reference power to amend only that Act (once enacted) in the future. **Subject based referrals** give the Commonwealth power to legislate in a particular area without any specification of how to deal with the subject referred.

Other legal frameworks for national legislation are: "**Mirror**" **schemes which** involve one State enacting a law which is then enacted in the same or similar terms in another jurisdiction and; **Complementary approaches** which involve one jurisdiction, either the Commonwealth or a State, enacting a law which is then applied by each of the other participating jurisdictions as a law of that jurisdiction.

* Norfolk Island Territory, with a population of only 2200 people, has also been given some local rule making powers by the national Government.

*Source:* Australian Government.

councillor each appointed for a three-year term. A permanent secretariat, headed by the executive councillor and jointly funded by the Commonwealth and the States, supports the work of the CRC.

### *Incentive mechanisms: National Partnership Payments*

The new financial arrangements give the States far greater control on how to administer the funds within their own jurisdiction. All payments are centrally processed by the Australian Treasury and paid directly to each State treasury, giving them greater flexibility on how to negotiate regulatory reform within their own jurisdiction. This flexibility, as well as competition between the States, is intended to lead to innovation and improvements in the methods of service delivery within the States, resulting in increased productivity.

The IGA provides for a system of National Partnership (NP) payments to be used where the Commonwealth intends to fund specific outcomes. There are three forms of NP payments: *project* payments to support specific projects; *facilitation* payments to initiate reform in a specific area and lift standards of service delivery, and; *reward* payments based on the achievement of agreed performance benchmarks. The IGA provides clear guidance on the design, administration and reporting arrangements of National Partnership Agreements and the role of the CRC in determining that reform targets have been achieved.[10]

### *The COAG Reform Agenda and the Seamless National Economy*

The regulatory reform stream of the COAG reform agenda has been an evolving agenda which has been given momentum from the new model of co-operative federalism. As early as the February 2006 COAG meeting[11] the Commonwealth and States agreed to improve their regulatory management processes, while also continuing the previous COAG co-operation on National Competition Policy (NCP) and microeconomic reform. At COAG in April 2007 fundamental principles of the regulatory reform component of the national reform agenda were identified, which included a commitment to good regulatory principles and the continued application of the NCP guiding legislative principle to remove restrictions on competition from regulation unless it can be shown that the national interest cannot be served in any other way.

A core aim of the regulatory reform agenda has been to reduce instances of cross jurisdictional regulatory overlap and regulatory inconsistency, where this places a burden on business and the community, but at the same time preserve the potential for innovation and dynamism in competitive regulatory approaches. Through COAG, governments agreed to revise their RIA procedures to consider for new regulatory initiatives whether an existing regulatory model outside their jurisdiction would efficiently address the policy issue in question and whether a nationally uniform, harmonised or jurisdiction-specific model would be best for the community. This involves a consideration of: the potential for regulatory competition, innovation and dynamism; the relative costs of the alternative models in use, including regulatory burdens and any transition costs; whether the regulatory issue is state-specific or national, and whether there are substantial differences that may require jurisdiction-specific responses (COAG, 2007b).

Over the past five years the number of businesses operating across State boundaries in Australia has increased markedly. At the end of the last data collection in the 2007 financial year more than 31 700 businesses were operating in more than one State or Territory. Of these more than 4 300 businesses were operating in every state and territory, and, by implication, under nine different regulatory regimes. Since 2003 the number of business operating in every state and territory has increased by more than 70% from just over 2 500 (ABS, 2007) (see Table 3.1). This demonstrated the need for regulatory reform to remove barriers to the operation of a national economy.

In December 2007 COAG created the Business Regulation and Competition Working Group (BRCWG) as part of the new working arrangements to spearhead national regulatory reform. The BRCWG is co-chaired by the Commonwealth Minister for Finance and Deregulation and the Minister Assisting the Finance Minister on Deregulation with high level representation by officials from State treasuries and central agencies. The Deregulation Policy Division in the Commonwealth Department of Finance and Deregulation acts as secretariat to the BRCWG. The BRCWG considered 35 possible reform areas according to an analytical framework that looked at the potential national benefits to workforce mobility, productivity and economic growth. Each reform area was categorised according to the level and type of regulatory change which is desirable; mutual recognition, harmonisation or a national regulatory system. In March 2008 COAG agreed to an implementation plan prepared by the BRCWG which included an expanded business regulation and competition agenda to cover 27 deregulation priorities including the acceleration of some "hotspots" that had been previously identified by COAG as priorities for reform (for a condensed list see Box 3.3).

Table 3.1. **Number of single and multistate businesses in Australia (2003-07)**

| Financial year end | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|---|---|---|---|---|
| All businesses | 1 870 068 | 1 911 546 | 1 939 974 | 1 964 943 | 2 011 914 |
| Single state | 1 840 362 | 1 881 435 | 1 909 617 | 1 934 301 | 1 980 213 |
| Multistate | 29 706 | 30 111 | 30 357 | 30 642 | 31 701 |
| All states | 2 514 | 3 006 | 3 228 | 3 627 | 4 329 |
| % of all businesses | | | | | |
| Single state | 98.41 | 98.42 | 98.44 | 98.44 | 98.42 |
| Multistate | 1.59 | 1.58 | 1.56 | 1.56 | 1.58 |
| All states | 0.13 | 0.16 | 0.17 | 0.18 | 0.22 |
| % change on previous year | 2004 | 2005 | 2006 | 2007 | % change 2003-07 |
| All businesses | 2.22 | 1.49 | 1.29 | 2.39 | 7.59 |
| Single state | 2.23 | 1.50 | 1.29 | 2.37 | 7.60 |
| Multistate | 1.36 | 0.82 | 0.94 | 3.46 | 6.72 |
| All states | 19.57 | 7.39 | 12.36 | 19.35 | 72.20 |

*Source:* ABS 2007.

Box 3.3. **Overview of the reform priorities of the NPA to deliver a Seamless National Economy**

The implementation plan of the National Partnership Agreement (NPA) to deliver a Seamless National Economy includes the delivery of 27 national reform priorities across the period 2008-09 – 2012-13, listed below. Areas of reform, known as COAG hot spots, are starred (*).

**Part 1 – 27 Deregulation Priorities**

Occupational Health and Safety (OH&S)*; Environmental Assessment and Approvals Processes*; Payroll Tax Harmonisation; Licences of Trades-people; Health Workforce Agreement; National System of Trade Measurement*; Rail Safety Regulation*; Consumer Policy Framework; Product Safety*; National Regulation of Trustee Corporations; National Regulation of Mortgage Broking; National Regulation of Margin Lending; National Regulation of Non-Deposit Lending Institutions; Development Assessment*; National Construction Code (NCC)*; Regulation of Chemicals and Plastics*; Registering Business Names*; Personal Property Securities (PPS)*; Standard Business Reporting (SBR); Food Regulation; National Mine Safety Framework (NMSF); A National Electronic Conveyancing System; Oil and Gas Regulation; Maritime Safety Regulation; Wine Labelling; Directors' Liability, and; A National System for Remaining Areas of Consumer Credit not covered above.

**Part 2 – Competition Reform**

Review of Australia's anti-dumping and countervailing system; Review of parallel import restrictions on books; Previously agreed energy reforms; Infrastructure access regulation; Previously agreed infrastructure reforms; Rationalisation of occupational licences; National transport policy and Previously agreed transport reforms

**Part 3 – Regulatory Reform**

The development and enhancement of existing processes for regulation making and review.

*Source:* Australian Government.

In November 2008 the 27 priority areas, and a further eight competition reforms were reflected in the preparation of a National Partnership (NP) agreement to *Deliver a Seamless National Economy* that was ratified by the States and the Prime Minister in February 2009. The BRCWG was given continued responsibility for ensuring the success of the Seamless National Economy reforms according to an agreed implementation plan. Among the top priorities was a commitment to harmonise occupational health and safety laws. Reflecting the success of the reform processes, COAG has added a number of issues to the BRCWG work plan during 2009, beyond the scope of the original NP Agreement. These are the reform of the legal profession and the not-for-profit sector, and an examination of competition issues associated with planning and zoning processes. The high level representation on the BCRWG has meant that it is well positioned to co-ordinate reform within jurisdictions.

Securing agreement by the States to reform and achieving implementation has been assisted by NP payments which provide an incentive to advance implementation and redistribute the expected financial benefits of reform. Under the NP Agreement for a Seamless National Economy, the Commonwealth government has agreed to provide the States with funding of up to AUD 550 million over five years from 2008-09, subject to satisfactory progress in advancing the 27 specified reforms against the agreed implementation plan. The payment model involves an initial "facilitation" payment of AUD 100 million and a reward component contingent upon an assessment that the key milestones have been achieved. The funding is shared among the States on an equal per capita basis. The reward payments are available in two tranches: no payments are made in 2009-10 and 2010-11 and then AUD 200 million is available in financial year 2011-12 and AUD 250 million in 2012-13 (Table 3.2).

The reward payments to each jurisdiction are contingent on "an assessment by the Commonwealth of the overall level of progress" based on the advice of the CRC that the jurisdiction has successfully achieved the reform milestones for the 27 deregulation priorities in the NP Agreement. Early indications are that the programme is on course and that it has considerable momentum. After the first year, the annual progress report card produced by the secretariat of the BRCWG for July 2009 reported that all of the 27 deregulation priorities are on track, except two where reform is reported as "slowing" (these are the reform of chemicals and plastics regulation, and directors liability).[12]

Table 3.2. **Seamless National Economy funding for the States based on per capita distribution**

| | 2008-09 AUD m | 2009-10 AUD m | 2010-11 AUD m | 2011-12 AUD m | 2012-13 AUD m | Total AUD m |
|---|---|---|---|---|---|---|
| NSW | 32.552 | 0.0 | 0.0 | 64.212 | 79.910 | 176.673 |
| Vic | 24.774 | 0.0 | 0.0 | 49.554 | 61.943 | 136.272 |
| Qld | 20.104 | 0.0 | 0.0 | 41.010 | 51.582 | 112.697 |
| WA | 10.133 | 0.0 | 0.0 | 20.683 | 26.021 | 56.838 |
| SA | 7.477 | 0.0 | 0.0 | 14.725 | 18.316 | 40.518 |
| Tas | 2.322 | 0.0 | 0.0 | 4.533 | 5.621 | 12.476 |
| ACT | 1.610 | 0.0 | 0.0 | 3.220 | 4.026 | 8.856 |
| NT | 1.028 | 0.0 | 0.0 | 2.062 | 2.580 | 5.671 |
| Total | 100.0 | 0.0 | 0.0 | 200.0 | 250.0 | 550.0 |

*Source:* National Partnership to Deliver a Seamless National Economy *www.federalfinancialrelations.gov.au/content/national_partnership_agreements/default.aspx.*

## Strengthening regulatory quality of COAG decisions

COAG has developed eight principles of best practice regulation (see Box 3.4) which guide the preparation of the regulatory impact statements (RIS) by Ministerial Councils. RIS are required to be done in two stages, first for release as a consultation paper for a regulatory proposal and at the final stage of a decision involving a regulatory option (COAG, 2007a). The Office of Best Practice Regulation (OBPR), provides independent advice on the adequacy of the RIS prepared for both consultation stage and for decision by Ministerial Councils. The OBPR also monitors and reports on the adequacy of these documents and the compliance by the Ministerial Council with the principles and guidelines but does not have any power to veto the decisions of Ministerial Councils if the analysis in the RIS is not adequate[13] (COAG, 2007a, p. 14).

### Box 3.4. **COAG principles of best practice regulation**

In October 2007, COAG agreed that all governments would ensure that regulatory processes in their jurisdiction are consistent with the following principles:

- establishing a case for action before addressing a problem;
- a range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed;
- adopting the option that generates the greatest net benefit for the community;
- in accordance with the Competition Principles Agreement, competition should not restrict competition unless it can be demonstrated that:
  1. The benefits of the restrictions to the community as a whole outweigh the costs; and
  2. The objectives of the regulation can only be achieved by restricting competition.
- providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear;
- ensuring that regulation remains relevant and effective over time;
- consulting effectively with affected key stakeholders at all stages of the regulatory cycle; and
- government action should be effective and proportional to the issue being addressed.

*Source:* COAG (2007a).

The OBPR (and the former ORR) have reported that the Ministerial Councils' compliance with COAG's impact analysis requirements has been uneven over time, but appears to be improving. The OBPR has repeatedly highlighted the need to improve awareness of the scope of the RIS requirements and the required level of analysis, as well as the need to strengthen capacity of Ministerial Councils' officials to conduct regulatory impact analysis (PC, 2004a, p. 83; OBPR, 2007, p. 87). Key issues appear to be the rate of turnover of staff in the secretariats supporting Ministerial Councils, the long time frames over which policy options develop and a lack of knowledge of the requirement of the best practice principles. The quality of Ministerial Councils' RIS can have important efficiency consequences for the quality of regulatory outcomes as most States and Territories do not require a subsequent RIS to be prepared for a local regulation if a RIS conducted by the relevant Ministerial Council has been assessed as adequate at the decision-making stage by OBPR.[14]

### *Communications and capacity challenges*

A systemic reform of the scale of COAG's reform agenda clearly presents a significant communication challenge for the Commonwealth government. The changes to "business as usual" have to be understood by the people working in the governments of the Commonwealth and States, by business and by members of the community, particularly as the future focus of reform is on outcomes and is designed to allow for flexibility in policy and service delivery. This will place greater demands on the States to improve their policy service capabilities and to demonstrate success in service delivery. The success of the new federal financial relations framework will rely upon the involvement of communities holding the State governments to account for their performance. Realising the benefits of accountability and the incentives for performance in the project will depend upon good communication with all stakeholders and careful political management by the Commonwealth. In this respect it is notable that the government is trying to emphasise the national impacts of early reform achievements as widely as possible.

With such an ambitious reform programme, capacity bottlenecks can hamper progress toward implementing regulatory reform, for example, by creating inconsistencies across the States and ultimately undermine the effectiveness of the co-ordinated COAG reform agenda. The facilitation payments of AUD 100 million are intended to address this within the States. The CRC also appears to be alert to challenges for key implementation tools, highlighting the need for legislative drafting skills where there are high resource demands in the short term. In the longer term, the changed role of the Commonwealth, with a more national focus on regulation and the increased responsibility of the States for service delivery will increase the need for sharing experiences among jurisdictions and models of good regulatory practice, including the challenge of assessing a coherent picture of emerging regulatory risks which in a national framework can arise in different parts of the country. Some institutional capacity for this already exists in the Australia New Zealand School of Government which has been operating since 2003 with the participation of the Commonwealth and State governments and New Zealand, and builds on cross-jurisdictional co-operation and a culture of mutual learning and sharing of experiences.

The Australian Productivity Commission (PC) plays an important role in the achievement of the objectives of COAG's reform agenda. It is a respected source of advice on the potential areas where reform will deliver economic benefits. It is charged with providing an assessment to COAG of the economic impacts and benefits of the reform agenda and it supports the CRC in the collection of performance data to monitor and measure progress in respect of the National Partnership Agreement implementation. A number of the areas for reform in the COAG reform agenda were identified in reports of the PC. The PC is also undertaking a series of studies on *Performance Benchmarking of Australian Business Regulation* across the Commonwealth and the States, including reviews of the regulation of a range of industry sectors (among them OH&S and food safety regulation) as a source of comparative information and to be able to subsequently assess the benefits post-reform.

## Co-ordinating arrangements within the States

An important part of this assessment is looking at the co-ordination capacity within the States. There is evidence that the States have consistently moved toward strengthening their strategic approach to reform across government agencies. States have put in place

diverse inter-ministerial co-ordination mechanisms to facilitate implementation of the COAG reform agenda, including arrangements to monitor implementation and have pursued an alignment of State priorities with the COAG reform agenda. Usually, it is the central agency with primary responsibility for regulatory reform that co-ordinates implementation of the national regulatory reform agenda within the States. New South Wales, Queensland and South Australia have each appointed Ministers with specific responsibility for championing better regulation and public management within the Cabinet. Across jurisdictions, treasury departments have taken a lead role in facilitating implementation of federal financial and regulatory reform. The financial transfer arrangements in the IGA have contributed to strengthening this role as, under current arrangements, treasury departments manage the financial flows. This adds to the authority of State central treasuries to direct reform and to manage the dialogue and co-ordination with the line agencies that carry out the bulk of implementation. Under the previous arrangements funds were transferred directly from Commonwealth agency to State agency, which limited the scope for central management of reform within the States.

### *States' reform priorities*

The available evidence suggests that there is a strong alignment of the States' reform priorities and the COAG agenda. A review of the States' strategic planning instruments indicates that their policy priorities are largely in line with the priority areas of COAG's reform agenda, although the States emphasise different specific reform priorities, perhaps reflecting different stages of reform within the sub jurisdictions. For example, Victoria, South Australia and New South Wales have been particularly active in advancing the red tape reduction agenda. South Australia emphasises regulatory reform for renewable energies, as well as zoning and planning reforms. Tasmania's identified priorities include transport infrastructure and free movement of labour. This attention to different aspects of reform in turn has facilitated the emergence of State champions of reform with an interest in driving national reform in particular areas. For example, Queensland has joined New South Wales, South Australia, Victoria and the Commonwealth, to participate in a BRCWG Regulatory Reform Sub-Group to assist the BRCWG in the development and enhancement of existing processes for regulatory making and review.

### *Managing relations with stakeholders to facilitate implementation*

In most cases States manage relations with stakeholders through well established and regular consultation mechanisms. Most of the States have prepared guidance for government agencies on engaging stakeholders. The Australian Capital Territory and Victoria present annual plans of envisaged legislative proposals to Parliament. New South Wales and Victoria have a programme of public reviews of existing legislation to identify policy priorities and areas for future reform. Queensland is implementing a phased programme of reviews by all agencies of their existing stock of regulation to reduce the regulatory burden, in consultation with key stakeholders. Western Australia is taking a similar approach through an *ad hoc* group, the Red Tape Reduction Group, which is consulting widely with industry groups and local governments on opportunities to cut regulatory burden. Tasmania has established a Business Tax and Regulation Reference Group, comprising business representatives, to identify opportunities for regulatory reform.

### *Performance reporting to CRC*

Reporting to CRC on the performance of the States toward achieving milestones and objectives identified in National Partnership Agreements is an essential feature of the 2008 Intergovernmental Agreement on Federal Financial Relations. In addition to releasing National Partnership payments, performance reporting is also expected to serve as a repository of best practices, capture institutional and policy innovation and facilitate cross-jurisdictional learning and sharing of experience. States are aware of risks of performance reporting including the additional resources required, the tight timetable for reporting results and the potential for duplication of existing reporting arrangements. States are exploiting the opportunities for utilising existing performance reporting mechanisms to meet the CRC requirements. A critical aspect of the performance reporting framework is the continued reliance on the annual *Report on Government Services*. This report has been produced since 1995 through a steering committee with representation by the States and the Commonwealth and chaired by the Chairman of the PC, which also provides the secretariat for the steering committee.

## Strengthening regulatory quality at the State level

The six States and two Territories that comprise the Australian Federation are relatively diverse in terms of population and the nature of the main areas of economic activity. Accordingly, the extent to which they regulate may vary significantly. Furthermore, in the absence of co-ordinating frameworks, jurisdictions have an incentive to take an approach to regulation that focuses on that single jurisdiction's welfare. As such, they may fail to capture economies of scale or "spill over" effects when they assess the costs and benefits of regulation.

The establishment of better systems for regulatory management is a key strategy for promoting regulatory quality in multi-level governance systems. The reality of different jurisdictions is that it does not allow for a single system of regulation, and regulatory harmonisation or mutual recognition is not always achievable, or necessarily efficient. Having in place effective regulatory management arrangements across jurisdictions that consistently meet best practice standards are thus essential to achieve regulatory quality in a country as a whole and to embed practices that promote the development of high-quality regulation for the body of law operating in that jurisdiction.

The 2005 *OECD Guiding Principles for Regulatory Quality and Performance* are as applicable at the sub-national levels of government as they are for national administrations. Specifically, regulatory quality reform should be facilitated through the adoption of the following features of systems of regulatory management at all levels of government:

- *Regulatory policies/strategies* that promote high-quality regulation, facilitate co-ordination and exchange of information across levels of government and across jurisdictions, recognise national objectives but take into account the diversity of jurisdictions' socio-economic and political characteristics.
- *Regulatory institutions* that are consistent across jurisdictions to ensure efficiency and effectiveness of regulation;
- *Regulatory tools* that are systematically used across all levels of government and are embedded in existing decision-making processes to ensure full ownership by each jurisdiction.

The political commitment at the COAG level to improving regulatory management has furthered action toward establishing stronger regulatory policies/strategies, institutions and tools across Australia. COAG has provided a forum for lowering transaction costs of reform and sharing good practice experiences. The COAG process has also helped build momentum for the establishment of strategies, institutions and tools for strengthening regulatory management at the State level. A key step was the commitment by the States to consistently strengthen regulatory quality which has been given renewed support by the government elected in 2007 (see Box 3.5). There is evidence that jurisdictions have been converging around common regulatory quality management mechanisms promoted by COAG, where previously some States had only limited arrangements in place.

