

Regulatory responses must be balanced and operate in a way that does not impede growth and productivity

**2010
SCORECARD
OF RED TAPE
REFORM
SUMMARY**

2010 Scorecard of Red Tape Reform: Summary

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'The benchmarking of the performance of regulation across jurisdictions has assisted in identifying opportunities and challenges of regulatory reform in Australia ... The advocacy of 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.'

– OECD Reviews of Regulatory Reform, *Australia: Towards a Seamless National Economy*, OECD, 2010, p. 142.

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Governments are increasingly under pressure to regulate against all risks, despite the costs and burdens that may be imposed on business and the community by doing so. However, regulatory responses must be balanced and operate in a way that does not impede growth and productivity. Business regulation therefore continues to be a key focus for the Business Council of Australia (BCA).

The BCA considers that a regular assessment of jurisdictional performance of regulation-making is an important mechanism for holding regulatory authorities to account.

In May 2007, the BCA published *A Scorecard of State Red Tape Reform* (2007 Scorecard). The 2007 Scorecard responded to concerns that showed that the level of red tape in Australia was growing three times as fast as the rate of economic growth and that much of Australia's business regulation was being produced in an uncoordinated way across the country.

Consistent with the approach taken in the 2007 Scorecard, all jurisdictions' regulation-making systems (including the Commonwealth) have again been assessed against four key benchmarks: principles; accountability, transparency and process of review. The assessment determines whether jurisdictions have a set of comprehensive frameworks for regulation-making (including prospective and retrospective solutions) and whether there has been any positive reform progress, including evidence of a reduced regulatory burden, over the period since publication of previous BCA assessments.

This document is a summary of the key findings from the 2010 Scorecard research report. The detailed research contained in the 2010 Scorecard can be found on the BCA website at bca.com.au.