Box 3.5. **COAG commitments to better regulatory management mechanisms**

In the COAG meeting of 10 February 2006, Commonwealth, State and Territory governments agreed to strengthen "gate keeping" as part of the decision-making process; improving the quality of regulation impact analysis; better measurement of compliance costs; and broadening the scope of regulatory impact analysis. Moreover, Commonwealth and State governments agreed to:

- Adopt a common framework for benchmarking, measuring and reporting on regulatory burden across all levels of government;
- Set quantifiable targets for the reduction of red tape (for those jurisdictions that choose to do so).

*Source:* COAG (2006a).

The benchmarking of the performance of regulation across jurisdictions has assisted in identifying opportunities and challenges of regulatory reform in Australia. It has been an important strategy to direct efforts and resources towards areas of reform that were lagging and identify emerging best practices. Through the COAG process, the States have committed to a rigorous process of benchmarking conducted by the Productivity Commission. In November 2008, the PC completed the first stage of the benchmarking exercise, focusing on identifying a benchmarking methodology, baseline information and initial estimates of business compliance costs (PC, 2008a, 2008b). The methodology adopted by the Productivity Commission relies on the adoption of regulatory management practices as a proxy for the quality of regulation. The benchmarking exercise has the potential to become an independent monitoring tool, fully owned by all Australian jurisdictions and embedded in the COAG mechanism, providing feedback on regulatory reform implementation and incentives to address bottlenecks and challenges. The advocacy from the Business Council of Australia which has produced a "Scorecard of State Red Tape Reform" benchmarking the performance of the States has also been an impetus for reform of regulatory management mechanisms.

COAG commitment to strengthening gate keeping has facilitated the use of this institutional model for promoting regulatory quality. All States have established a body responsible for screening compliance with regulatory impact assessments. Significantly, some States that already had gate keeping mechanisms in place have re-evaluated them and strengthened their role in providing high-quality analysis to elected officials. In Victoria, the oversight reach of the VCEC was extended to include the review of measurements of

the administrative burden of regulation (Victorian Government, 2006). Western Australia has established a Regulatory Gate keeping Unit (RGU) within the Department of Treasury and Finance to better monitor and report compliance with the preparation of Regulatory Impact Analysis (RIA) across government agencies. In 2008, the Queensland Office for Regulatory Efficiency was moved to Queensland Treasury to ensure regulatory reform, including regulatory oversight, is centrally driven.

Table 3.3. **Gate-keeping and regulatory oversight in the States**

| | |
|---|---|
| New South Wales | • A Better Regulation Office (BRO) within the Department of Premier and Cabinet provides advice on new and amending regulation and the adequacy of Better Regulation Statements (BRS).<br>• Upon BRO advice, the Minister for Regulatory Reform can refuse to certify a BRS if it does not comply with better regulation principles. The Minister can also advise the Premier that the matter should not proceed |
| Victoria | • The Victorian Competition and Efficiency Commission (VCEC) has administrative independence under an executive order.<br>• The VCEC provides an independent assessment of RIS and BIA.<br>• The VCEC can require that a department undertakes further work if the RIS is deemed inadequate.<br>• The VCEC assessment of the RIS informs a compliance certificate that a Minister attaches to the proposed subordinate legislation.<br>• Further scrutiny is provided by the Scrutiny of Acts and Regulation Committee, which can disallow approved regulation if it finds it in non compliance with RIS requirements |
| Queensland | • A Queensland Office of Regulatory Efficiency (QORE) within the Treasury assesses the quality of RIS.<br>• QORE takes an advisory role. It is responsibility of individual agencies to ensure compliance with RIS requirements.<br>• The Department of the Premier and Cabinet also provides regulatory advice and oversight, specifically with the development of primary legislation, and works closely with Treasury to drive the national reform agenda.<br>• The Treasury is also responsible for ensuring the Public Benefit Test market competition requirements under the NCA are met. |
| Western Australia | • The Department of Treasury and Finance has primary gate keeping responsibilities.<br>• A Regulatory Gate Keeping Unit (RGU), established in 2009, assist government agencies with the RIA process and monitor and report on compliance.<br>• If RGU deems a RIS inadequate, the submission may not process to the decision maker. |
| South Australia | • The Department of Trade and Economic Development (DTED) reviews and assesses the adequacy of all BISs and provide advice on the preparation of Business Impact Statements (BISs) and the use of Business Cost Calculator (BCC).<br>• DTED's assessment of BISs and BCC is included with all policy proposals. |
| Tasmania | • An Economic Review Unit (ERU) within the Department of Treasury and Finance reviews all primary and subordinate legislation.<br>• The ERU certifies compliance with RIS requirements. ERU certification is required for legislation to proceed. |
| Australian Capital Territory | • A Regulation Policy Unit (RPU) within the Department of Treasury oversees quality of Regulatory Impact Statements (RIS), and sets RIS standards.<br>• Regulatory proposals that are found in non compliance might proceed but RPU's advice is attached. |
| Northern Territory | • A Regulation Impact Unit (RIU) within the Northern Territory Treasury assesses the adequacy of RIS.<br>• RIU takes an administrative role. It is the responsibility of individual agencies to ensure compliance with RIS requirements. |

*Source:* State responses to OECD questionnaire on multi-level regulatory governance, 2009.

Most States established RIA for subordinate legislation in the late 1980s and 1990s, during the wave of regulatory reforms undertaken through the NCP. Yet, in the absence of an established mechanism to facilitate systematic cross-jurisdictional co-ordination and exchange of information, there had been little convergence across jurisdictions on RIA methodologies and focus. RIA was mainly required for subordinate legislation or statutory rules. A new wave of reform facilitated by the COAG process has helped address these challenges. States have moved toward systematically including tools to assess business cost assessments of relevant regulation and to extend the scope of RIA to primary legislation. The Australian Capital Territory, New South Wales, Victoria, Queensland and Western Australia have provided guidance to consider national and cross-jurisdictional effects when assessing

Table 3.4. **Regulatory Impact Analysis in the States**

| | |
|---|---|
| New South Wales | • Under the 1989 Subordinate Legislation Act, a RIS is required for all principle statutory rules.<br>• The 2008 Guide to Better Regulation requires that all significant new and amending regulation be accompanied by a Better Regulation Statement setting out compliance with better regulation principles<br>• RIS are required to take into consideration extra-jurisdictional effects of regulation. |
| Victoria | • Under the Subordinate Legislation Act 1994, a RIS is mandatory for proposed statutory rules that impose an appreciable economic or social burden.<br>• Preparation of BIAs is required for any legislation that might have significant effects for business or competition. Where any regulatory instrument results in a material change in administrative burden imposed on business, the Standard Cost Model is required to be used.<br>• RIS and BIA are required to take into consideration extra-jurisdictional effects of regulation. |
| Queensland | • Under the 1992 Statutory Instruments Act, proposed subordinate legislation that is likely to impose appreciable costs on the community is subject to the preparation of a RIS.<br>• Since 1995, all new and amending primary and subordinate legislation restricting competition is subject to a public benefit test.<br>• RIA is being enhanced following a 2007 renewed commitment to regulatory reform. |
| Western Australia | • A RIA process applying to primary legislation is operational since July 2009. The process is expected to be extended to subordinate legislation and quasi-regulation.<br>• A Preliminary Impact Assessment will apply to all proposals. If the PIA shows significant negative impact, a detailed analysis is to be undertaken through a RIS.<br>• RIS are required to take into consideration extra-jurisdictional effects of regulation. |
| South Australia | • All Cabinet submissions require an assessment of regulatory impacts.<br>• Since July 2006, all proposals with a significant impact on business must include a Business Impact Statement and a Business Cost Calculator Report, assessing the cost of compliance on business. |
| Tasmania | • The Legislation Review Program requires a RIS for all new legislation for which competitive restrictions or negative impacts are identified.<br>• The 1993 Subordinate Legislation Act requires a RIS for all new and amending legislation imposing a significant burden, cost or disadvantage on any sector of the community.<br>• Impacts and costs of new and amended regulation on other jurisdictions or national markets are usually taken into consideration. |
| Australian Capital Territory | • Under the 2001 Legislation Act, a RIS identifying costs and benefits is required for all new regulation.<br>• The ACT Government Cabinet Handbook, updated in November 2008, prescribes that for all new and amended legislation or government direction, a RIS must be completed.<br>• RIS are required to take into consideration extra-jurisdictional effects of regulation. |
| Northern Territory | • A Preliminary Regulation Impact Assessment (PRIA) applies to all legislative proposals. If the PRIA shows significant negative impact, a detailed analysis is to be undertaken through a RIS. |

*Source:* State responses to OECD questionnaire on multi-level regulatory governance, 2009.

costs and benefits of regulation. Tasmania also considers costs imposed by new or amended regulation on other jurisdictions or national markets. Also, cross-jurisdictional co-ordination appears to have accelerated the pace of reform. States originally introduced RIA across a long period between 1985 (Victoria) and 2001 (Australian Capital Territory). The timeline of the new wave of RIA reforms has been shorter, spanning from mid-2006 to mid-2009.

Since 2006, four States, New South Wales, Queensland, South Australia and Victoria, have set quantitative targets to cut red tape. The two early reformers, South Australia and Victoria, introduced initiatives to reduce regulatory burdens in mid-2006, adopting different approaches and methodologies. South Australia took a broad approach aimed at cutting both administrative costs to government and compliance costs to business. It has relied on the Business Cost Calculator used by the Commonwealth Government. Victoria adopted a narrower approach, focusing on administrative costs as measured by the Standard Cost Model. The two approaches have offered other States a set of options from which they could draw lessons and identify the approach that best fit their needs. Queensland and New South Wales adopted red tape reduction targets in 2008 and 2009, respectively. Both States have chosen an approach that address both administrative and compliance burdens. The Queensland focus is not limited to business but includes benefits and savings to business, community and government.

All jurisdictions are converging around provisions for consultations with stakeholders on new regulation and require or recommend consultation for at least 28 days on RIA. There is a progressive move toward using the RIA or RIS as a basis for consulting with stakeholders. Notably, Western Australia requires the public release of consultation RIS. NSW requires the publication of a Better Regulation Statement for significant regulatory proposals setting out how the regulation complies with regulatory good practice. Victoria has extensive processes for public consultation on RIS requiring prior consultation with the sector of the public on which an appreciable economic or social burden may be imposed by a proposed statutory rule, and also the release of the RIS for public comment for 28 days after independent advice from VCEC on the adequacy of the RIS has been obtained.

States are using different mechanisms for reviewing and updating regulation. Systematic sunset clauses for subordinate legislation were introduced in Victoria in 1985 and by New South Wales in 1995. Terms of sunset clauses vary, with Victoria and Tasmania having a ten year term and New South Wales having a five year term. Queensland introduced sunsetting provisions in 1992. In 2008, the government committed to the Queensland *Regulatory Simplification Plan 2009-13*, under which agencies deliver three year regulatory simplification plans aimed at reducing their existing stock of regulation. Western Australia has introduced a systematic review mechanism through the RIA process, but sunset clauses are not systematically applied. Most States have introduced regular reporting mechanisms to assess progress toward regulatory reform.

All States provide online access to legislation and, as a practice, regulators use the Internet to make information easily available to stakeholders. However, one area for development appears to be the use of the Internet by business regulators to facilitate and reduce the administrative costs of licensing and compliance transactions. Benchmarking reports published by the PC suggests that use of electronic tools to facilitate speedy and less burdensome compliance processes remains relatively limited among regulatory agencies. Most business regulators in all States do not allow for filing of licence applications via the Internet. In part, this might be the consequence of requirements that cannot be easily performed online, but the use of on-line services also remains limited for compliance steps which might require a less stringent oversight. For example, on average across the States fewer than 10% of business regulators provide access to online renewal of licences or payment of fees (PC, 2008a).

COAG and the BRCWG are working to reduce information requirements for business and facilitate online processing of reporting requirements. For example, in March 2008, COAG launched a Standard Business Reporting initiative aimed at reducing the burden of reporting financial information to government and providing a single secure way to interact electronically with government agencies. Implementation is expected to roll out in the course of 2010 (COAG/BRCWG, 2008).

Australia's States are very advanced from an OECD perspective for the consistent effort towards embedding good practice regulatory management in decision-making processes. Commitment to national reform by States has helped strengthen regulatory management across jurisdictions by lowering barriers to reform and keeping up momentum. This commitment has been critical for improving regulatory quality in Australia, which in turn has the potential to improve long-term growth prospects across jurisdictions.

The choice of regulatory policies and strategies has facilitated commitment to regulatory reform. Benchmarking business regulation across jurisdictions has facilitated comparisons across the States, thus triggering healthy competition for better performance and accelerating the pace of reform. Late comers have built on emerging good practices and introduced innovative approaches to regulatory management. Benchmarking business regulation has also drawn attention on areas of reform that might need concerted action and greater focus. The availability of online services at the level of State regulators shows scope for significant improvement, even compared with other OECD jurisdictions. As COAG is taking action to address some of these issues, the role of performance monitoring is important. Moreover, important areas of regulatory quality have not been covered in the initial benchmarking conducted by PC. These areas include, for example, quality of the RIS and RIA analysis and their impact in reducing actual regulatory burdens.

Regular and systematic benchmarking has proved to be effective. However, after the initial assessment conducted by the PC, COAG does not appear to have agreed on a timeline for regular benchmarking as of yet. Benchmarking has also the potential to further develop at the sub-national level, as Victoria tends to be more advanced than other States for systematically collecting key performance information on their State regulators.

## General assessment of the challenges and opportunities for multi-level regulatory governance

The reforms invigorated by the current Commonwealth government ensure it is very well placed to tackle some of the core regulatory challenges faced by the Australian Federation. These reforms build on a track record of successful regulatory reform across successive administrations. An initial wave of reform, launched in the 1980s, opened up the Australian market to international exposure. In the early 1990s, a second wave of reform, the National Competition Policy, enhanced competition and the development of a national market.

The most recent wave of reform had its genesis in December 2007, when all Australian governments, through the Council of Australian Governments (COAG), agreed to a new model of co-operation underpinned by more effective working arrangements between the Commonwealth and the States. COAG agreed seven priority areas for its 2008 work agenda. Importantly, these priorities included business regulation and competition and the establishment of the COAG Business Regulation and Competition Working Group (BRCWG). During 2008, the BRCWG developed an agenda focussed on delivering a seamless national economy, culminating in COAG agreeing in November 2008 to a AUD 550 million National Partnership Agreement to deliver a Seamless National Economy, funded by the Commonwealth. This is an ambitious programme aimed at enhancing regulatory quality and embedding strong regulatory management in institutional arrangements and decision-making processes across levels of government. It is designed to reverse the declining productivity trend and increase workforce participation.

This represents a very promising venture, which deserves praise and has been well received by the private sector and commentators. Australia stands out among OECD member countries for innovative and cutting edge initiatives aimed at facilitating regulatory reform across levels of government. Established co-ordination arrangements are in place to facilitate multi-level intergovernmental dialogue and co-operation. A new framework guiding federal financial relations provides an opportunity to enhance the effectiveness of financial transfers by allowing more responsibility to States to deliver

services, while promoting a culture of accountability and transparency through regular monitoring of performance. Payment arrangements facilitate the commencement of reform activity by the States and are astutely designed to provide maximum incentives for implementation. The delegation of responsibilities, including oversight of reform progress and receipt of National Partnership payments, to core ministries, including the State treasuries, also represents a powerful policy lever.

A comprehensive reform package has been put in place to facilitate the active participation of all jurisdictions. This led to formulating a charter for reform that is transparent and allows for planning and sequencing of reform activities. Moreover, a process has been set up to strengthen regulatory quality at the sub-national level, with the States showing greater convergence on policies, institutions and tools to improve regulatory management. Recent progress has been in part driven by a commitment to a rigorous benchmarking process that has helped identify challenges and opportunities for improvement.

Australia's ambitious reform process also presents challenges. Any reform conducted in a multi-level regulatory governance context is complex, and can be affected by Commonwealth-State relations, reform strategies as well as regulatory management at state level. However, tools and strategies exist to overcome most of these challenges. Many of these have already been put to use in the current Australian reform effort, which bodes well for its future success and potential achievements.

Some of these strategies may also have implications that would need to be addressed in the longer term. For example, institutional arrangements that have been put in place to advance reform in the short term may overlap and duplicate existing structures, potentially adding some costs to the reform process. A shift in the financial relationship between the Commonwealth, on one side, and the States, on the other side, may require a change in the way of doing business and enhanced capacities on both sides. Benchmarking of business reporting also draws attention to areas of reform that might need greater attention, such as the availability of online services at the level of State regulators. As additional areas of reform are included and further efforts are required to strengthen national markets, commitment from all jurisdictions to advancing reform becomes essential. Thus maintaining commitment and momentum for reform becomes the key for obtaining success in the long term, as outlined below in the policy recommendations. This is key to ensuring that jurisdictions maintain their interest and direct the necessary human and financial resources to advance reform.

The COAG national reform agenda builds on previous microeconomic reform programmes that have strengthened the resilience of the Australian economy. However, the long-term goal of the Commonwealth government is to break out of a cycle of periodic reform programmes and to embed a commitment to good regulatory management in the culture of the public administration. Despite the clear strengths of the COAG reform programme, pragmatically it will be difficult to maintain the sharpness of the incentives and political leadership that has driven these reforms, particularly after the last incentive payments are made in 2013. Forecast future fiscal constraints, as outlined in the Commonwealth Government's *Intergenerational Report*, may reduce the capacity to the Commonwealth Government to fund reform in the States and political attention will also be drawn away to more immediate demands. The challenge for Australia is not so much in a refinement of tools for regulatory management, which are well developed by OECD

standards, but to promote continuous improvements in regulatory design and in embedding a commitment in the culture of State and Federal administrations to develop regulation that is efficient, effective and in the national interest.

### *Commonwealth-State relations*

A common potential obstacle to reform in multi-level governance systems is the lack of effective levers of reform. For example, unbalanced fiscal relationships can reduce innovation and flexibility at the sub-national level and jurisdictions might lack incentives to initiate reform. In addition to financial incentives, important drivers appears to be institutional and co-ordination arrangements across levels of government to channel demand for reform and facilitate coalition building and the presence of champions of reform. To facilitate ongoing reform, it is important to ensure there are appropriate governance arrangements with sufficient authority to most effectively regulate or implement policies and programmes.

Australia stands out among OECD member countries in adopting innovative institutional approaches which appear promising and go beyond similar mechanisms in other countries. A key reform lever has been the establishment of COAG as a permanent forum for policy dialogue and co-ordination across levels of government. COAG has been and continues to be instrumental in lowering barriers to reform created by the multiplicity of jurisdictions, capturing innovations from different jurisdictions and providing a forum for the Commonwealth and the States to champion reform. It has been a platform for the redesign of pre-existing co-ordination arrangements, the Ministerial Councils, to facilitate dialogue and co-ordination and improve the effectiveness and efficiency of decision making.

At the end of 2007, to drive reform, COAG introduced new working arrangements centred on working groups that were instrumental in advancing COAG's reform agenda, particularly in relation to regulation reform. These innovative institutional arrangements have benefited from a clear agenda, strong leadership, in-depth technical knowledge and strong administrative support. These important elements should be taken into consideration as COAG continues fine-tuning co-ordination arrangements to implement further national reforms.

In November 2008 COAG reaffirmed its commitment to new co-operative working arrangements through a new Inter-governmental Agreement for an overarching framework for the Commonwealth's financial relations with the States. The IGA is aimed at improving the quality and effectiveness of government services by reducing Commonwealth prescriptions on service delivery by the States, providing them with increased flexibility in the way they deliver services to the Australian people as well as providing a clearer specification of roles and responsibilities of each level of government and an improved focus on accountability for better outcomes and service delivery. The new framework also provides tangible incentives to commit to reform and strengthen jurisdictions' ownership of implementation, through a system of project, facilitation and reward payments to help drive reform. It has also centralised the management of payments in treasuries both at the Commonwealth and State level, which represent powerful core agents of reform. Greater autonomy for the States, combined with an outcomes focussed performance reporting framework, is intended to produce not only greater accountability of the States to citizens, but also more effective implementation drawing on the better knowledge of local needs and implementation challenges that States have.

The reforms also feature a significant rationalisation of the number of payments to the States for Specific Purpose Payments, while increasing the overall quantum of funding. The new framework also includes a number of National Partnership payments to fund specific projects and to facilitate and reward States that deliver on nationally significant reforms based on National Partnership Agreements entered into by the Commonwealth and the States.

### *Reform strategies*

Identifying a reform strategy is necessary to facilitate reform across levels of government and address the challenges of implementation. Sub-jurisdictions have different levels of interest and political commitment which can create delays in implementing national reform. Resistance to reform can be expected from stakeholders that stand to lose from reform. At the sub-national level entrenched interests may be stronger within the local socio-political environment. This is also an issue if jurisdictions expect uniform schemes to increase the cost of regulation. In a multi-level governance context, reforms are likely to be interdependent. Sequencing and pacing reform according to the jurisdictions' capacity, resources and commitment is important to facilitate implementation. The actions of one jurisdiction affect other jurisdictions. If a jurisdiction fails to take necessary actions, overall reform can be undermined.

Australia has taken action to address these challenges by launching a comprehensive path to reform. Developed in consultation with the States the reform agenda provides jurisdictions the opportunity to participate in national reform and further their own reform priorities. Identifying a reform package that attracts support from all jurisdictions builds on the strong involvement of government stakeholders that are able to facilitate implementation. A key step in the comprehensive reform package to create a Seamless National Economy has been the establishment of a Business Regulation and Competition Working Group (BRCWG). The BRCWG has brought together political commitment and technical knowledge, thus fostering upfront involvement of those agencies that are essential to facilitate implementation. With central agency membership, it appears to have been particularly effective.

### *Regulatory management at state level*

State jurisdictions are often responsible for developing regulation and implementing policies and programmes. Effective implementation requires the adoption of best practice regulatory management arrangements within jurisdictions to underpin regulatory quality across the nation.

Australia stands out among OECD member countries for the consistent efforts of its States and Territories at embedding good practice regulatory management into decision-making processes. These efforts have been advanced by the commitment undertaken within COAG to strengthen regulatory management at the State level. Best practice regulation making standards also apply to Ministerial Councils, which under the COAG reform agenda are required to take decisions that translate into laws and regulations more rapidly. The Office of Best Practice Regulation, part of the Commonwealth Department of Finance and Deregulation, is responsible for monitoring compliance with COAG RIA requirements, and has found that compliance by some Ministerial Councils with this requirement is inconsistent.

Benchmarking business regulation by the independent Productivity Commission has facilitated comparisons across jurisdictions, and triggered healthy competition for better performance and accelerated the pace of reform. It has also drawn attention to areas of reform where more concerted action and greater focus could be beneficial. Benchmarking is most effective when conducted regularly and systematically. Also, benchmarking has not yet taken hold at the sub-national level, except in one State.

## Policy options for consideration

The following policy options are intended to assist Australia to strengthen regulatory reform across levels of government and address some of the challenges identified in this review.

- ***Ensure national institutional arrangements can support ongoing regulatory reform***

Australia is taking advantage of uniquely designed institutions and processes to address its multi-level challenges. The structure of COAG, including through the use of working groups and well structured secretariats, provides a unique opportunity which needs to be maintained and consolidated. The working groups that were established in December 2007 have been instrumental in advancing the COAG reform agenda, and particularly the BRCWG, which builds on the strength of its constituency. Identifying champions of reform within State and Territory Governments could also reinforce current reform efforts, and could help strengthen leadership within Ministerial Councils.

COAG could continue to use the BRCWG to drive implementation of reform and to identify and promote new areas of reform, or alternatively it could establish another body for this purpose. In either case, there is a need to ensure that there is an ongoing process for identifying and referring new areas of regulatory policy suitable for national reform according to an evaluation of the potential economic benefits. This could continue to reflect advice from the Productivity Commission.

Under the new federal financial relations framework, COAG requested the COAG Reform Council monitor and report to COAG on the aggregate pace of activity in progressing COAG's agreed reform agenda. At its March 2008 meeting, COAG agreed that, to assist the COAG Reform Council in its role of helping to enhance accountability and promote reform, and monitoring the progress of COAG's reform agenda, the Commission would report to COAG on the economic impacts and benefits of COAG's agreed reform agenda every two to three years.

Now that the reform efforts are underway, further tasks and assignments could be scoped for the relevant body to develop an ongoing agenda. While these need to be identified in joint co-operation between the Commonwealth and the States, a possibility could be to address some policy areas of the National Competition Policy that have yet to be completed, as underlined in the chapter on competition policy. These areas include for example the pharmacy and the taxi industries. They could also include the development of a timetable for a second round review of existing legislation against the NCP guiding legislative principle. The current reform momentum could provide a window of opportunity for advancing these reform areas.

- ***Maintain momentum for reform by establishing formal arrangements for ongoing consultation with business in relation to current and proposed regulatory reforms***

While the current reform agenda is well advanced, one of the challenges is the potential loss of momentum for reform in the future. The lessons of the NCP legislative

reforms were that financial incentives were not sufficient at that time to maintain momentum and prevent backsliding by jurisdictions without the commitment of key stakeholders. This can be prevented through a proactive strategy on several fronts.

The first is to maintain political commitment for reform, both at the Commonwealth and at State level. This is consistent with core OECD knowledge and principles for regulatory policy. Such an inter-jurisdictional initiative in a multi-level context needs to be sustained as it has the potential to deliver clear results and political wins. Maintaining national institutional arrangements to promote reform is important to this. Ongoing political commitment can also be enhanced by providing for more regular and structured interaction with the private sector and the national business community.

To facilitate regular communication with stakeholders on inter-jurisdictional regulatory reform, the BRCWG report card should be continued as it is a useful communication tool to stakeholders on progress being made by the Commonwealth and the States in implementing agreed actions under the National Partnership agreement.

The BRCWG, or a similar national entity, could also consider more formal and regular interaction with key business stakeholders to gauge their views and support for the current reform agenda and for other reforms of most concern to business.

- ***Strengthen regulatory management mechanisms at State level through ongoing benchmarking and co-operation***

Australian States have already made significant progress and are engaged in substantial reform efforts. Existing benchmarking programmes, including that currently being undertaken by the Productivity Commission, in response to a request by COAG, are useful. Continual benchmarking of business regulation could help deliver the benefits of innovation across jurisdictions and assess progress in addressing challenges. This could be institutionalised with a fixed timetable providing jurisdictions with clear timelines for action. This could, for example, facilitate an increased diffusion of online services for licence applications, which tend to currently lag behind in a number of jurisdictions. Institutionalising benchmarking could help improve data production and analysis at the level of each jurisdiction. Developing criteria to compare the arrangements in place within States can assist in determining which features of reform models are best suited to the States' public management arrangements and identify future reform priorities and further beneficial reforms to improve regulatory quality. Data production and analysis could in turn help identify implementation challenges at the State level and spearhead action.

A key strength of the COAG reform agenda and the new federal financial relations is its focus on outputs and outcomes and its aim to profit from the competitive dynamic of jurisdictions experimenting with alternative approaches. It will be important that performance monitoring and reporting by the COAG Reform Council – including learning from best practice – is translated into ongoing improvements in these outcomes.

Besides benchmarking, the sharing of information can also help to foster good regulatory practice. The example of other countries shows that using common fora for sharing best practice at state level can also facilitate more consistent programme implementation and contribute to strengthened capacity. For example, the disciplined application of a policy of cost recovery in setting regulatory charges can assist in facilitating national reform by minimising the impact on jurisdictions and licence holders when functions are transferred to other jurisdictions. A review of the application of cost recovery principles by regulators and sharing the approach for consistent cost recovery

guidelines could improve administrative efficiency and facilitate future reform initiatives. The COAG Reform Council's monitoring reports may be able to highlight examples of best practice.

Sharing common approaches to RIA at a local level is also likely to yield benefit. States have consistently moved to take into consideration the national impact of regulation when conducting RIA for local regulation. This is a bottom-up approach to building a seamless national economy that should be encouraged and enhanced. Moreover, to raise awareness of cross-jurisdictional issues, Commonwealth and State agencies responsible for regulation policy could bring together regulators and staff from different jurisdictions for joint training sessions on impact analysis of national regulatory issues.

To remain aware of developing systemic problems in areas of national responsibility, the creation of networks of regulators will be increasingly necessary to share regulatory knowledge across jurisdictions and across regulatory fields within jurisdictions. The ANZSOG model of networked intergovernmental learning and research may provide a model for enhancement and emulation in this regard.

- ***Strengthen the compliance and transparency of impact assessment of decisions taken by Ministerial Councils***

Australia has a well developed framework for assessing the costs and benefits of regulatory proposals by Ministerial Councils. However, oversight of this framework by the OBPR suggests that compliance and transparency by Ministerial Councils has been inconsistent. To improve performance and support robust policy development, OBPR should inform Ministerial Councils where a RIS is inadequate or a proposed decision would be non-compliant with the RIS requirements and explain why this is the case. There would also be benefit in clarifying the requirement that COAG RIS be made public, with a requirement that where the OBPR assesses the RIS as inadequate that this assessment and reasons for its inadequacy be published with the RIS.

### *Notes*

1. The Australian federal government is also referred to as the Commonwealth Government of Australia. In this paper the term federal regulation is used interchangeably with Commonwealth regulation.
2. This chapter is a synthesis of a longer background paper multi-level regulatory governance which was peer reviewed by the Working Party on Regulatory Management and Reform in Paris on 22 September 2009. The background paper was drafted by Gregory Bounds, Policy Analyst, OECD Regulatory Policy Division, and Filippo Cavassini, Master's Candidate, Harvard Kennedy School of Government. It is available at *www.oecd.org/regreform*.
3. Originally agreed to in 2006.
4. See COAG Communiqué December 2007.
5. See COAG Communiqué October 2008.
6. The way that the revenue is distributed is not based on where it was collected, but according to a formula determined by the Commonwealth Grants Commission which is intended to produce "horizontal fiscal equity" across all jurisdictions.
7. COAG Communiqué 29 November 2008
8. The funding agreement operates over five years and covers:
   - AUD 60.5 billion in a National Healthcare SPP;
   - AUD 18 billion in a National Schools SPP;
   - AUD 6.7 billion in a National Skills and Workforce Development SPP;

- AUD 5.3 billion in a National Disability Services SPP; and
- AUD 6.2 billion in a National Affordable Housing SPP.

9. With the exception of the schools SPP which is to be distributed according to full-time student enrolments in government schools.
10. IGA Schedule E, paragraph 22.
11. In February 2006, COAG agreed to address six priority cross-jurisdictional "hot spot" areas where overlapping and inconsistent regulatory regimes are impeding economic activity: rail safety regulation; occupational health and safety; national trade measurement; chemicals and plastics; development assessment arrangements; and building regulation. COAG Communiqué 10 February 2006.
12. Towards a Seamless National Economy Progress Report Card July 2008-July 2009 *www.finance.gov.au/deregulation/docs/2009_annual_report_card_July.pdf*.
13. Such provision exists for Commonwealth legislation that does not comply with Commonwealth best practice regulation requirements; see OBPR (2008), p. ix.
14. Such provision is clearly stated in the RIS guidelines of the Australian Capital Territory, New South Wales and Victoria; see Department of Treasury (2003), p. 18; Better Regulation Office (2008), p. 24; Department of Treasury and Finance (2007), pp. 4-9.

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PART III

# Competition and Market Openness

OECD Reviews of Regulatory Reform: Australia 2010
Towards a Seamless National Economy
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*Chapter 4*

# Competition Policy

*This chapter is a summary of the background report Competition law and policy in Australia available at* www.oecd.org/regreform. *It describes competition policy and law enforcement. It explains the integrated National Competition Policy reforms of the 1990 and the strengthening and modernisation of competition law and enforcement that accompanied it. The basic elements of the main competition law, the Trade Practices Act, are explained, and recent amendments about cartel enforcement and predatory pricing are analysed. It also describes sector-specific competition issues and special regimes, some of them based on laws of States and Territories.*

## Foundations

The progress of reform in Australia has tracked the evolution of the economy. Once protected, it is now comparatively liberal. For most of the 20th century, competition policy in Australia was weak. Stable domestic cartels kept inefficient firms healthy enough to support generous labour conditions. By the 1980s, though, deteriorating economic performance showed that this policy approach would no longer support prosperity. To reverse the decline in Australia's economic standing, Australia embarked on a wide-ranging programme of fundamental reforms, beginning with financial markets and international trade and investment. Substantial productivity gains since the mid-1990s have been due to a range of pro-competitive reforms, including ones that have made infrastructure services such as telecoms, energy and transport more efficient.

The major competition reform programme of the 1990s was achieved by a complex re-articulation of the commonwealth-state relationship. A committee chaired by Professor Fred Hilmer recommended substantial reforms to the competition policy framework. In February 1994 the Council of Australian Governments ("COAG") agreed to the principles of competition policy articulated in the Hilmer Report, and in April 1995, all Australian governments reached agreement on a National Competition Policy. Implementation of the National Competition Policy rested on the political agreement of all Australian governments, because under Australia's federal constitutional structure, the Commonwealth is limited in the extent to which it can legislate in areas reserved constitutionally for the States and Territories.

Three intergovernmental agreements underpin the National Competition Policy. The Conduct Code Agreement and Competition Principles Agreement led to creating a uniform national Competition Code, incorporating the substantive principles of the TPA and applicable to all businesses, including government business. The Implementation Agreement provided for payments from the Commonwealth to the States and Territories for satisfactory progress in implementing their reform commitments. The payments were a recognition that all of the governments should share the benefits of stronger economic growth and thus higher tax revenue resulting from the reform programme to which they contributed. The Implementation Agreement set conditions for the payments, the fulfilment of which were monitored by the newly established National Competition Council.

The structural changes brought about by the National Competition Policy reforms have not been free from controversy. Commonwealth decisions to withhold payments have been a particular source of intergovernmental tension. There has also been public criticism of the social consequences of the reform agenda, particularly in relation to the effects on rural and regional areas. This led to Parliamentary inquiries in the late 1990s, as well as a reference to the Productivity Commission in 1998 to report on the impact of competition policy on rural and regional Australia. While each of these inquiries affirmed widespread support for the beneficial effects of National Competition Policy, they also recognised concerns about the nature and rate of change and for the need to ensure that the reform agenda was properly communicated.

### Box 4.1. **Competition Reforms under the National Competition Policy Programme**

**General reforms**

- Extension of the anti-competitive conduct provisions in the Trade Practices Act (1974) to unincorporated enterprises and government businesses.
- Reforms to public monopolies and other government businesses:
  - structural reforms – separating regulatory from commercial functions, reviewing the merits of separating natural monopoly from potentially contestable service elements and separating contestable elements into smaller independent businesses; and
  - competitive neutrality – corporatised governance structures for significant government enterprises, similar commercial and regulatory obligations to those faced by competing private businesses (such as liability for taxes or tax equivalent payments, dividends and rate of return requirements) and independent mechanisms for handling complaints.
- Independent authorities to set, administer or oversee prices for monopoly service providers.
- Third-party access to essential infrastructure services with natural monopoly characteristics, on reasonable terms and conditions, under a general national regulatory regime.
- Review of legislation to assess whether regulatory restrictions on competition are in the public interest and, if not, what changes are required. Legislation reviewed has dealt with professions and occupations, statutory marketing of agricultural products, fishing and forestry, retail trading, transport, communications, insurance and superannuation, child care, gambling and planning and development services.

**Sector-specific reforms**

- Electricity: Structural, governance, regulatory and pricing reforms to introduce greater competition into electricity generation and retailing and to establish a National Electricity Market in the eastern states.
- Gas: A similar suite of reforms to facilitate more competitive supply arrangements and to promote greater competition at the retail level.
- Road transport: Implementation of heavy vehicle charges and a uniform approach to regulating heavy vehicles to improve efficiency, enhance safety and reduce transactions costs.
- Water: Institutional, pricing and investment reforms to achieve a more efficient and sustainable water sector, and implementation of arrangements that allow for the permanent trading of water allocations.

*Source:* Productivity Commission (2005a), p. XV.

The National Reform Agenda succeeded the National Competition Policy. This process, launched in 2006, is also based on agreement among governments, selecting priority areas for reform. Three streams of this programme are human capital, competition and regulatory reform. A COAG Reform Council reports to COAG annually on progress in implementing the National Reform Agenda, playing a role similar to that of the National Competition Council in the National Competition Policy reforms. The National Reform Agenda programme involves a system of payments, to recognise costs and revenue forgone by the states and to reward them for reaching reform milestones.

Modernising competition law and enforcement to create an integrated, national system was a key element of the National Competition Policy. The first national legislation

to regulate anti-competitive conduct dated from 1906. The current law, the Trade Practices Act (TPA), came into force on 1 October 1974, replacing legislation that had been adopted in 1965. Legislative change in the 1970s was prompted by accelerating inflation, increasing consciousness of consumer welfare and growing recognition that competition, rather than protectionism, was more likely to promote economic growth and efficiency. The TPA adopted the American system of general prohibitions supported by penalties enforceable by courts of law, and it introduced a system for authorising arrangements on the grounds that their public benefits outweigh anti-competitive effects.

Since its enactment the TPA has regularly been the subject of review or inquiry. The Hilmer Committee report in August 1993 recommended creating the ACCC to enforce the law and widening the TPA's scope of application. The 2003 report by the Dawson Committee supported continuing the broad, uniform application of competition law and recommended improvements in merger review, a notification procedure for collective bargaining by small business, stronger penalties and measures to make the ACCC more accountable. Most of the Dawson Committee recommendations were accepted by government. Key recent changes include formal merger clearance procedures and amendments to the abuse of dominance prohibition. The Dawson Committee also recommended "the introduction of criminal sanctions for serious, or hard-core, cartel behaviour". Legislation establishing cartel offences commenced on 24 July 2009.

The TPA deals with competition, fair trading and consumer protection. Australia takes an integrated approach to the relationship between competition and consumer policies, recognising their mutually reinforcing roles. The object of the TPA is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection". It is concerned with protection of the process of competition. The distinction between promoting competition and protecting competitors – small business competitors particularly – has been an ongoing and divisive theme in debates about the TPA's prohibition of abuse of dominance.

Competition is recognised as a means to an end, the enhancement of welfare. Decisions applying the TPA have treated welfare in this context principally in economic terms. The Australian Competition Tribunal favours the "total welfare" standard, which recognises both producer and consumer welfare, but observes that benefits to producers should weigh less than benefits to end-consumers. In Australian practice, competition and efficiencies are treated as separate concepts. Separation results from the structure of the TPA and the different roles of the courts and of the administrative bodies. In assessing contraventions of the core prohibitions, the courts are charged with determining the competitive effects of conduct, and questions of efficiencies are not considered. In assessing applications for authorisation, the ACCC and Australian Competition Tribunal are entrusted with the economically more complex and resource-intensive task of weighing efficiencies against effects on competition.

## Substantive issues: Content of the competition law

The TPA covers all of the familiar areas of competition law: restrictive agreements, abuse of dominance and mergers. The prohibitions employ a combination of a substantial lessening of competition (rule of reason) tests and strict liability or *per se* tests, with exemptions and defences to balance policy interests. There is a considerable body of case

law in which the provisions have been interpreted and applied; however, after recent amendments there may be some uncertainty about certain areas.

The TPA, as a federal act, must be linked to heads of power in the Commonwealth Constitution, in this case the corporations' power. The TPA prohibits anti-competitive conduct by corporations, in Part IV. Each State and Territory government has enacted a schedule version of Part IV, identical to Part IV except that it applies to persons and unincorporated entities. The collection of substantively identical laws is generally referred to as the Competition Code. To apply the same law throughout Australia in each of its jurisdictions, the States and Territories agreed that the ACCC, the Australian Competition Tribunal and the Federal Court would be given powers to enforce the Competition Code.

Application of competition provisions of the TPA takes two forms: prohibitions enforced in court, with significant penalties and remedies for breach, and administrative authorisation and notification to obtain exemption or immunity from the prohibitions on the grounds of public benefit. For matters other than mergers, authorisation is granted by the ACCC, with review on the merits by the Australian Competition Tribunal. "Public benefit" is construed broadly, but primacy is given to the achievement of economic goals of efficiency and progress. Other public benefits that have been recognised include environmental benefits, improved public safety, promotion of industrial harmony and expansion of employment opportunities.

Separate Parts of the TPA deal with regulation of access to declared essential facilities, telecommunications and liner shipping, unfair trading and consumer protection. The government and the ACCC repeatedly emphasise the integrated and mutually reinforcing nature of competition and consumer policy. Integration is reflected in the approach taken to enforcement. Except for access regulation, the Commission does not separate the staff working on enforcement in competition and consumer matters and does not distinguish between the two areas in statements on enforcement policy. Combining competition, access regime, regulation, fair trading and consumer functions at the ACCC enables enforcement to be flexible, varying according to the economic, social and market situations.

### *Horizontal agreements*

Section 45 is the TPA's general prohibition on restrictive agreements. Contracts, arrangements or understandings among competitors are prohibited if they contain a price fixing provision or an "exclusionary provision", or if they have the purpose, effect or likely effect of substantially lessening competition in a market within Australia. The prohibition of exclusionary provisions was aimed at primary boycotts, in which competitors conspire to exclude another competitor.

Extensive amendments in 2009 add new cartel offences and a new set of parallel civil *per se* prohibitions. It is now an offence or a civil violation to make a contract, arrangement or understanding that contains a cartel provision – that is, price fixing, output restriction, market allocation or bid rigging – or to give effect to a cartel provision. The offences differ from the civil prohibitions in requiring proof beyond reasonable doubt and proof of mental (fault) elements associated with criminal law. The general provisions of Section 45 about restrictive agreements remain, except for its *per se* prohibition.

The scheme of prohibitions in relation to cartel conduct appears complex and duplicative. The existing prohibition on "exclusionary provisions" overlaps substantially with the new output restriction and market allocation prohibitions. The new prohibitions

are wide ranging in scope and so may catch legitimate or pro-competitive or efficiency-enhancing activity. To some extent this risk is offset by provision for exceptions and defences. Nevertheless, as a result of the breadth of the new prohibitions, the *ex ante* protection of the authorisation procedure may be sought to a greater extent than has previously been the case.

A range of exceptions, exemptions and defences can apply to horizontal agreements that otherwise would be subject to the offences and prohibitions. These deal with overlaps, joint ventures, collective bargaining and acquisitions. Notification is available only for collective bargaining contracts that do not exceed a threshold of duration and value. Overlap between prohibitions is reduced by assigning some conduct to specific sections of the TPA rather than the general prohibition of Section 45. Some potential ambiguities remain, however.

The joint venture exception covers a cartel provision that is for the purposes of a joint venture for the production or supply of goods or services. This arguably would expose joint buying, marketing and research and development collaborations to criminal liability. Some concern had been expressed that prospective joint venture parties would need to put their preliminary negotiations into contractual form or even seek prior authorisation simply to negotiate. These concerns were substantially addressed by amendments and explanations during the final Parliamentary consideration of the legislation. Joint venture parties may be able to rely on other exceptions, too.

Policy and enforcement outcomes will depend on the exercise of discretion by enforcement agencies, the ACCC and the Commonwealth Director of Public Prosecutions (DPP). The agencies have a Memorandum of Understanding, under which the Commission is responsible for investigating cartel conduct and gathering evidence, managing the immunity process in consultation with the DPP, and referral of serious cartel conduct to the DPP for consideration for prosecution, while the DPP is responsible for prosecuting the cartel offences in accordance with the DPP's *Prosecution Policy of the Commonwealth* and seeking remedies, including under "proceeds of crime" legislation. The general Commonwealth Government policy of bifurcated enforcement reflects the value attributed to independence of prosecution from investigation and from the political process as well as consistency in prosecutorial decision-making across all federal offences. The effectiveness of the bifurcated system will depend on shared philosophy and priorities and good communication between the two agencies.

Australian attitudes about co-operation between competitors have changed dramatically since the tolerant approach of the 1950s. The shift to a punitive attitude toward hard-core cartels is probably best traced to the mid to late 1990s when the ACCC secured victories and penalties against cartels in the express freight, fire protection, concrete, and electrical transformer industries. Some, such as the animal vitamins cartel, related to the Australian operations of international cartels. As early as 1994, the Trade Practices Commission, the predecessor of the ACCC, called for criminal sanctions for cartels.

At least since the mid-1990s, cartels have been a high priority in the agency's enforcement agenda. In 2005 the ACCC substantially amended its Immunity Policy for Cartel Conduct to align it with international best practice. Since then, the Immunity Policy has been credited with a substantial increase in cartel detection rates. The most significant case to date involved a price fixing and market sharing cartel between Australia's two largest cardboard manufacturing companies, Visy Ltd and Amcor Ltd. Amcor secured

immunity, while Visy settled the case based on admissions of liability and agreement to submit to record-level penalties. The corporate penalty of AUD 36 million was more than double the previous record penalty levied in Australia and the individual penalties were equally unprecedented.

The ACCC has sought changes to the law to facilitate enforcement against collusive practices where the communication between competitors is tacit and it is difficult to prove that the parties have committed to parallel action. The call for amendment was made in a 2007 general inquiry by the ACCC into petrol pricing, following a narrow judicial interpretation of "understanding" that resulted in findings of no liability. The government released a discussion paper in early 2009 on this subject and it is now reviewing the submissions about it.

### *Vertical agreements*

The TPA also contains prohibitions relating to vertical restraints. Restraints that are not related to price are all called "exclusive dealing" in Australia. Most exclusive dealing practices only breach the general prohibition, in Section 47, if they have the purpose or effect of substantially lessening competition. This is most likely if there is insufficient interbrand competition because of market power at the level of the supplier or buyer.

There is no competition test involved, though, for practices involving third line forcing. Requiring that the purchaser acquire goods or services from a third party is illegal *per se*. The Hilmer and Dawson Reviews called for reinstating a competition test, pointing out that there are instances in which third line forcing may be beneficial and pro-competitive; however, the Act has not yet been amended.

Section 48 prohibits minimum resale price maintenance regardless of its effect on competition. A price may be "recommended", but only genuine non-obligatory recommendations will escape Section 48. There is also a loss-leader defence, which has been little used. This prohibition was inserted in 1971 in response to concerns about rising inflation and has had bipartisan political support. The economic case for relaxing the prohibition is not strong, given the concentrated structure of Australian industry, in which resale price maintenance could more easily be used to support horizontal co-ordination.

All forms of exclusive dealing may be authorised if they confer sufficient public benefits to outweigh the anti-competitive effects. The streamlined "notification" procedure is available. Nearly all notifications involving exclusive dealing are about third line forcing, for which only the public benefit element is relevant. The ACCC receives hundreds of these every year and opposes only a few. There is yet to be an application for authorisation for resale price maintenance.

### *Abuse of dominance (misuse of market power)*

In Australian practice, abuse of dominance is described as "misuse of market power", which is prohibited by Section 46 of the TPA. A corporation with a substantial degree of market power may not take advantage of that power for specified purposes, such as substantially damaging or eliminating a competitor or competitors or preventing or deterring competitive conduct. It is not possible to avoid the prohibition through the authorisation or notification process.

The scope and application of Section 46 has been the subject of significant controversy. In its original form, it was headed "monopolisation" and dealt, in effect, with

monopoly power. In 1986, the threshold was lowered, to a "substantial degree" of power in a market, and the heading was changed to "misuse of market power". Proposals to make enforcement easier by incorporating an "effects" test, to replace the "purpose" element, have been considered on at least 10 occasions but virtually always rejected. The real challenges associated with proving a breach are establishing the requisite degree of power and that the respondent had taken advantage of it.

A Parliamentary inquiry into TPA protection of small business made several recommendations in 2004. Most of these have now been implemented. Amendments in 2007 made it clear that more than one corporation may have substantial power, that market power does not mean absolute freedom from constraint, that a corporation with substantial power in one market may not engage in conduct in another market for a proscribed purpose and that power may arise from contracts or arrangements.

Another amendment dealt with the critical element of "taking advantage" of power. The possession of substantial power is not prohibited *per se*; rather, the law is concerned about the use of that power for an illegitimate purpose. The test of "use" is not a moral judgment, but a causal connection between the power and the conduct. An amendment in 2008 codified aspects of this connection, such as whether the firm would have acted in the same way in a competitive market or whether its conduct was materially facilitated by the firm's power.

Two recent amendments add uncertainty to the law applied to predatory pricing. At the behest of Parliamentary advocates for the small business sector, the former government introduced a new provision that prohibits sales below cost, for a sustained period for an impugned purpose. The prohibition in this "Birdsville amendment", so-called after the remote pub in which it was supposedly penned, is based on market share rather than market power, and it does not require showing a connection between market share or power and the offending conduct. The intended relationship between the Birdsville amendment and the general prohibition of misuse of market power is not clear. Another recent amendment aggravates the uncertainty, by denying that a predatory pricing violation should depend on the alleged predator's ability to recoup its losses from supplying below cost. The true extent of the amendments will be tested if a firm is found liable for below cost pricing in circumstances where it is unlikely that the firm would be found to have substantial market power and there is little prospect of recoupment. The ACCC is ready to take action if an appropriate case arises, and private litigation is also possible.

Remedies for breach of Section 46 typically include declaratory and injunctive orders and financial penalties. A remedy of divestiture has been considered in the past, but it has not been accepted. Problems of access to or abuse by a network monopoly or infrastructure provider are addressed by a separate section of the TPA, which prescribes a regulatory system for defining and regulating an "access regime", described below.

### *Mergers*

Mergers or acquisitions that would have the effect, or likely effect of substantially lessening competition in a substantial market in Australia or in a State or Territory or region are prohibited by Section 50. Factors taken into account include import competition, barriers to entry, concentration, countervailing power, likelihood of higher prices or margins, extent of likely substitutes, dynamic characteristics of the market such as growth,

innovation and product differentiation, risk of loss of a vigorous and effective competitor and vertical integration.

This list of factors does not include efficiencies. The ACCC does recognise the relevance of efficiency effects in examining a merger proposal. Where a merger is likely to achieve significant efficiencies but the efficiencies do not prevent a substantial lessening of competition, the merger may only proceed if authorised by the Australian Competition Tribunal. It applies a net public benefits test, and efficiencies are given primacy in assessing claimed public benefits. Other public benefits could include a significant increase in the real value of exports or a significant substitution of domestic product for imported goods. The Tribunal is required to take account of matters that relate to the international competitiveness of Australian industry.

The ACCC has detailed guidelines about how it applies the "substantial lessening of competition" test. The most recent version of the Merger Guidelines was published in November 2008. A lessening of competition is considered substantial if it confers an increase in market power on the merged firm that is significant and sustainable. The Commission considers and compares two possible future states; one with the merger and one without it. The commission then asks whether there is a real chance that the difference between them in competition terms will be substantial. The "without" position is not necessarily the status quo, but rather the expected position of the market in the foreseeable future (generally 1-2 years) without the acquisition. The Commission is likely to have competition concerns warranting investigation in the case of any merger generating a Hirschman-Herfindahl index (HHI) greater than 2000. After concentration, which is taken as a starting point for analysis, the most important merger factor is the height of barriers to entry. Entry is considered effective if it is likely to have a market impact within a 1 to 2 year period by deterring or defeating an attempted exercise of market power. The Commission will regard imports as likely to provide an effective and direct constraint where they have represented 10% of total sales in each of the previous three years.

There has been long-standing debate in Australia about whether Section 50 adequately deals with "creeping acquisitions", that is, a sequence of acquisitions which are individually unlikely to lessen competition substantially but which may have that effect when taken together. The most recent call for reform followed an ACCC inquiry into competition in the grocery industry. In June 2009 the government issued a discussion paper proposing options to address creeping acquisitions concerns, such as a new prohibition on an acquisition by a firm with substantial market power that would have the effect of enhancing its market power. Further comment has been solicited, about potential unintended consequences and about the costs and benefits of alternative ways to deal with the concerns.

The three avenues for merger review in Australia are informal clearance by the ACCC, formal clearance by the ACCC and authorisation from the Australian Competition Tribunal. Informal clearance is a non-statutory procedure in which the ACCC assesses the competitive effects of the merger proposal and either "clears" it, undertaking not to oppose the transaction, or refuses to clear it and thus leaves open the possibility of opposing it if the parties decide to proceed. The ACCC clears most of the mergers it reviews.

The second option, introduced from 2007, is to apply to the ACCC for a formal clearance, which would be binding on the ACCC and third parties and subject to statutory

deadlines. The third option is to seek authorisation directly from the Australian Competition Tribunal, which applies a "public benefit" test. No one has yet made an application for a formal clearance by the ACCC or for authorisation by the Tribunal. This is because the informal system is more flexible than formal clearance and affords greater scope for preserving confidentiality, and in addition, the ACCC made substantial improvements to the informal clearance process, responding to criticisms about timeliness and transparency.

Where a firm involved in a merger is in failing condition, the test that is applied is whether the future state of competition with the merger would be substantially less than the future state of competition without the merger in which the firm fails. The counterfactual may not always be that the firm fails and its assets exit. If parties sought authorisation from the Australian Competition Tribunal, it would apply a net public benefits test, having regard to broader stability concerns and other issues that the ACCC may not consider when applying the substantial lessening of competition test. But the authorisation process may take up to six months, too long for transactions where timing is often crucial.

There is no compulsory pre-notification requirement for mergers in Australia. Parties could proceed with a transaction without notification or indeed seeking any regulatory consideration. The ACCC could then investigate and take enforcement action, such as an injunction or divestiture order and pecuniary penalties. In its 2008 Merger Guidelines, the ACCC has advised that parties should bring transactions to the attention of the Commission if their products are substitutes or complements and the merged firm will have a post-merger market share over 20%. Except for minor acquisitions that clearly raise no competition issues, the usual practice is for parties to voluntarily notify the ACCC.

### *Unfair competition and consumer protection*

The long-standing policy in Australia has been to recognise competition, fair trading and consumer protection as inter-related and mutually reinforcing. Thus, the TPA also deals with fair trading and consumer protection. It prohibits unconscionable conduct in business transactions. It prohibits a business from contravening an applicable industry code of conduct; the four mandatory codes of conduct dealing with franchising, oil, horticulture and unit pricing. It prohibits misleading or deceptive conduct and some other practices. And it establishes several basic protections for consumers, including laws against pyramid selling, a range of implied warranties in consumer transactions and provisions dealing with product information and safety standards. There are equivalent statutory provisions in State and Territory fair trading and consumer legislation. In addition, Australia's consumer policy framework includes a range of industry-specific legislation administered by federal or state and territory fair trading agencies, as well as ombudsmen, co- and self-regulatory arrangements and consumer education initiatives.

A review in 2007-08 by the Australian Productivity Commission found weaknesses in the consumer policy framework, many traced to the multitude of bodies and jurisdictions involved. Based on the Productivity Commission's recommendations, in October 2008 all Australian governments agreed to a new consumer policy framework, comprising a new national consumer law – the Australian Consumer Law – based on relevant provisions of the TPA. Like the Competition Code, the Australian Consumer Law will be implemented by a scheme of State and Territory legislation that adopts the provisions of the TPA. Streamlined enforcement will be based on formal agreements among the enforcement agencies in each

jurisdiction. The national consumer law will also regulate unfair terms in consumer contracts, establish a new regime for product safety and strengthen enforcement powers and redress options. Legislation including the new unfair contract provisions and enhanced enforcement powers was introduced into Parliament on 24 June 2009, and the Australian Consumer Law is intended to be fully implemented by 1 January 2011.

## Institutional issues: Enforcement structure and practices

### *Competition law and policy institutions and enforcement*

The Treasury advises ministers on competition policy, including the TPA, economic regulation of infrastructure and broader product markets. The Competition and Consumer Policy Division is in the Markets Group, which is also responsible for corporate law, financial services regulation policy and foreign investment policy. The ACCC, the Productivity Commission, the National Competition Council and the Australian Competition Tribunal are Treasury portfolio agencies.

The Australian Competition and Consumer Commission is an independent, national statutory authority. The Minister for Competition Policy and Consumer Affairs cannot give the ACCC directions regarding its functions under the competition provisions of the Act. The ACCC's Chairperson and Commissioners are appointed for up to five years by the Governor-General. Appointments must be supported by a majority of the State and Territory governments. Commissioners are independent and do not report to the Chairperson. Decisions are by majority vote.

The ACCC has a wide range of roles and responsibilities. It enforces the competition provisions of the TPA and decides about clearances, notifications and authorisations, and it administers the Competition Code's associated State/Territory legislation. It has a role in the regime governing access to essential facilities. It handles sector issues in telecoms and ocean shipping. In fair trading and consumer protection, its application of the TPA complements the consumer protection role of State and Territory consumer affairs agencies. The ACCC also has responsibilities for oversight of prices.

In deciding about taking enforcement action, the ACCC takes account of the harmfulness of the conduct and the culpability of the businesses and individuals involved, as well as the likely educative or deterrent impact of enforcement action. It applies a "compliance pyramid", with education, information and liaison at the base, moving through voluntary compliance and self-regulation to enforceable undertakings to court proceedings at the tip. As a part of a move away from a complaints-driven enforcement model, the ACCC has a branch that performs research, intelligence and analytical tasks on information from external sources.

The ACCC also detects infringements through its co-operation and immunity policies. The general Co-operation Policy applies to civil contraventions. Under the Immunity Policy for Cartel Conduct, full amnesty from prosecution and penalty will be granted to the first eligible cartel participant to report its involvement and co-operate fully with the investigation and prosecution of other participants. Since its introduction in 2005, the ACCC credits the Immunity Policy with a substantial increase in its detection of cartel activity, exposing potential cases at the rate of about one a month.

The ACCC can issue statutory demands for information. Failure to comply is an offence. The Commission has recently brought several proceedings for non-compliance. The ACCC may also enter premises and search for and seize evidence, pursuant to a search

warrant issued by a magistrate. With the criminalisation of serious cartel conduct will come additional surveillance and telecommunications interceptions powers to apply in the investigation of such conduct.

The ACCC may accept formal administrative settlements or enforceable undertakings, but it must go to court to obtain penalties. Civil penalties against corporations may be up to AUD 10 million, three times the value of the illegal benefit or 10% of annual turnover. A civil penalty of up to AUD 500 000 can be imposed on an individual. The highest civil penalty imposed on a corporation for breach of the competition provisions to date is AUD 36 million, and on an individual, AUD 1.5 million. Penalties are yet to be imposed applying the maxima involving three times the gain or 10% of turnover. For the cartel offences, individuals face imprisonment for up to ten years and fines of AUD 220 000, while criminal fines for corporations mirror the penalties for the civil provisions. The maximum individual fine is less than half of the individual civil penalty, but it is consistent with the maximum fines for the TPA's criminal consumer offences.

The constitutional separation of judicial and administrative powers requires that only a court can determine whether a contravention has occurred and issue orders against offenders. For the TPA, the relevant court is the Federal Court of Australia. A fairly well-established pool of judges on the Federal Court have experience or expertise in competition law. There has been a concerted effort on the part of judges, practitioners and experts to develop innovative ways to make the most effective use of economic evidence. One of these, known as the "hot tub", was pioneered by the Trade Practices Tribunal (as it was then known). At the conclusion of all the evidence, all of the experts give their opinions and then their views about the opinions of the other experts. Other steps to make expert testimony more useful and effective include relaxation of the rule against experts giving evidence of the issues that are ultimately for the court to determine and providing for experts to give evidence by way of submission. The court may appoint its own expert, but this procedure has rarely been used.

The Australian Competition Tribunal can review determinations of the ACCC granting or revoking authorisations. For mergers, the Tribunal can review ACCC decision about formal clearances and can decide on applications for authorisation. The Tribunal also has powers to review or inquire concerning access matters, exclusive dealing and market power in ocean shipping. The President and Deputy Presidents of the Tribunal must be judges of the Federal Court of Australia. Tribunal proceedings have been like those of a court, in the level of formality and procedures and in observance of rules of evidence. The current President is examining ways to make proceedings less formal and to streamline procedures and reduce the volume of documents, the number of experts and the time taken in witness examination.

### *Other means of applying competition law – private actions*

The TPA provides private litigants with a right of action to recover damages. Private litigants may also seek injunctions, divestiture (in the case of mergers) and other orders such as a declaration that a contract is void or an order for specific performance. Some aspects of the law might help private plaintiffs. For example, a plaintiff can submit a court's finding of fact in an enforcement action brought by the ACCC as *prima facie* evidence (Section 83). And the law also enables a party (or prospective party) to certain proceedings at the ACCC, the Tribunal or the court to ask the Attorney-General for a grant of financial or legal assistance (Section 170). Where the Commission decides not to take action in

respect of a private party complaint, the reasons for the decision will be outlined in a letter to the complainant. When the ACCC concludes a matter with a settlement, the agreed set of facts may give private party plaintiffs a foundation on which to build a case. The ACCC also has the power to bring representative actions seeking compensation on behalf of victims but to date has only done so in consumer protection cases.

Few private actions have been pursued concerning the competition law provisions, particularly the cartel provisions. Some of these have been significant, though, in terms of developing jurisprudence. Reasons for the small number of competition cases could include expense and uncertainty (with losing litigants required to pay the winner's costs), the lack of financial incentives (with only single damages available), the relative ease of obtaining adequate injunctive relief, the difficulties of proving damage and the fact that many victims may not be aware that they have been affected by illegal anti-competitive conduct.

Concerned that private litigation could jeopardise ongoing investigations or undermine the efficacy of its immunity policy for cartel conduct, the ACCC has not voluntarily provided witness statements and transcripts of interviews conducted relating to an immunity applicant. The ACCC has also sought to protect the confidentiality of information provided by cartel participants who came forward under the immunity policy, despite criticism of non-disclosure from the Federal Court and complaints from lawyers for plaintiffs. Legislation was recently introduced to strengthen further the ACCC's capacity to protect information provided by immunity applicants, by limiting substantially the circumstances in which the ACCC can be compelled to produce or disclose immunity information. This legislation gave effect to Recommendation B.2.b: the OECD's 1998 *Recommendation of the Council concerning Effective Action Against Hard Core Cartels* (to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process). The ACCC need not give reasons for a refusal to disclose, and the role of the courts in reviewing such decisions is curtailed.

### *International issues*

The TPA applies to conduct that is engaged in outside of Australia if the party engaging in the conduct is an Australian incorporated entity, a body corporate carrying on business in Australia, an Australian citizen or a person ordinarily resident within Australia. Ministerial consent is required to proceed with private actions that involve conduct outside Australia. In actions for damages, consent must be obtained before the conduct can be relied upon at a hearing. In actions for other remedial orders, consent must be given before proceedings are instituted. The Minister must give such consent unless, in the Minister's opinion, the conduct was required or specifically authorised by the law of the country where it occurred and consent is not in the national interest. Ministerial consent is obtained in most cases.

The ACCC has formal co-operation agreements with numerous counterpart agencies, including two treaty-level agreements with the United States, an agreement covering consumer protection with the European Community, and agreements with New Zealand,

Taiwan, Korea and Fiji. These agreements generally contain provisions about notification of enforcement activities that may affect the other party's interests and about avoidance of conflict provision to minimise adverse effects of one party's enforcement activities on the other party's interests. The TPA authorises the ACCC to exchange confidential information with domestic and foreign regulators, although the ACCC can impose conditions on disclosure so as to protect the confidentiality of the information provided.

### *Resources and priorities*

The ACCC is one of the largest competition agencies in the world, reflecting the breadth of its portfolio and the range of its sectoral responsibilities. The ACCC has 727 staff budgeted in 2008-09, of which 320 work in competition and consumer protection. One-third of the ACCC's expenditure on staff goes to enforcement and compliance about competition and consumer protection. After enforcement and compliance, the next largest allocation of the staff budget, 10%, is for the work of the Australian Energy Regulator, which was established in 2005 as a constituent part of the ACCC but operates as a separate legal entity.

Most recent ACCC investigations relate to horizontal agreements. Cartel cases also have usually drawn the highest levels of penalties. Total penalties in 2007 exceeded previous years due to the record AUD 38 million in the Visy/Amcor price fixing case. Relatively few investigations into abuse of dominance lead to legal proceedings. This low ratio probably reflects the legal and economic complexity of such matters.

## Limits of competition policy: Exclusions and sectoral regimes

A principal task of reform since the 1990s has been to correct the government-business relationship, in several dimensions. Removing "exemptions" was closely related to rationalising infrastructure regulation, because infrastructure services and regulation provided by states were, by virtue of the state involvement, not subject to Commonwealth competition law. Changing the conception of state-provided services required means to ensure competitive neutrality between the commercial operations of governments and private providers. Reform about exemptions and special treatment involving non-government activities called for reviewing laws and regulations to remove impediments to competition and establishing a common, coherent scheme for assessing and regulating sectoral monopoly problems of access to essential facilities. Removing and discouraging exceptions from competition law was an important element of the Competition Principles Agreement among the Australian governments in the 1990s. The scope of exceptions has shrunk since then, as many were reformed in the course of the review. But many remain.

### *General principles of exclusion or special treatment*

General provisions define how other legislation can create an exemption from the TPA. The Commonwealth and any state or territory can authorise or approve conduct that would otherwise violate the TPA. Legislation must be explicit and specific about the conduct that is to be exempted and about the creation of an exemption. Regulations that implement an exemption are subject to a two-year sunset. The TPA does not otherwise define or limit the substantive criteria or scope of such exemptions. Under the National Competition Policy plan, review under the Competition Principles Agreement framework is required at least once every 10 years, and legislation is not to be retained unless benefits of

the restriction to the community as a whole outweigh the costs. The government enacting it must notify the ACCC.

The list of enactments and regulations that confer exemption is long. The ACCC publishes the list on its website and in its annual report. Many of these exemptions are narrow and technical. Some are commonly encountered in other jurisdictions, where they are also difficult to reform. Most arise at state and territorial levels of government.

### *Government entities and operations*

Exemptions for state-related enterprises have been eliminated. One element of the NCP deal was to extend the TPA prohibitions to government businesses and unincorporated enterprises such as partnerships. Competitive neutrality of government-related commercial operations was also implemented in the mid-1990s. Governments at all levels adopted generally similar frameworks of principles and institutions. The policy goal is to eliminate inefficient distortion of resource allocation, by eliminating any commercial advantage that public ownership might confer on entities engaged in significant business activities. Governments agreed to use a corporatisation model for significant business enterprises, so the prices they charge are calculated on the same basis as their private sector competitors. Formal arrangements were set up to investigate complaints from private sector businesses about how government businesses implemented the reforms.

### De minimis *and other small-business exclusion*

Authorisation for small businesses to engage in collective bargaining is facilitated, in order to equalise their bargaining positions with larger firms. This is not a blanket exemption, but a simplification of the procedure for obtaining an authorisation from the ACCC, that is, a decision that a practice which is formally prohibited is nonetheless permissible. The *Dawson Report* recommended making this a negative option process of notification, putting the burden on the ACCC to take action if it objects. The regime was introduced in 2007.

### *Common general exclusions*

Agreements about wages, hours and terms of employment are not covered by the basic prohibition of restrictive agreements in Section 45, but the TPA applies to some other labour issues. The TPA was amended in 1996 to authorise the ACCC to take action against secondary boycotts. This prohibition was aimed principally at the conduct of trade unions and its effect on third parties.

Conditions in agreements licensing patents, design copyrights and trademarks are exempted from the TPA, so long as they are limited to permitted topics. Terms in patent and copyright licences must relate to the invention or design or items made with it. Terms in trademark contracts must relate to the kinds, qualities or standards of goods bearing the mark.

### *Access regime and structural reforms*

The TPA's novel system for defining and regulating "access regimes" applies the notion of essential facilities across sectors. The purpose is to promote economically efficient infrastructure use and investment and competition in markets upstream and downstream

from the service. Use of common principles and procedural frameworks is intended to encourage consistent regulation of access in each industry and across industries.

The first step, when a user applies to subject a service to the access regime, is a recommendation by the National Competition Council about whether the statutory criteria are met. The principal criteria for "declaring" a service are that access would promote a material increase in competition in some other market and that it would be uneconomical for anyone else to develop another facility to provide it. The decision to declare the service is made by a minister. Terms and prices for access are then to be negotiated commercially with the provider, in principle. But if the parties cannot agree, their disputes are resolved by an "arbitration" proceeding at the ACCC. The outcome of that proceeding can be an order of access or interconnection and specification of terms and charges for it. Access pricing regimes should give parties an incentive to reduce costs or improve productivity. A state or territory may set up an access regime. If it is certified by the NCC as in compliance with the statutory principles, services covered by that state regime are not subject to the declaration-arbitration process.

Since 1995, there have been over 40 applications for declaration to the NCC. Services at issue include rail, airports, water and sewer, natural gas transportation, electricity transmission and data processing. About a third of these have been declared, in rail, airports and water and sewer services. Despite the availability of a general rule and process, in practice special regimes have been set up for gas, water, electricity and telecoms. Contested actions under the general procedure are mostly about access to railway lines. Some of these disputes have been time-consuming and costly. Suggestions for reform have included eliminating the recommendation stage at the NCC or the declaration decision by the minister, or simplifying the process of appeal about the merits of the declaration decision.

In April 2009, the government announced an intention to revise aspects of the access regime procedures. Key features include binding time limits for decisions and some limits on the merits review by the Australian Competition Tribunal. These proposed reforms follow some of the points of the Competition and Infrastructure Reform Agreement of 10 February 2006, in which governments committed by 2010 to incorporating consistent regulatory principles in access regimes for significant infrastructure facilities. The principles include limiting merits reviews to the information before the original decision maker and binding time limits of six months for regulatory decisions.

### *Sectoral issues and special regimes*

#### *Telecommunications and media*

Telecoms is subject to special competition rules, in separate Parts of the TPA. The ACCC is the regulator that applies these sector-specific competition rules. The sector-specific competition regime regulates a historic monopoly that delayed the usual reform steps, of privatisation and vertical separation, in part because there was resistance to complete privatisation. The principal services remain highly concentrated. The sector-specific competition regime was designed to aid the transition from a historic monopoly to an openly competitive market where the privatised incumbent, Telstra, would be one of many carriers. But Telstra has been able to retain considerable market power in the new environment, despite measures such as the unbundling of the local loop and the

imposition of accounting and operational separation on its functions. It remains one of the most vertically integrated providers in the world, with dominant positions in the fixed-line, mobile, broadband and pay TV segments. Much of the ACCC's enforcement has been about access to Telstra's wires by other providers of DSL data service. Cable TV is a less competitive alternative to DSL in Australia, because Telstra has a controlling share (50%) in the largest cable TV provider.

The government has recently announced the establishment of a company to build a national broadband network, to operate on a wholesale-only basis. This will effectively supersede Telstra's copper network. The government has also commenced a wide-scale review of the regulatory regime, examining ways of promoting greater competition across the industry, including measures to better address Telstra's vertical integration, such as functional separation. It is also considering addressing competition and investment issues arising from horizontal integration of fixed-line and cable networks, and telecommunications and media assets.

Media ownership and control are regulated by limiting concentration of ownership in broadcasting sectors and of ownership across different media. Transactions are prohibited where they result in an "unacceptable media diversity situation", defined in terms of the number of media groups in an area. Rules set limits on common control of broadcast and newspaper outlets nationally or in broadcast areas. Despite the goal of encouraging viewpoint diversity, the number of providers is small and stable. There are three significant free over-the-air television broadcasters, and the pay-TV market is also concentrated. Foxtel, with a substantial majority of metropolitan area subscribers, is owned 50% by Telstra. The outcome of measures to promote viewpoint diversity has been to limit the number of providers and protect the incumbents against entry.

### *Energy: Electric power and natural gas*

Sector-specific access regimes are applied in a structure that ensures co-ordination with the ACCC's administration of analogous principles of competition law. Restructuring these industries and rationalising regulatory structures to create coherent national markets and policies is a major accomplishment of the long-term reform process. The move toward integrated national regulation was a COAG priority, which required establishing several new regulators. Some steps remain, and one of the key institutions is being set up in 2009.

The Australian Energy Regulator (AER) is a constituent part of the ACCC, which operates as a separate legal entity. The AER regulates the wholesale electricity market and is responsible for the economic regulation of the electricity transmission and distribution networks. The AER is also responsible for the economic regulation of gas transmission and distribution networks and enforcing the national gas law and national gas rules. The Australian Energy Market Commission (AEMC) is responsible for rule making and market development. The rules AEMC develops deal with the operation of the systems, not with prices. The Australia Energy Market Operator commenced operations on 1 July 2009, as a single national electricity and gas market operator. Its responsibilities will include a new national transmission planning function.

Structural separation of transmission, distribution, production and retail and third-party access to power lines and pipelines were achieved long ago in most areas. Retail contestability is also in place in most areas. Prices for power are comparatively low. Retail

prices are capped in all jurisdictions except Victoria, where the caps were removed after an AEMC study concluded that competition there was sufficient.

### *Postal services*

The TPA's access regime rules do not apply to services provided by Australia Post. The ACCC has several regulatory responsibilities in the postal sector, about prices and cross-subsidies, and the Australia Post is subject to the TPA's competition prohibitions.

### *Liner shipping*

Ocean shipping conferences are regulated by a separate section of the TPA, which exempts agreements about rates, capacity levels and liner scheduling. A review by the Productivity Commission released in 2005 recommended repealing this exemption and relying instead on the general provisions of the TPA for authorising joint actions if they would be beneficial to the Australian economy. The Australian Government decided to retain the separate section but to clarify its objectives and narrow its scope; however, these amendments have not yet been implemented. A further review is scheduled for 2010-11.

### *Railways*

Reforms over the last 15 years have addressed the long-standing problem of co-ordinating among States and Territories to create an efficient national rail system. The principal regulatory tool for access to key infrastructure is the TPA access regime rules. The ACCC's roles in this sector include assessing codes and undertakings about rail infrastructure access, arbitrating disputes between operators and infrastructure providers and analysing mergers and authorisations.

### *Financial services*

Merger or acquisition proposals involving banks are subject to a process in addition to the ACCC's competition assessment. A national interest test is applicable only to mergers and acquisitions involving financial institutions. This is administered by the Treasurer of the Australian Government. Mergers of insurance companies are also subject to additional regulatory reviews.

Disposals of distressed banking assets can be done quickly, without merger-control review by the ACCC, where the stability of the financial system or the interests of depositors could be jeopardised by delay. This exclusion from the TPA was enacted in response to the financial sector crisis of 2008. The amendment enables the Australian Prudential Regulation Authority to intervene quickly. The ACCC is consulted about these transfers, but it does not have power to take action about them under Section 50 of the TPA.

### *Agriculture*

Until recently, there has been an exclusive monopoly over bulk wheat exports. In 2008, a system for accrediting exporters of bulk wheat was established. After October 2009, accreditation will require formal access undertakings under the TPA, assessed by the ACCC, or a state or territory access regime that is certified as effective after recommendation by the National Competition Council. Some monopolies and marketing boards involving agriculture are authorised at the level of States and Territories. Products subject to these competition constraints include sugar, rice and potatoes.

### *Professional, service licensing (state)*

A number of professions and services are subject to licensing requirements under state laws and regulations. Some states that recognise the qualifications of providers licensed in other states nonetheless require them to pay separate licensing fees to practice. Reform may require compensation payments, because states use the funds for other, sometimes related purposes, such as insurance to protect consumers against defaults. The COAG National Reform Agenda programme recognises disparities in state regulation of licensed services as one of the problems it seeks to correct, in order to establish a seamless national economy. A step in that direction was COAG's April, 2009 announcement of a project to establish uniform national regulation of the legal profession.

### *Pharmacies (state)*

Entry into the retail pharmacy business is limited. A national review was undertaken in 2000, which produced recommendations to COAG to remove the restrictions on the number of pharmacies that pharmacists could own while supporting regulations prohibiting non-pharmacists' ownership or control. No jurisdiction implemented the recommendations, which were abandoned as a result of organised opposition to a major chain's proposal to enter. There is evidently no current plan to renew the reform effort. The restraints are probably raising consumer prices or limiting services. *Ex post* studies have found that removal of similar restraints on retail competition in other jurisdictions, such as Italy, has led to significantly lower prices.

### *Taxis (state, local)*

States still impose numerical limits on the number of taxis allowed, despite the National Competition Policy review process. Queensland, for example, did a National Competition Policy review of its rules in 2000 and determined to retain them and even to extend the controls so that "limousines" could not compete with taxis. In 2004, the Queensland Government stated that it would release new licences in response to performance criteria related to waiting time. As the number of taxis in many markets has declined or held steady despite increasing demand, the cost of a licence has increased. That cost represents the value of preventing competition, and hence it is a measure of the cost that the monopoly imposes on the consumer and the economy. Reform in this sector in other countries has often involved compensating licence holders for the loss of some of that value.

## Competition advocacy and policy studies

A key role in policy analysis and recommendations for improvement is performed by the Productivity Commission, the Australian government's principal policy review, research and advisory body on microeconomic policy and regulation, including competition. The National Competition Council also played a role in policy formulation and monitoring in the early years following the implementation of the Hilmer reforms, but its role is now more limited, concerned with declarations of facilities for the purposes of the TPA access regime.

The Productivity Commission was created in 1998. Its work has been key to the "political economy" of promoting reform, providing evidence and measures to counter the claims of special interests and explain to the community what is at stake and quantify

likely gains from reform. Its remit covers all sectors of the economy, including all levels of government. It operates as an independent advisory and educative body. Inquiries with recommendations for policy action must be done in response to a request from government. The government responds in detail to its recommendations. The Productivity Commission consists of a chairman and up to eleven other Commissioners, supported by 80 professional and support staff. It publishes about 40 reports and studies per year.

Productivity Commission recommendations carry weight with all Australian governments and all sides of politics. While governments do not always accept the Commission's advice, most of its recommendations are typically accepted and its findings are generally endorsed. Some of the Productivity Commission's recent projects that are directly relevant to competition policy include:

- Review of the Copyright Act 1968: Parallel importation of books (2009);
- Review of Price Regulation of Airport Services (2008);
- Inquiry Report into Road and Rail Freight Infrastructure Pricing (2007)
- Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping (2005); and
- Research Report on the Australian and New Zealand Competition and Consumer Protection Regimes (2005).

The ACCC does not have a competition advocacy role. However, it acts to achieve compliance through a range of mechanisms, including enforcement, education and through the administration of the TPA. The ACCC sometimes does studies related to enforcement. Thus, concerns about rising food prices led the Federal Government to commission an inquiry from the ACCC, in 2008, which focused on ways to remove any remaining restrictions on competition in the grocery sector, including planning (zoning) barriers that affect new entrants.

Review of legislation was an important, and controversial, element of the National Competition Policy programme. That programme effectively ended when the last payments were made to the States in 2005. The National Competition Council's final assessment report in 2005 indicated that 22% of the priority legislation review and reform task remained incomplete. Had the programme continued, with on-going assessments by the Council and associated payments, some of the difficult areas (such as taxis) may have been dealt with in the second round of reviews. The legislative review component of the NCP programme was contentious, in part because it was the aspect where the National Competition Council recommended the majority of the deductions from competition payments. Nonetheless, most legislation was reviewed and many important reforms were implemented. Notable examples included the national dairy industry, shop trading hours, bakeries, podiatry, veterinary services and liquor licensing.

The COAG National Reform Agenda builds on some aspects of the NCP process. The National Partnership Agreement to Deliver a Seamless National Economy, aimed at reducing unnecessary and inconsistent regulation, includes some competition issues among its 27 identified priority areas. The programme retains a link between meeting targets and a budget incentive, which includes a "reward" component with payment contingent on independent assessment that milestones have been achieved.

Systems for requiring regulatory impact statements are well established in Australia. Such statements are mandatory for decisions by all government bodies. A checklist similar

to the one in the OECD competition assessment "toolkit" is incorporated into the preliminary assessment guide used in the Office of Best Practices Regulation.

## Conclusions

A generation of reform to stimulate competition has laid a strong foundation for resisting backsliding. The National Competition Policy programme, building on the trade, fiscal and monetary reforms in the 1980s, has produced clear economic performance benefits, largely from correcting substantial weaknesses in important infrastructure sectors and eliminating inefficient constraints on competition. The Productivity Commission, in its current form a product of the reforming drive of the national competition policy era, is a model for institutionalising evidence-based policy-making. Strong institutions and political support for competitive reform should help Australia preserve the gains and the process that produced them even in the current difficult economic conditions.

The transition from a "national competition policy" to a "national reform agenda" suggests decision makers felt that the competition problems have been resolved. Australia is certainly in a much better position than it was 20 years ago. But restructuring government-provided network services and reviewing legislation to eliminate restraints have put Australia into the mainstream. It faces the same issues that are found in many, if not most, OECD member jurisdictions. Infrastructure reform is incomplete. The extent of the derogations from competition law, from liner shipping to taxicabs, pharmacies to agricultural marketing boards, that survived the process which supposedly would cull them reveals the incorrigibility of some issues. Australia's experience shows that even a comprehensive reform programme will have trouble with these familiar hard cases. That does not mean they should be ignored, though.

After 15 years of experience, some aspects of the National Competition Policy package may need more thought. The access regime system has not quite been a general system. Rather, in most of the usual network-industry settings, the regime has been tailored by legislation to fit sectoral considerations and interests. In less obvious settings, the complex, time-consuming process has become a source of concern. The current proposals to streamline the process can do no harm, but they may not end the controversies. Any process can be gamed; where much is at stake, parties and their lawyers will find ways to string it out as a negotiating tool.

The substantive content of Australia's competition law has been subject to major review in the last six years. Most of the amendments recommended in the Dawson Review and in a subsequent Senate Committee review have been implemented. Some are recent, such as the cartel reforms. Australian competition law is thus now in a transition period and it will be some time before proper assessment can be made of the advances. Nonetheless, some of the changes have raised particular questions.

The priority given in Australia in the last 10-15 years to anti-cartel law and enforcement is in line with international trends. Whether the recent amendments achieve the right balance will become evident as they are implemented in the next few years. Assessments will be influenced by how the ACCC approaches enforcement, including how it distinguishes between criminal and civil cases and the outcomes in the early cases that are prosecuted. Penalties for breach have been low by international standards. This may now start to change with the 2007 amendment to the civil penalty maxima (allowing for calculation based on the gain from the contravention or 10% of turnover). For serious cartel

conduct, the introduction of criminal sanctions is a significant step, and the 10 year maximum jail term is a clear signal that the legislature expects custodial sentences to be imposed when convictions are secured.

The ACCC is generally highly regarded as an independent and effective enforcement agency. Well resourced, it is a model for combining complementary functions of sector regulation, consumer protection, market oversight and competition enforcement. Reflecting a formal government decision on the separation of policy and enforcement functions, the ACCC eschews any formal or substantial role in competition advocacy or policy development, and it is perhaps for this reason that it allocates relatively few resources to its research and analysis division and has limited engagement with external academia.

The Australian Competition Tribunal plays an important role as a merits review body, and the economic content in its determinations has made a significant contribution to both the legislative and judicial development of the law. On one view, it could do more – for example, all non-merger authorisation applications could be made directly to the Tribunal. On the other hand, since the *Dawson Review* there have been improvements made by the ACCC in response to concerns about timeliness in the authorisation process. There is no longer a good case in Australia for a specialised competition court. Appreciation of the performance of the Federal Court has grown considerably in recent years. Each of these institutions appear to strive for continuous improvement in substantive calibre of their decision-making and the efficiency of their processes.

Cartel criminalisation brings a new agency into the enforcement arena in the form of the DPP. There are potentially substantial benefits for objectivity and independence in decision-making by virtue of the separation of investigatory and prosecutorial functions between the ACCC and DPP. However, reaping such benefits is contingent on a smooth and close working relationship between the two agencies. The preparedness of the DPP to amend its Prosecution Policy to accommodate the ACCC's policy on immunity is an early good sign in this respect, as is the considerable effort being made by senior ACCC and DPP representatives to participate together in conferences and explain the approach that they propose to enforcement of the new regime. The true test lies ahead in the decisions that will need to be made in connection with actual cases.

As compared with the high public profile and strong government backing of the enforcement activity of the ACCC, support for private enforcement of competition law, specifically cartels, is less clear. The reasons for the lack of private enforcement relate in large part to the lack of financial incentives for such actions. There are also significant impediments to obtaining the information required for proof of liability and damages. In other countries private enforcement has been recognised as making an important contribution to enforcement, and regulators have led the way in exploring avenues for facilitating private actions while ensuring at the same time that public enforcement is not undermined.

The Treasury is responsible for advising the Minister on proposals for amendments, and does so in consultation with businesses, consumer groups and the ACCC. The Treasury is currently consulting with the public on possible amendments to deal with creeping acquisitions and possible amendments about the meaning of "understanding" under Section 45. The extent of consultation on law reform with the business sector and profession has increased recently.

The recent amendments to the TPA follow the detailed, prescriptive and complex style of statutory drafting that is a hallmark of the TPA and many other pieces of Australian legislation. This style seeks logical clarity and completeness, through precise definitions and explicit listing of possible applications, perhaps in an effort to close loopholes in advance. But a disadvantage of this style is that it encourages parties and judges to focus on logical analysis of the words of the statute rather than on the legislation's fundamental concepts and purposes.

## Policy options for consideration

- ***Consider more vigorous action to promote competition in telecoms and electric power***

Considerable progress has been made toward setting up a competitive market for electric power on a national scale. Nonetheless, continued public ownership and retail price control may be hindering competition. To be sure, competition assessments have concluded that there is now adequate competition in Victoria and South Australia. Further privatisation and removing the ceiling on retail prices should be considered. Since the creation of the National Electricity Market, prices have risen faster in New South Wales, where there is still a public monopoly, than in other states in eastern and south-eastern Australia, yet productivity gains have been smaller (OECD, 2008). Removal of retail price controls would depend on the state of competition in retail markets. As markets increasingly connect and competition expands, the need for retail price regulation to control market power should decline. States and Territories may be using their price-control powers to support other policy objectives. As the retail market becomes competitive, though, those other objectives should then be achieved by less inefficient means.

Similarly, the continued, albeit indirect, public ownership interest in the historic telecoms monopoly and the failure to separate completely the network-monopoly elements from its competitive operations may be dampening competition and complicating regulation. Consideration should be given to separating infrastructure management from service provision, notably between the management of broadband Internet access infrastructure and marketing activities, in order to encourage construction of a fibre optic network without impairing competition. The plan for a separate fibre optical network is a promising approach. The government has announced that this network will be wholesale only. The government may invest up to AUD 43 billion with the private sector. Its financial involvement in constructing a fibre optic Internet system should not end up strengthening the dominant position of the incumbent. Competition and diversity of programme sources could also be enhanced by divesting Telstra from its ownership relationship with pay-TV providers.

- ***Finish the unfinished business of the NCP legislation review***

Some exemptions and special regimes remain, despite the 10 year programme of review and revision. These include liner shipping, at the national level, and state-level items such as taxis and pharmacies. The economic performance benefits of removing these remaining constraints may well be less than those of reforming utility infrastructure services. But a principle of equity, of eliminating special privileges and the rent-seeking abuse of regulation, as well as the prospect of some additional efficiency benefit justifies taking action. These special-interest protections are common in other jurisdictions, of course, and they have proven to be difficult to remove there too. Incumbents that benefit

organise to retain their advantages, and overcoming that influence may require motivating competing interests. For example, consumer complaints in Ireland about poor taxi service achieved little; instead, open entry followed a lawsuit by would-be competitors who argued successfully that regulations limiting the number of licences denied them a constitutional right to engage in the business. Pharmacists' efforts to prevent entry have been countered by mass market retailers. Doubt about the effects of reform can be met by citing successful experience from countries such as Italy, Norway and New Zealand that have relaxed or eliminated controls on pharmacy chains or on entry by other firms.

- ***Maintain the regular review to identify and correct constraints on competition***

Competition issues are less prominent in the current COAG National Reform Agenda than they had been under the National Competition Policy. The new themes, of harmonisation and co-ordination across jurisdictions to achieve a seamless national economy, are important, and if achieved they will support healthier competition. Eliminating inconsistencies about regulations such as construction codes, the environment and workplace health and safety will encourage entry. But the institutions supporting these efforts should also follow through on the NCP plan of regular reviews of the constraints that were nonetheless retained, to check whether the reasons for retaining them are still valid and to require rent-seekers to justify their special treatment.

- ***Eliminate the special prohibition of predatory pricing, or remove the market share element***

The scope and effectiveness of the prohibition against misuse of market power may be even less clear now than it was before the recent amendments. To some extent, this reflects the significant influence of small business "politics" in Australian competition law. The TPA now includes a prohibition aimed at predatory pricing that could curb discounting by large corporations. Replacing a market power criterion with a market share threshold invites inefficient outcomes, promising protection of the interests of smaller firms but potentially resulting in higher costs to the consumer. Elaboration of ways to interpret "taking advantage of" market power may add complexity and uncertainty, too.

The general prohibition of misuse of market power can deal with predatory pricing. The new dedicated prohibition risks creating uncertainty about pricing decisions. The current government has been thwarted in the Parliament in its attempts to address these concerns. The government should take advantage of future opportunities to remove at least the market share aspect of the "Birdsville amendment". A consistent legally principled and economically robust approach to interpretation of this new prohibition by the courts over coming years will be critical to its prospects.

- ***Clarify the scope of the* per se *prohibitions on cartel conduct and the approach to exemptions***

The statutory regime applicable to cartel conduct appears complex and duplicative. The design of the cartel offences raised questions about their relationship with the civil prohibitions. Amendments and further explanations have addressed concerns that were expressed about coverage of "joint venture" activity. As a step toward rationalising the regime, the existing *per se* prohibition on exclusionary provisions could be repealed, given its substantial overlap with the new *per se* prohibitions on output restriction and market allocation. Alternatively it could be amended to narrow its application to collective boycotts and thereby minimise the overlap with the new prohibitions. The Dawson Committee recommendations for amendment of the exclusionary provision prohibition could be re-examined in light of the recent reforms.

The new *per se* prohibitions are generally consistent with the guidance of the OECD 1998 Recommendation, with respect to the categories of conduct that should be regarded as the most serious of antitrust violations. The OECD also recommended that prohibitions not extend to conduct that is "reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies" (OECD, 1998). Australian competition law relies on the authorisation procedure to recognise efficiencies and offer protection correspondingly. The availability of this ex-ante protection has been relied on in answer to concerns about the breadth of the new cartel prohibitions, as has the assurance that prosecutorial discretion will be exercised conservatively. But it will be costly, and perhaps inappropriate, to require economic actors to apply for prior authorisation of conduct that as a matter of policy should not be prohibited. Whether this is an optimal approach in light of the imposition of criminal liability is a matter that could be revisited once there has been some experience with enforcement of the new regime.

- ***Make third line forcing subject to a competition test***

Third line forcing should not be subject to a per se prohibition. *Per se* prohibition is difficult to justify on economic grounds. This is borne out by the large number of notifications received by the ACCC for such conduct each year, almost all of which are considered to raise insufficient competition issues to concern the Commission. The Dawson Committee recommended removing *per se* liability for third line forcing and subjecting it to a competition test, consistent with other forms of exclusive dealing. It is inefficient and overly burdensome to require firms to notify conduct that in the majority of cases has been shown to be either benign or even pro-competitive. Australian competition law is in a state of flux, with amendments having recently been made or under consideration for most of the prohibitions under the *Trade Practices Act*; thus, review of whether Australia's particular economic conditions continue to justify strict liability for third line forcing would be timely.

- ***Consider including economic efficiency in competition analysis, rather than something outside it***

The separation of competition and efficiency considerations is a long-established feature of competition regulation in Australia, reflecting initial concerns about judicial capacity to deal with efficiency analysis. In some other jurisdictions, efficiency considerations are incorporated into the test for infringement, such as in assessing vertical restraints under a "rule of reason". Given the significant development in Australian competition law jurisprudence over the last 35 years, there may be an opportunity to reflect on and possibly reconsider the two-tier approach to adjudication in the future. Any such reconsideration should acknowledge the substantial practical benefits associated with the way in which the authorisation procedure currently works for non-merger conduct, as well as the effectiveness of the informal clearance process for mergers.

- ***Support private enforcement of competition law***

Private enforcement has the potential to complement and strengthen public enforcement of competition law. Where private litigation has had a low profile, raising that profile requires a champion who will take an impartial principled position and consult widely and meaningfully with all stakeholders. The Australian Law Reform Commission might be given a reference to hold an inquiry into the subject. The ALRC has previously held inquiries into matters of trade practices law and is a highly regarded independent body. The issues are likely to range across areas of evidence and procedure, and thus the

ALRC may be better positioned and skilled for this purpose than a body like the Productivity Commission. As part of such an inquiry, impediments to private litigation, in particular the requirement for ministerial consent where the relevant conduct has occurred outside Australia, could be reviewed.

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*Chapter 5*

# Market Openness

*This chapter is a summary of the background report* Enhancing Market Openness through Regulatory Reform in Australia *available at* www.oecd.org/regreform. *It assesses the extent to which the Australian regulatory system promotes market openness, global competition and economic integration, thereby avoiding trade disputes and improving trust and mutual confidence across borders. The chapter includes an assessment of mechanisms to ensure regulatory transparency and the involvement of the trade community; to avoid discrimination and unintended trade restrictive effects of regulation; and to encourage the use of internationally harmonized measures and the recognition of equivalence of foreign regulatory measures. Australia's approach to regulatory policy and reform reflects recognition of the importance of maintaining and strengthening the openness of its markets to international competition. The regulatory framework consistently promotes a market-openness-friendly regulatory environment, even if there may be room for further improvement of implementation.*

## General context

Trade is essential to Australia's prosperity. While Australia may resist the downturn relatively better than some countries, as discussed in Part I, the need remains to pursue reforms in order to further strengthen Australia's ability to compete in the global market place. The role of trade in the economy can be seen from the fact that trade (exports plus imports) as a percentage of GDP has grown significantly in the past two decades to reach 48% – although this is still one of the lowest shares in OECD. In 2008 economic growth was accompanied by a significant increase in two-way trade in goods and services, although much more in value (an increase of 23%) than in volume (about 8%). While Australia's trade balance was in deficit at that time, in 2007 this represented only about 2% of GDP – relatively small compared with some OECD countries. With export values growing more rapidly than import values in 2008, the trade deficit was considerably smaller that year.

Slightly over half of Australia's trade (imports and exports) in 2008 was with OECD, dominated by the EU, Japan and the United States. However, the importance of East Asia (including OECD members Japan and Korea) is very clear: it accounted for 56% of Australia's exports and 46% of its imports. Japan is Australia's most important two-way trading partner, with 13.5% of total trade, followed by China (13.1%) and the US (9.7%).

With respect to the product composition of Australia's exports, coal and iron ore were by far the most important products in 2008. As a reflection of the global boom for mineral products, the value of these two categories of exports doubled in 2008 compared with the previous year, to account for over one-third of the value of merchandise exports. Agricultural exports accounted for only 14%, compared with nearly 28% a decade earlier (nevertheless, about two-thirds of Australia's agricultural production is exported). The major agricultural export products remain bulk commodities such as beef, grains, wine and dairy. The major category of industrial exports in 2008 was transportation equipment. With respect to imports, the major categories were machinery and transport equipment (which in turn contributes to Australian exports in this same field) and mineral fuels.

Services trade in 2008 represented about 20% of total Australian trade (very close to the OECD average). The most important export categories were education services, personal travel (excluding education), and professional, technical and other business services.

Inward international investment has remained relatively strong, reflecting the open investment policy followed by Australia. The level of foreign investment in Australia increased by AUD 80.9 billion in 2008 and reached AUD 1.74 trillion by 31 December 2008. The stock of inward direct investment thus represents close to 33% of GDP. At that time, the major holders of investment in Australia were the United Kingdom (25%), the United States (24%), Japan (5%), Hong Kong, China (3%) and Singapore (3%). As of 2007, inward direct investment was heavily concentrated in mining (25%), manufacturing (18%), wholesale and retail trade (15%) and finance and insurance (14%). The level of Australian investment abroad reached AUD one trillion in 2008, an increase of AUD 12 billion on the previous year.

Table 5.1. **Australia's trade in goods and services by top ten partners, 2008**[1]
**(AUD million)**

| Australia's top 10 two-way trading partners | | | | | | |
|---|---|---|---|---|---|---|
| | | Goods | Services | Total | % share | Rank |
| Japan | | 70 997 | 5 019 | 76 016 | *13.5* | 1 |
| China | | 67 595 | 6 198 | 73 793 | *13.1* | 2 |
| United States | | 38 823 | 15 918 | 54 741 | *9.7* | 3 |
| Singapore | | 22 308 | 8 700 | 31 008 | *5.5* | 4 |
| United Kingdom | | 19 287 | 9 161 | 28 448 | *5.0* | 5 |
| Republic of Korea | | 24 820 | 2 402 | 27 222 | *4.8* | 6 |
| New Zealand | | 16 949 | 5 989 | 22 938 | *4.1* | 7 |
| India | | 15 347 | 3 587 | 18 934 | *3.4* | 8 |
| Thailand | | 15 483 | 2 786 | 18 269 | *3.2* | 9 |
| Germany | | 13 424 | 2 227 | 15 651 | *2.8* | 10 |
| **Total two-way trade** | | **453 693** | **109 896** | **563 589** | ***100.0*** | |
| *of which:* | *APEC* | *320 908* | *60 920* | *381 828* | *67.7* | |
| | *ASEAN 10* | *70 653* | *18 215* | *88 868* | *15.8* | |
| | *European Union 27* | *71 002* | *20 263* | *91 265* | *16.2* | |
| | *OECD* | *233 082* | *53 711* | *286 793* | *50.9* | |

1. All data is on a Balance of Payments basis, except for Goods by country which are on a recorded trade basis.

*Source:* DFAT STARS database & ABS catalogue 5368.0, April 2009 Issue.

Australia's highest trade policy priority is the successful conclusion of the Doha Round of Multilateral Trade Negotiations. It is also pursuing simultaneously a policy of negotiating free trade agreements. A particular focus in this regard has been trade with China and other Asian countries, drawing on Australia's geographic proximity to these countries and the complementary role Australia can play in providing raw materials and food for the burgeoning economies in that region. A major plank in Australia's trade policy in recent years has thus been the development of strong trade and investment links in the Asia-Pacific region, reflected in Australia's leadership role in APEC and in moving forward on FTA negotiations with particular Asian countries or groups of countries.

## The policy framework for market openness: The six "efficient regulation" principles

As traditional barriers to trade have fallen, the impact of domestic regulations on international trade and investment has become more apparent than ever before. In a global economy, regulations need to be market-oriented and friendly toward trade and investment. The 1997 OECD *Report on Regulatory Reform* and the 2005 OECD *Guiding Principles for Regulatory Quality and Performance* identified six "efficient regulation principles" which should be built into domestic regulations, procedures and administrative practices to ensure that they successfully enhance market openness. These principles are the basis for the analysis below.

### *Transparency and public consultation benefits from well developed, easily-accessible and proactive arrangements, although efforts to improve the user-friendliness of technical standard setting are still ongoing*

Market openness requires that all market participants be fully aware of regulatory requirements so that they can base market activity decisions on an accurate assessment of costs and benefits. This is especially important for foreign firms, which have to cope with

differences in the business environment, such as language and business practices. Transparency requires access to information on regulations and openness of the rule-making process through public consultation.

Information on Australian regulations, including regulations affecting foreign parties, is widely and easily accessible through a variety of means in paper and electronic form. Furthermore, the administration provides value-added information services, such as free notification services in the ComLaw website, compilation or "cut and paste" versions of amended legislation, and a consultative forum for business and government representatives in the *Business.gov.au* website to encourage the use of information technology to reduce business compliance costs.

The right of access to documents conferred under the *Freedom of Information Act 1982* (FOI Act) is not affected by the reason for seeking access, nor subject to any conditions of nationality or residence, other than to have an address for service or delivery in Australia. All sub-federal jurisdictions in Australia have equivalent freedom of information legislation.

Arrangements for the timing between publication of legislation and its entry into force ensure predictability and offer stakeholders time to prepare for implementation, while Legislative Instruments are subject to sunsetting (periodic review and repeal) approximately 10 years after registration, so as to ensure their continuing relevance and appropriateness.

In parallel to the general information channels, Australian agencies operating in trade-related areas use extensively handbooks, websites and enquiry points, ensuring a high level of accessibility, timeliness and user friendliness of trade-related information. Agency specific mechanisms of particular relevance to foreign parties include Australia's Import Risk Analysis (IRA) Handbook 2007, the Australian Quarantine and Inspection Service (AQIS) enquiry point, the Food Standards Australia New Zealand (FSANZ) central enquiry point, the Australian Customs Information and Support Centre (CI&SC), and contact points called for by Australia's international commitments. The latter include the SPS and TBT Contact Points, as well as contact points for *Codex Alimentarius,* the International Plant Protection Convention (IPPC) and the World Organisation for Animal Health (OIE). The SPS Contact Point sends SPS notifications to the WTO on proposed SPS measures that are not substantially the same as the content of an international standard and that may have a significant effect on trade of other WTO members, and co-ordinates Australia's responses to enquiries regarding its SPS measures. Australia also provides to its trading partners information on technical regulations and standards through a single point of enquiry in DFAT and gives them the opportunity to comment. This is particularly important as legislative, executive, and judicial powers relating to technical regulations and standards are shared between the Commonwealth and state and territory governments.

An example of a trade-specific information channel is the Australian Customs and Border Protection CI&SC, which operates alongside the Australian Customs website and the officers based in a number of Australia's partner countries, so as to ensure that client queries, be they domestic or foreign, about Australian border processes are efficiently addressed. The CI&SC is committed to acknowledging client communication immediately and providing a full response to email and fax contacts within two working days, or notifying within one working day if it cannot fully answer the query on time. The CI&SC

seeks to achieve 80% of phone calls answered within five minutes and 80% of urgent Cargo Systems Support phone contacts answered within three minutes. Combined general public and systems support calls to the CI&SC total around 1 500 each weekday. Surveyed stakeholders generally express satisfaction with CI&SC service ("good" or "excellent" ratings have been received by 54% of survey respondents for consistency of information; by 63% of respondents for Customs and Border Protection's ability to resolve issues for business; and by 40% of respondents for timeliness).

Standards Australia, the main national standard setting body, is a signatory to the WTO TBT Code of Good Practice for the Preparation, Adoption and Application of Standards, and is committed to the transparency and prior comments provisions contained therein. In addition, Australia's national standard setting bodies, both at the Commonwealth and State/Territory levels, are subject to COAG principles of effective consultation. Based on these requirements, prior consultation of interested parties is component of the procedures for preparing technical standards and regulations that affect international market openness. Although the Productivity Commission acknowledged the general soundness of transparency mechanisms in Australia's standard setting processes, it highlighted concerns about the timeliness and user-friendliness of online information mechanisms and consultation processes. In response to these concerns, Standards Australia is currently elaborating interactive web-based consultation mechanisms aiming to cut down standards production time by focussing on the points of disagreement between participants.

Australia has a longstanding commitment to meaningful and comprehensive engagement with the civil society in general, including the business community both domestic and foreign, based on the guidelines laid down in the *Best Practice Regulation Handbook*, and the corresponding *Guide for Ministerial Councils and National Standard Setting Bodies*, at the sub-federal level. The guidelines call for consultations that are widely based and organised in an accessible and targeted manner so as to capture the diversity of affected stakeholders, including foreign ones. Failure to take account of affected parties' legitimate interests may allow the affected party to challenge those decisions under Commonwealth legislation enabling review of administrative decisions in federal courts. In addition, a special business consultation webpage within the Australian online business information gateway *www.business.gov.au* allows government agencies to further promote public consultations and widen their potential consultation audience. Stakeholders can register on the website to make sure they get an opportunity to express their views on government policy and regulation. Registration to consultation websites is open to everyone without any qualifying conditions and in particular no requirement of a domestic presence.

Those consultations are supplemented by Australian Government's regular consultations and collaboration with the States and Territories on major economic and social reform meant to avoid unintended barriers to market openness at the sub-federal level. It is worth noting that consultations between federal and sub-federal entities also generally involve New Zealand counterparts, reflecting the strong political and economic ties between the two countries. In order to ensure a smooth and efficient functioning of the Trans-Tasman Mutual Recognition Arrangement (TTMRA) and avoid unnecessary conflicts with other policy objectives in either country, the arrangement provides for early consultation with trans-Tasman and interstate counterparts, and processes for trans-Tasman co-ordination. In particular, New Zealand counterparts may be involved in decisions made by ministerial councils and national standard setting bodies both at the Commonwealth and state level.

Where a proposal involves a trans-Tasman issue, the New Zealand Regulatory Impact Analysis Unit comments on the consultation RIS before it is made public.

The extensive participation of foreign businesses in consultations on issues of interest to them underscores the efficiency and accessibility of the system. In the area of telecommunications, the second, third and fourth largest telecommunications carriers operating in Australia, which are either foreign-owned or have a foreign parent company, are full participants in regulatory processes and regularly make submissions, such as in the case of ACCC's *Mobile terminating access service (MTAS) 2007 pricing principles,* or ACMA's development of *Principles for Spectrum Management*. However, government departments and regulatory bodies observe that many foreign commercial parties often make submissions through their domestic subsidiary companies or through the industry representative body. In addition, foreign parties may also interact with Australian authorities through their representative government missions located in Australia, or through Australian missions in the host country. This is, for instance, the most used approach as regards shipping regulation.

### Box 1.1. **The Quarantine and Biosecurity Review: A model consultation arrangement**

In February 2008, Australia launched a major review of its quarantine and biosecurity systems. An independent Panel of experts, appointed by the Minister for Agriculture, Fisheries and Forestry, was asked to review the appropriateness, effectiveness and efficiency of current arrangements, including public communication processes and governance and institutional arrangements, and to produce a report (*One biosecurity: A Working Partnership,* also known as the *Beale Report*, from the name of the Panel's Chair), consulting in the process with relevant domestic and international stakeholders.

The Panel first prepared and released an Issues Paper in order to prompt discussion and attract submissions and comments from all interested stakeholders. It received around 220 written submissions from a wide range of interested parties, including overseas submissions, and organised over 170 meetings with domestic and international stakeholders, both individuals and representatives of organisations. The Panel also sought information from Australia's trading partners on their arrangements for managing biosecurity risks and held discussions with government officials and business representatives in New Zealand, North America, Europe, and representatives from other WTO members.

A dedicated website (*www.quarantinebiosecurityreview.gov.au*) offered online support to the process: reference documents used during the review were made available on the site, alongside with copies of all the submissions received. At the completion of the consultation process, the *Beale Report*, submitted to the Australian Government, described the current situation, summarised comments received and presented specific recommendations. The Australian Government released its Preliminary Response to the report in December 2008, agreeing in principle with all 84 recommendations and outlining the actions the government intends to take in order to put the recommendations into practice. The Response is publicly available on the DAFF website along with updates of progress with reform.

Changes to Australia's quarantine and biosecurity system based on the *Beale Report* have and will continue to be notified through the SPS notification system, whereby the normal comment and consideration process will occur.

The Australian administrative law framework provides for a range of administrative and judicial appeals, open to foreign parties without any qualifying conditions, other than to demonstrate that the decision to be reviewed directly affects their interests. They all follow transparent procedures and practices, applied in a non-discriminatory way to domestic and foreign parties.

Transparency is also important in the area of government procurement in order to ensure that the market for public works, supplies and services is effectively open to national and international competition. Contrary to most OECD countries, Australia is not a signatory of the WTO plurilateral Agreement on Government Procurement (GPA), which contains international disciplines for government procurement, but it is an observer in the WTO Committee on Government Procurement and feels that the procedures it follows are on a par with international best practice.

Transparency in Australia's public purchases does seem to be generally well established through the mechanism used to achieve "*value for money*", which is the guiding principle of Australia's procurement policy framework. As in other OECD countries applying a "*value for money*" procurement principle, this implies maintaining a procurement system that is aligned as much as possible to general commercial practice, including considerations that are not limited to price, and that is administratively efficient for both government and suppliers. This general principle is buttressed by provisions of transparency and accountability to ensure that all potential suppliers have access to the process and are treated equitably, that conditions for participation and evaluation criteria are clearly articulated and that procurement-related actions are documented, defensible and substantiated. Commonwealth procurement entities are subject to a co-ordinated procurement contracting framework, while the other two levels of government (state and territory, and local) have their own procurement frameworks and policies.

This framework and the range of web-based and printed guidance documents to assist with implementation, are all available free of charge, but the most significant transparency safeguard of the system is the publication of Australian Government business opportunities, annual procurement plans, multi-use lists and contracts awarded through the AusTender website. Australian Government contract statistics are available online. For 2006/07 they covered 82 532 contracts above the AUD 10 000 value threshold triggering the AusTender publication requirement, for a total value of AUD 28 978.5 million. For 2007/08 they covered 69 493 contracts for a total value of AUD 26 361.8 million.

The analysis of costs and benefits of each procurement proposal is judged throughout the whole procurement cycle (whole-of-life costing) and is based not only on the consideration of costs, but also on the performance history of prospective suppliers, the relative risk of each proposal, the fitness of the proposal for the purpose of the procurement project, or the flexibility to adapt to possible changes over the lifecycle of the project. Commonwealth Procurement Guidelines require procuring entities not to use specifications or prescribe conformity assessment procedures in a way as to create an unnecessary obstacle to trade. Specifications should, where possible, be set out in terms of performance and functional requirements and be based on international standards, where they exist, except where the use of international standards would fail to meet the agency's requirements or would impose greater burdens than the use of recognised Australian standards. In order to avoid capture or discriminatory treatment, specifications must not require or refer to a particular trademark or trade name, patent, copyright, design or type,

specific origin, producer, or supplier, unless there is no other sufficiently precise or intelligible way of describing the requirement. In exceptional circumstances where this type of specification is absolutely necessary words such as "or equivalent" must be included in the specification.

Although the CPGs allow government agencies considerable flexibility to adapt to particular procurement situations, all agencies are required to follow mandatory procurement procedures for procurement above certain thresholds, based on the maximum anticipated value of the contract including extensions and renewals and incorporating all component parts in case of multiple contracts. There are no special appeal procedures applying solely to Australian government procurement. Procurement decisions by Australian (Commonwealth) Government departments and agencies are subject to administrative or judicial review and to the general principle that suppliers should enjoy the same rights and obligations when dealing with government that they have when dealing with other private sector entities.

### *Non-discrimination: A clear commitment to non-discriminatory economic policies, although the effects of the investment screening process and of the increasing number of FTAs are not totally clear*

The application of non-discrimination principles in making and implementing regulations aims at providing effective equality of competitive opportunities between like goods and services irrespective of the country of origin and thus at maximising efficient competition on the market.

Like many other countries, Australia does not have a general legislative requirement to avoid discrimination against or among foreign stakeholders in the drawing up and application of regulations. However, this goal is largely achieved through Australia's international commitments, in particular under the WTO, although, despite the broad scope of WTO members' obligations with respect to non-discrimination in their trading relations, some areas exist where discrimination is possible. For instance, specific policies consistent with Australia's WTO obligations exist in Australia to assist small and medium enterprises (SMEs) and, in limited circumstances, indigenous Australians.

As is common practice today, Australia provides special treatment to many of its trading partners under a number of WTO-consistent agreements and arrangements. Unilateral preferences are provided under the Australian System of Tariff Preferences for least developed countries, under PATCRA for Papua New Guinea, and under SPARTECA benefiting the Forum Island countries. These preferences concern only customs tariffs and in some cases import quotas.

A broader range of provisions is included in Australia's bilateral and regional free trade areas (FTAs), which cover goods and services and extend in varying ways to trade-related regulations and procedures, as specified in the relevant agreements or developed under them. In recent years, Australia has been increasingly active in developing FTAs. Australia currently has in force five FTAs, respectively with New Zealand (1983), Singapore (2003), Thailand (2005), the United States (2005) and Chile (2009). A number of other agreements have not yet been put into effect (an FTA with ASEAN was negotiated and signed jointly with New Zealand with effect in December 2009) or have not yet been finalised. The latter include ongoing negotiations with Korea, Japan, China, Malaysia, the Gulf Co-operation Council and the Trans-Pacific Partnership Agreement – which will build on the Trans-Pacific Strategic Economic Partnership Agreement that entered into force in

2006 between Brunei Darussalam, Chile, New Zealand and Singapore; Peru, the United States and Vietnam will also participate in these negotiations. Additional FTAs (*e.g.* with Indonesia) are under consideration.

Although this might suggest potential discrimination against countries that are not parties to any of these agreements, in practice, the level of regulatory discrimination is probably not significant, partly thanks to the high level of transparency concerning Australia's FTAs. This transparency begins with the negotiating process, which typically starts with a feasibility study (sometimes jointly conducted) and which involves consultations with a wide range of industry, State and non-governmental stakeholder groups. Once agreements are reached and put into effect, detailed information on them is made available on the DFAT website. In addition, Australia participates in the transparency processes of the WTO, including discussions in the Committee on Regional Trading Agreements (CRTA). Similarly a range of other agreements not directly established as FTAs but involving issues such as investment protection and mutual recognition (as between US SEC and ASIC, providing a basis for stock exchanges and broker-dealers to operate in both countries) are publicly available on the Internet. Second, certain benefits of Australia's FTAs are extended to all as a matter of course. For example, extension of the term of copyright protection under Australian law to the life of author plus 70 years, a feature of the AUSFTA, now applies to all copyright holders.

Australia's foreign investment policy is generally open and transparent. Nevertheless, some foreign equity restrictions continue to exist in sectors considered sensitive. In particular, 49% equity ceilings currently exist in three sectors: international aviation, federally-leased airports and domestic shipping. While restrictions were removed on media in 2007, that sector is considered to remain sensitive and investments are subject to prior approval, irrespective of size, as described in the following paragraph. Recently, attention has been attracted to investments by foreign state-owned enterprises and sovereign wealth funds. A focal area in this regard has been potential investment in the raw materials sector.

A comprehensive screening process is applied under the Treasury to proposed foreign purchases of Australian businesses or real estate to ensure that such investment is not contrary to the "national interest" (foreign investment for establishing new businesses is not subject to screening). A Foreign Investment Review Board (FIRB) examines foreign investment proposals against the background of the government's foreign investment policy and makes recommendations to the government, who has sole responsibility for approving or rejecting them. Foreign acquisitions of interest in an Australian business must be notified for approval when above a certain threshold value. In certain cases approval is required irrespective of the value, as for investment in the media or investment proposals by a foreign government or its agencies. Today the screening process seems to cause few problems in practice: the main sector negatively affected by screening is residential real estate, while business proposals are only rarely rejected.

However, concerns have been expressed about the persistent lack of transparency in the general screening process and in particular the absence of detailed public reasoning for decisions to reject investment proposal as contrary to the national interest. It was also argued that the time taken for considering applications (up to 30 days to examine and up to a further 10 days to advise the parties of the decision; that time period may be extended by a further 90 days if necessary) may affect concerned businesses in a negative manner,

because of the uncertainty it creates. It should be noted that to date extensions are rare – less than 1% of investment applications. In February 2008 the Australian government issued a set of principles for improving the transparency of the screening regime with respect to investment by foreign governments, conscious of the sensitivity that is sometimes aroused by those investments. It is still early to judge the concrete impact of the principles on the overall transparency of the process.

Investment provisions exist in Australia's FTAs with Singapore, Thailand, Chile and the United States; particularly in the latter case preferential treatment is foreseen, where among other things higher threshold values are specified for notification and prior approval. However, this more favourable treatment does not appear to have increased investment from the relevant partner countries. In August 2009, the Treasury announced a further easing of investment screening thresholds for non-US private investments in existing businesses, from AUD 100 million to AUD 219 million and an annual indexation of the threshold to keep pace with inflation. It is expected that, based on the new thresholds, 20% of all business applications will no longer need to be screened by the FIRB. The liberalised screening thresholds took effect in September 2009.

In the case of domestic regulation relating to services, exemptions to MFN treatment are possible as long as they are listed. For Australia, this is limited to two cases in relation to audiovisual services (where national treatment is provided to film and television co-productions with certain countries). Australia's FTAs all include a services chapter, in most cases following a "negative" rather than a "positive list" approach. Since they exclude fewer sectors than under Australia's GATS commitments, and since those exclusions are subject to a "ratchet" effect prohibiting new restrictions, these FTAs generally provide greater benefits to FTA partners than are available under GATS.

In the area of government procurement, Australia operates a "single procurement policy framework" that makes no distinction between foreign and domestic providers of goods or services, nor does it distinguish among foreign providers. Under these circumstances, Australia applies to all foreign suppliers the provisions that are stipulated under the Government Procurement chapters of Australia's FTAs with Singapore, the United States and Chile. However, despite the "value for money" principle, foreign suppliers have complained about the complexity and cost of the tender process, exacerbated by differences between Commonwealth and State procurement. One of the goals of Infrastructure Australia (established in January 2008) is the standardisation between Commonwealth and State jurisdictions of tender processes and contract documentation for infrastructure projects. This is important in the context of the stimulus package which includes significant additional funding for new infrastructure projects.

As regards government assistance for structural adjustment in certain industries, programmes (principally in textiles, clothing and footwear (TCF); automobiles; and pharmaceuticals) have been progressively reduced and have not discriminated against foreign-owned producers in Australia, as they have aimed to promote participation of Australian-based production in global supply chains. Government protection of the TCF industry has been significantly reduced as tariff rates have fallen (although they remain high relative to other manufacturing sectors). A post-2005 assistance package provided various types of adjustment assistance including for R&D and product development and diversification, in order to promote high value-added production in Australia and to encourage more labour-intensive production to move abroad. The observed continued

decline in the TCF workforce is consistent with Australia's policy objectives to focus on adding value and moving labour intensive production offshore.

### *Avoiding unnecessary trade restrictiveness: an explicit commitment included in RIA mechanisms results in a trade-friendly regulatory environment although further improvements are possible at the sub-federal level; customs procedures promote trade facilitation but could inspire other border agencies*

Where possible, policy makers should favour regulations that have the least restrictive effects on trade, a principle that is included in several WTO agreements. Mechanisms need to be put in place to give effect to this principle, including *ex ante* assessment of the impact of proposed regulations on trade and investment, reviewing them after a certain time, and streamlining procedures.

In Australia a number of specific provisions are aimed at ensuring that government entities prepare and apply regulations and administrative practices that do not hamper the free flow of goods, services and investment. Australia explicitly lists the "*impact on Australia's international capital flows or trade*" among the areas that need to be investigated when elaborating regulatory proposals. The potential impact of prospective regulations on trade and investment is assessed in the framework of Australia's Regulatory Impact Analysis (RIA), including during the preliminary self-assessment which allows distinguishing between proposals that will have no or low impacts, medium impacts, and significant impacts on business and individuals or the economy, for which in-depth analysis is undertaken. The Australian Government also funds an independent body, the Productivity Commission, which provides advice on the elimination of barriers to economic efficiency, including trade. From time to time, *ad hoc* government inquiries are formed to review trade and industry development measures.

Where a proposed regulation might have a direct bearing on *international trade* or export performance, a Trade Impact Assessment should be incorporated into the RIS. The Trade Impact Assessment summarises the impact of regulatory options and proposals on exporters, and assesses the overall impact on Australia's international trade. Training to government officials expected to undertake regulatory impact analysis is provided by the Office of Best Practice Regulation (OBPR). However, in order to make sure that the RIS analysis meets the information requirements of a Trade Impact Assessment, officials are required to consult with the Trade, Competitiveness and Advocacy Branch of the Department of Foreign Affairs and Trade (DFAT), entrusted with an oversight role on regulation that may impact on international trade. In addition DFAT, in concert with the Attorney General's Department (AGD), monitors the consistency of all trade-related measures with Australia's WTO and Free Trade Agreement (FTA) obligations.

In order to address issues of potential trade restrictiveness prior to regulation being adopted, federal regulatory changes that potentially impact on trade are forwarded by domestic agencies to DFAT and/or AGD for review prior to being introduced to Parliament. DFAT and AGD have specialist trade law units that are consulted during the elaboration of any regulation potentially affecting trade. The Office of International Law in AGD regularly offers advice to Australian Government agencies in regard to new proposals, laws, regulations and administrative decisions; it is also required to approve all National Interest Analysis (NIA, see below). In addition to their involvement during the regulatory elaboration stage, officials from DFAT and AGD are in regular contact with officials from all government agencies whose work may impact on trade, so as to provide continuous

guidance on Australia's international trade obligations and make sure that no unintended inconsistencies find their way into domestic regulation. Australian Government departments regularly monitor the implementation of measures which may affect trade to ensure the consistency of any such measures with Australia's WTO and FTA obligations. Furthermore, DFAT runs a trade policy course several times per year which is open to officials from federal, state and territory government agencies, so as to promote a better awareness of market openness stakes.

A regulatory impact assessment process is also applied with respect to Australia's international commitments linked to international negotiations or agreements, when these are expected to have a significant impact on business and the economy. Assessments occur both prior to the formal commencement of negotiations and at the stage when endorsement is sought to sign the final text of a treaty. Before engaging in negotiations, concerned administrations need to accompany the Cabinet submission or letter to the Prime Minister, the Minister for Foreign Affairs or other relevant ministers with a RIS focussing on the nature of the problem being addressed, the objectives of the proposed treaty and a preliminary discussion of options and their respective costs, benefits and, where appropriate, levels of risk. Prior to the signature, a more elaborate RIS is required, including detailed cost-benefit analysis that assesses the likely impacts on different groups within the Australian community. It may also include a quantitative assessment of compliance costs if this is deemed necessary by the OBPR.

All treaties signed by the Australian executive (except those the government decided are urgent or sensitive) are tabled in both Houses of Parliament for at least 15 sitting days before any treaty action is taken which would bind Australia under international law. They are accompanied by a National Interest analysis (NIA), noting the reasons why Australia should be a party, and set out the legislative action required to implement the treaty's obligations. Where relevant, this includes a discussion of the foreseeable economic, environmental, social and cultural effects of the treaty action; the obligations imposed by the treaty; its direct financial costs to Australia; how the treaty will be implemented domestically; and what consultation has occurred in relation to the treaty action. Line departments and agencies are required to consult State and Territory governments at an early stage in the preparation of NIAs. As part of the transparency requirement, the RIS and/or compliance cost report for the treaty and the NIA are tabled or made public with the final text of the treaty. NIAs are also made available on DFAT's website.

Powers and responsibilities in relation to trade and commerce with other countries or foreign corporations, including those relating to the collection and control of customs, excises and bounties lie with the Federal Government. However, regulations produced at the state or territory level may also impact on international trade and affect the openness of the Australian market, or generate regulatory barriers to trade and investment because of divergent or duplicative requirements among States. Australian Commonwealth and State governments seek to improve regulatory consistency between jurisdictions and avoid unintended barriers, including through annual meetings of their respective regulatory reform units and the Australian Government's regular consultations and collaboration with the States and Territories on major economic and social reform.

Policy reforms of national significance which require co-operative action are dealt at the Council of Australian Governments (COAG). Where formal agreements are reached, these may be embodied in Intergovernmental Agreements. Co-ordination of activities

takes place in over 30 COAG Ministerial Councils, which initiate, develop and monitor policy reform jointly in these areas, including developing harmonised regulatory policy responses and reducing existing regulatory inconsistencies. New Zealand ministers have full membership in councils when matters affecting New Zealand are being considered, in relation to trans-Tasman mutual recognition. COAG and the Ministerial Councils are subject to the Best Practice Regulation principles and require the preparation of a RIS where regulatory decisions are likely to have significant impacts on business.

However, regulatory heterogeneity across Australian States is still a concern for Australian businesses that seek to establish activities in more than one State and for foreign businesses. The 2009 Productivity Commission report on the mutual recognition schemes operating between Australian jurisdictions calls for expanding gradually the coverage of mutual recognition schemes where regulatory approaches have converged. The report also underlines that mutual recognitions schemes operate less effectively on the services side than on the goods side. Occupational standards in particular seem quite challenging because of the difficulty to achieve regulatory confidence among jurisdictions as to the potential risks of lower standards. The Productivity Commission recommends applying to mutual recognition registrants the same ongoing requirements for further training and professional development as applied to local registrants, so as to improve local customers' confidence on their qualifications, skills and experience. COAG has commenced initiatives to decrease redundancy and improve regulatory consistency and harmonisation between jurisdictions through the COAG reform agenda, especially the National Partnership Agreement to Deliver a Seamless National Economy.

Australia is also firmly committed to streamlining and harmonising customs procedures, in order to ensure that these procedures do not compromise the efficiency of its trade liberalisation efforts. The Australian Customs and Border Protection Service has been quite active in monitoring and benchmarking the efficiency of its processes and conducted in 2007 a Time Release Study (TRS) in order to assess its performance. The results of Australia's first TRS were released in February 2009 and the study will be repeated annually as an aid to strategic planning. The TRS has covered all border-related procedures, *i.e.* quarantine and health matters managed by AQIS, as well as border controls on trade administered by Customs and Border Protection on its behalf and on behalf of 41 other concerned government agencies. It has identified 0.3 days of interval between arrival and release for air cargo and 1.3 days for sea cargo.

The 2007 TRS results were validated with industry and confirm that Australian Customs and Border Protection processing performance is not a significant impediment to trade. Among the factors identified as enabling Australia's good performance were the large degree of electronic reporting from users to Customs and Border Protection, with more than 98% of all reports and declarations submitted electronically via electronic data interchange (EDI); and the availability of an Integrated Cargo System (ICS), which enables a common declaration to Customs and Border Protection and AQIS and is accessible to industry 24 hours per day, seven days per week for the receipt of reports and declarations. Furthermore, these results match well with Australia's good performance as recorded in international benchmarking indicators: the Logistics Performance Index (LPI) indicates an average of 1.71 day for Customs clearance, and 3.44 days of lead time[1] for imports. Australian Customs and Border Protection Service continues to refine examination and inspection rates as part of an intelligence-led and risk-based approach to cargo intervention.

Box 1.2. **Time Release Study: A trade facilitation benchmarking tool**

A TRS is a standardised method to assess the trade facilitation performance of Customs administrations and other agencies and private entities operating at the border. It was elaborated following similar initiatives undertaken by the Customs Administrations of Japan and the United States and endorsed by the WCO in 1994, then shaped into a methodological Guide in 2002. TRSs serve the principles of the WCO Kyoto Convention to simplify and harmonise customs procedures internationally and the aims of APEC's Trade Facilitation Action Plan II, to further reduce trade transaction costs.

A TRS seeks to measure the average time taken between the arrival of the goods and their release and to identify problem areas and potential corrective actions to increase efficiency. The objectives of TRS are to baseline current performance by Customs, other national authorities such as the port, health, veterinary, agriculture and other agencies, as well as the trading community which includes brokers, forwarding and shipping agents, carriers, banks and other intermediaries; and identify opportunities for improvement or reform. Undertaken over a series of years, such as in the case of Japan, which conducted 9 TRS since 1991, it allows monitoring the evolution of the border process and assessing the efficiency of reform measures: Japan's successive TRS exercises sustained reforms that reduced sea cargo intervals from 7 days in 1991 to 2.7 days in 2006 and air cargo intervals from 2.2 days to 0.6 days over the same period. In addition to Australia, the USA and Japan, other OECD countries that have undertaken a TRS include Korea and Mexico.

On the other hand, quarantine inspection rates still raise significant concerns from Australia's trading partners. Since 2001 Australia has applied mandated border inspection targets of 100% for all international air and sea vessels, mail and sea passengers and 81% for air passengers, following the sense of crisis engendered by the UK foot and mouth disease outbreak. These targets were motivated by that specific outbreak risk only and remained unchanged subsequently. The recent Beale review recommended moving away from mandated inspection targets in favour of a comprehensive risk-return approach to allocating inspection resources. The move to a risk-return approach has been given in principle support by the government. In response to these developments, and supported by analysis of historical data, AQIS is trialling a number of new methods in order to move towards this risk-return approach. These trials will be closely monitored and validated before being fully implemented. AQIS will continue to collect surveillance data for international vessels, passengers, mail and air freight to identify high-risk pathways and emerging risks. AQIS will also be increasing both targeted and random surveillance programmes on import pathways. In September 2009, the government announced a series of institutional and operational reforms, arising from the Beale review and supported by a budget of AUD 14.7 million. This includes funding scoping work for investment in information and communications technology, scoping work for future arrangements for post-entry quarantine facilities, support for interim institutional arrangements, the development of new biosecurity legislation and extending current approaches to risk analysis at the border.

In addition to confirming the satisfactory performance of customs services, the 2007 TRS identified a number of target areas showing potential for improvement. In particular, it was highlighted that around 20% of sea cargo and 16% of air cargo consignments are not fully reported and declared at arrival, with some 15% of sea cargo still not fully reported

when the goods are physically available for delivery, a proportion that is higher than the actual percentage of goods impeded by the border agencies.[2] A higher proportion of declarations lodged early could further reduce the average time from arrival to release, pointing to the need of further mobilising and raising awareness among the logistics industry involved in Australian goods trade.

Australian Customs and Border Protection is currently working to improve stakeholder engagement and working relationships with a wide range of policy agencies through the establishment of a Permit Issuing Agency and Stakeholder Forum. The Forum is expected to provide an ongoing mechanism to actively discuss whole-of-government policy and implement appropriate strategies designed to facilitate legitimate trade through the streamlining of handling procedures for restricted or prohibited goods. Australian Customs and Border Protection is seeking to reduce the administrative logistics costs for importers and minimise the duplication by policy agencies of the existing border measures. Furthermore, Australian Customs and Border Protection continues work with industry and other stakeholders to explore opportunities to improve electronic data uptake and transfer for border management purposes.

### *Encouraging the use of internationally harmonised measures: these mechanisms appear quite effective in dealing with regulatory divergence, except in the area of sanitary and phytosanitary policies*

The use of internationally harmonised measures as a basis for product regulation can enhance market openness by reducing costs generated by regulatory divergence.

The basic rule that shapes Australia's current approach to technical regulation is the generic requirement for officials to promote regulation that is demonstrably the most effective means for achieving the relevant policy objective. This applies to all standards developed by Australian standard-setting bodies that are subsequently incorporated into regulations or are used as regulatory standards. Such standards should be subject to a RIS demonstrating their policy effectiveness, including a scrutiny of the costs associated with them, especially where they were not specifically designed for the problem at hand. Overly complicated standards or standards imposing unnecessarily high compliance costs do not meet the policy effectiveness test and should thus be rejected. In addition, regulators should avoid modifying voluntary standards they incorporate into regulation, unless they can show clearly that modification is necessary to address the identified problem.

Australian regulatory policy reflects a clear and explicit commitment to international harmonisation, both at the Commonwealth and state and territory levels. The COAG Best Practice Regulation Guide prescribes that, wherever possible, regulatory measures or standards should be compatible with relevant international or internationally-accepted standards or practices in order to minimise the impediments to trade, although it is indicated that "compatibility" does not necessarily mean uniformity. The Guide also sets out that national regulations or mandatory standards should be consistent with Australia's international obligations, including obligations under the WTO TBT and SPS Agreements and invites regulators to refer to the WTO Code of Good Practice for the Preparation, Adoption and Application of Standards. The Best Practice Regulation Handbook calls for existing international standards to be taken into account when considering regulatory options. Where regulators decide to deviate from such international standards, they must specifically address the implications of this divergence in the RIS, explaining why it may

not be appropriate to adopt those standards unchanged. The RIS must in particular demonstrate that the benefits outweigh the costs of divergence to stakeholders and that the deviation is not violating Australia's international commitments. Foreign parties can present comments to the department or agency preparing a regulation and associated RIS. Any concerns raised through the consultation process should be identified in the RIS, along with how the concerns have been addressed in the final regulatory proposal. Enforcement of the government's RIA requirements in relation to standards is overseen by the Office of Best Practice Regulation (OBPR).

Within COAG, a major focus of regulatory harmonisation has been on product safety, where COAG has been supporting the harmonisation of consumer law, involving the transfer of certain responsibilities to the federal level. Australian States would retain the power to impose temporary orders on product safety grounds in order to address risk alerts, but those orders would be subject to confirmation at the federal level or would otherwise lapse. Regulatory harmonisation achievements in this area were formalised by the signing of an Intergovernmental Agreement on 2nd July 2009. The adoption of complementary legislation is expected by the end of 2010.

Australia's main national standardisation body is Standards Australia, a not-for-profit non-government standards body responsible for the development, formulation and approval of standards. Australian standards and guidance material are available through Standards Australia's publisher, SAI Global. As an adjunct or alternative to developing their own standards, regulators across all tiers of government in Australia mandate into law a significant percentage of the standards developed by Standards Australia, and representatives of regulatory agencies often participate in the development of those standards. Of more than 6 500 standards published by Standards Australia, approximately 2 400 are referenced in Australian legislation/regulations. Standards Australia is also in charge of co-ordinating national and international standardisation initiatives and accrediting other standard-setting bodies in Australia, in accordance with the Memorandum of Understanding (MOU) between Standards Australia and the Commonwealth Government. The MOU calls for a development of standards aiming primarily at the net benefit of the Australian community as a whole, preserving competition and favouring performance based rather than prescriptive requirements. No new Australian standard should be developed where an acceptable international standard already exists.

Standards Australia is a signatory to the WTO Code of Good Practice for the Preparation, Adoption and Application of Standards and abides by the Code's principles. It is also Australia's representative in international and regional fora such as the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC), the International Council of Societies of Industrial Design (ICSID) and the Pacific Area Standards Congress (PASC).

The national output of standards is increasingly aligned with international standards (according to Standards Australia this is the case with 33% of the current stock, with international standards as a per cent of yearly publications having moved from 20% in 1995 to 60% in 2005). Although the stock of aligned domestic standards is relatively limited compared with other OECD countries (62% in France, 78% in Canada, or 90% in Sweden) this does not seem to create major problems for foreign manufactures seeking to enter the Australian market. The most internationally oriented sectors are domestic (household) electrical appliances and telecommunications equipment, where internationally aligned standards are

close to 100% and in excess of 80% respectively. Areas of industry where standard-setting is predominantly domestic include building, construction and occupational health and safety, where Australia considers that no significant international standards exist. Australia deems that around one third of its standards do not have an international equivalent.

Australia's Import Risk Analysis process (IRA) is also expected to rely on international standards. The IRA assesses whether a proposed agro-food import can be brought into the country in a way that meets the country's *Appropriate Level of Protection – ALOP* – and under what conditions. Consistent with Australia's obligations under the SPS Agreement, the IRA does not need to rely on international standards if those are *considered as not providing sufficient protection to meet Australia's ALOP.* Although Australia's definition of ALOP as a risk estimation matrix reflecting the probability of a pest or disease incursion combined with the anticipated consequence of such an event is among the most explicit available internationally, its actual expression in the IRA has attracted criticism from Australia's trading partners. In particular, the IRA process has in the past been criticised domestically and internationally for insufficient scientific scrutiny, lack of transparency and early stakeholder involvement, and significant delays (a number of these criticisms are registered in the Beale report). Although draft IRA reports are released for public comment, some IRAs have been in progress for the last eight years or more.

In September 2007 Australia implemented significant changes to the IRA process. Changes included the reinforcement of a pre-existing Eminent Scientists Group and the introduction of tighter timelines, 24 months for a standard IRA and 30 months for an expanded IRA. It is still early to judge the efficiency of those reforms. However, the Beale Report, which has reviewed applicable quarantine and biosecurity arrangements in 2008, made a number of recommendations to further improve Australia's IRA process through an increase of resources and enhancing the independence, transparency and accountability of the process. In September 2009, the government announced a series of measures to strengthen Australia's biosecurity operations, including by consolidating the Department of Agriculture, Fisheries and Forestry's biosecurity functions into a new one-stop shop, integrating AQIS, Biosecurity Australia and other areas in a Biosecurity Services Group; and appointing an economist to the Eminent Scientists Group which is responsible for reviewing the import risk analyses conducted by Biosecurity Australia.

### *Recognising the equivalence of other countries' regulatory measures: this works generally smoothly, although the mutual recognition of professional qualifications at the State level is still a challenge*

In cases where the harmonisation of regulatory measures is not considered feasible or necessary, the recognition of equivalence of other countries' regulatory measures in attaining the same regulatory objective may be the most appropriate avenue for reducing technical barriers related to regulatory divergence. Australia has engaged in significant efforts to improve mutual recognition both at the international and at the sub-federal level. In order to promote confidence in this mechanism, recognition of equivalence is generally supported by international co-operation on accreditation of laboratories, certification and inspection bodies, spearheaded in Australia by NATA (National Association of Testing Authorities) and JAS-ANZ (Joint Accreditation System of Australia and New Zealand).

The Australian Government seeks to promote international arrangements for the mutual recognition of conformity assessment in both regulated and voluntary sectors. Australia's Free Trade Agreements (FTAs) with New Zealand, Singapore, Thailand, the

United States, Chile and ASEAN/New Zealand all include provisions which encourage regulatory authorities to recognise the equivalence of regulatory measures of the FTA partner countries and promote mutual recognition, equivalence and harmonisation in relation to technical regulations, including, where possible, by regional and local entities. Some FTAs encourage relevant bodies to develop mutually acceptable criteria for licensing and certification of professional service suppliers.

In addition, specific Government to Government Mutual Recognition Agreements (MRAs) for goods were concluded with New Zealand, the European Community, EFTA and Singapore. These provide for the recognition by one Party of conformity assessment (testing, inspection and certification) undertaken by the other Party (but not of applicable standards). The Trans-Tasman Mutual Recognition Arrangement however is more far-reaching, as it provides that a good that may legally be sold in one of the two partners may also be sold in the other, regardless of differences in standards or other sale-related regulatory requirements between Australia and New Zealand. Likewise, a person registered to practice an occupation in one of the countries is entitled to practice an equivalent occupation in the other without the need for further testing or examination.

Australia has also concluded services-related MRAs, including a mutual recognition arrangement with the US Securities and Exchange Commission (SEC) on US and Australian securities regulation. Professional qualifications recognition arrangements are essentially driven and supported by the relevant professional bodies, as professions are regulated at state and territory government level and not at the commonwealth level. Many of the peak professional bodies in Australia set national standards for their profession, including through the assessment of overseas-trained professionals and the accreditation of university courses, and are also assessing authorities for skilled migrants seeking entry to Australia. The accreditation may also be carried out by independent bodies with membership from the relevant professional bodies' professional associations, consumer bodies and registration boards. However, the delegation of foreign qualifications' recognition to professional bodies that may have a stake in the issue seems to have generated burdens for foreign service providers. More generally, the Australian Government supports international mobility through a range of multilateral, bilateral and regional activities, including conventions and memoranda of understanding on education and training co-operation and qualifications recognition.

Finally, there are numerous examples of domestic regulations which require regulators and policy officers to pay due regard to international arrangements on goods and services requirements: for instance, regulators are encouraged to accept test reports from laboratories accredited by NATA and NATA's MRA partners; and conformity assessments under the International Accreditation Forum's (IAF) multilateral MRAs.

At the sub-federal level, the COAG agenda has focussed in particular on product standards, product safety and mutual recognition of professional qualifications and a national trade licensing system. In the recent past a number of areas have been considered for mutual recognition, including the legal profession and the health profession. The most significant challenge has been to address inter-jurisdictional differences on educational requirements, probity standards and training requirements, as States prescribing a higher standard of qualifications express concerns about seeing their policy objectives undermined. For instance, although COAG is committed to the objective of uniform laws for the regulation of the legal profession in Australia, admission to the legal profession on the basis of overseas qualifications is still problematic: recognition of such qualifications

seems to lack uniformity and predictability among States, especially to the extent that it is in the hands of professional bodies that may have a stake in the issue, thereby generating considerable burdens for foreign service providers. On 30 April 2009, COAG agreed to set up a taskforce on reform of regulation of the legal profession, with the objective of developing uniform laws across jurisdictions.

### *Application of competition principles from an international perspective: A framework that works reasonably well*

The existence of efficient institutions and appeal mechanisms for hearing and deciding complaints about regulatory or private actions that impair market access and effective competition by foreign firms are key issues from an international market openness perspective.

Australia's competition policy and enforcement framework aims to be transparent, non-discriminatory and effective. It follows that foreign firms are subject to the same laws and procedures for hearing and deciding complaints as domestic firms. The Best Practice Regulation guidelines include a competition assessment that examines whether regulatory proposals discriminate between foreign and domestic goods or services, including on restrictions on trade or investment.

Foreign firms benefit from a number of reforms promoted at the Commonwealth or State level. Of particular relevance is the National Competition Policy which applies to all business activities, including government enterprises and provides a legislative framework for extending third party access to essential infrastructure services, such as electricity networks, rail tracks and natural gas pipelines. Following the 2005 recommendations by the Productivity Commission, the NCP seeks to improve practices in certain areas of anti-competitive activity, including anti-dumping, cabotage restrictions and pharmaceuticals. Furthermore, it pursues a National Reform Agenda, endorsed by COAG in 2006, aiming among other things to reduce regulatory burden and facilitate investment in export-oriented infrastructure. At the State level, the new national consumer policy framework announced by COAG in February 2009, will provide for the implementation of a new national product safety regulatory and enforcement framework and the development of enhanced enforcement co-operation among national and state regulatory agencies. It can be hoped that the new policy framework will simplify and clarify the requirements that foreign suppliers need to meet when participating in the Australian market.

Arrangements that substantially reduce competition are prohibited in Australia under the 1974 Trade Practices Act (TPA). In principle this Act applies to all goods or services supplied by domestic or foreign firms that operate in the Australian market. However, exemptions still exist for liner cargo shipping and export contracts. With regard to the latter, restrictions on cartels originating outside Australia are stricter than those on Australian exporters.

Finally, in order to prevent possible anti-competitive conduct from reducing the benefits of market openness expected of free trade agreements, Australia has decided to include in each FTA a competition chapter, elaborated with the participation of the Australian Competition and Consumer Commission.

## Conclusion

From the above review and analysis, it is clear that Australia's approach to regulatory policy and reform reflects recognition of the importance of maintaining and strengthening

the openness of its markets to international competition. The ability to pursue this policy orientation has no doubt been enhanced by Australia's strong economic performance in recent years and its relative resistance (compared with some other countries) to the global economic downturn that began in 2008. At the time of its accession to OECD in 1972, Australia's market was relatively protected compared with other OECD countries. Since then, however, Australia has engaged seriously in reforms, in its trade policy as well in other structural and regulatory policies. In terms of adopting and applying the six principles of trade-friendly regulatory reform identified in the past by the Trade Committee and which serve as the basis for the OECD country reviews of regulatory reform, Australia has achieved a very high standard. The challenges of regulatory reform in Australia are strongly characterised by the federal system of government and by Australia's geographic size. At the same time, through effective political leadership and transparent involvement of stakeholders in the regulatory process, the challenges are generally well recognised and are being addressed on a variety of levels. Australia should be commended for its frequent re-evaluation of the regulatory process and effects on the economy and its willingness to implement reforms suggested by this re-evaluation.

## Policy options for consideration

- ***Follow up application of the provisions for specific assessment of trade and investment impacts in the RIA process, in particular by clarifying the use of the Trade Impact Assessment***

There is widespread recognition today both inside and outside OECD of the importance of assessing the impact of regulatory changes before undertaking them. As mentioned above, Australia is one of the OECD countries that most clearly specifies procedures for including in RIA an assessment of trade and investment effects, although there appear to be few cases where these procedures have actually been applied. Australia should continue efforts to ensure effective implementation of trade impact assessments.

- ***Pursue and expand efforts to harmonise the FTAs in which Australia participates***

Australia is not unique in actively pursuing regional and bilateral trade agreements, and the overlapping obligations it has undertaken in these agreements are not excessively complex by international standards. However, a recent development could be a promising approach for the future by helping to overcome the "spaghetti bowl" effect. This is the goal of creating a sort of regional umbrella agreement through a Trans-Pacific Partnership Agreement linking a number of bilateral agreements involving Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, the United States and Vietnam. Although planned, the negotiations have not yet begun and therefore their results cannot yet be assessed. They may however suggest a way to spread the benefits of trade liberalisation while providing an important element of harmonisation that could be a strong vector for international trade and investment. This is an approach that Australia should promote strongly. It can help harmonise and simplify regulatory requirements while reducing economically unjustified discrimination.

- ***Continue to reduce and rationalise government assistance to industry and services***

While Australia has made striking progress in reducing previously high levels of government assistance to certain industrial sectors, there remains scope to reassess the usefulness of continuing programmes as the national economy evolves. In most of the sectors benefiting from aid, rapid economic expansion in Asia and the importance for

Australia of participating in global value chains suggest the need for significantly different strategies on the part of Australian producers and a role for government firmly focused on strengthening international competitiveness. This in fact is the explanation given for changes in the assistance provided *e.g.* to the automobile sector, but continuing programmes do not so far appear to have fully taken on board the new realities. In the automobile industry there is recognition of the importance of innovation and developing products that are more environmentally friendly; while new programmes focus on these aspects, they continue to complement older programmes reflecting a more protectionist approach to adjustment. A similar situation can be seen in the TCF industry, where the range of benefits provided to what is now a very small economic sector appears disproportionately expensive and economically distortive.

- ***Continue and strengthen efforts to harmonise Australian standards with international standards***

Despite the clear trend in favour of harmonisation of the national output of standards, the stock of Australian standards aligned to international standards is relatively low compared with OECD best practices. Australia should encourage further integration to international markets so as to secure better access to international trade for Australian companies, shorter lead time for new products, faster approval of Australian products and enhanced public procurement opportunities in other countries thanks to product conformity.

- ***Strengthen transparency in standard-setting***

A number of steps could improve the ability of stakeholders to participate in the standard setting process and thus ensure that the results are more market- and trade-friendly. These include strengthening the accessibility of base documents for the elaboration of technical standards and regulations; enhancing opportunities for public comment; and pursuing the development of interactive web-based consultation mechanisms currently being undertaken by Standards Australia.

- ***Take steps to introduce reforms to the quarantine inspection system, as recommended in the Beale report***

Following the Beale Report recommendations and in accordance with the recent reforms announced by the Australian government, the definition of biosecurity risk and appropriate level of protection should be tightened, including a clarification of the economic assessment involved in the definition; the transparency of import risk analysis improved; and the analysis of risks and returns reinforced, to replace as a basis for quarantine inspections the currently applicable mandatory inspection targets. This would provide a more efficient protection of Australia's environment while removing the persistent irritants to Australia's trading partners.

- ***Pursue the COAG agenda towards harmonisation of product safety standards. Establish a clear basis for the mutual recognition of professional qualifications***

The COAG process for harmonising product safety standards at the sub-federal level has already gained good momentum. Efforts should be pursued to ensure that the reform agenda is consistently implemented among Australian States. On the other hand, further clarifications are needed on the applicable qualification, registration, skills and experience standards for services in order to make sure that diverging approaches between States do not generate unnecessary barriers to trade. Enhancing inter-State regulatory confidence about the objectives pursued should greatly facilitate the recognition of equivalence of professional qualifications and activities.

## Notes

1. Lead time is understood as the average time from port of discharge to consignee for 50% of shipments.
2. 1% for air cargo and 12% for sea cargo when the goods are physically available for delivery.

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OECD Reviews of Regulatory Reform

# AUSTRALIA

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Australia has built strong governance foundations for the development of good regulatory management and competition policies, which are likely to be conducive to economic growth. It aims to reinvigorate a wide agenda of national reforms and to embed past reform achievements in new working arrangements between the Commonwealth and the states. This reform agenda is likely to yield substantial economic benefits for years to come, but demands joint participation and commitment from both the Commonwealth and all states. Maintaining the momentum for reform is a critical challenge, which requires a strategic vision as well as strenuous efforts to promote change and to establish a culture of continuous regulatory improvement.

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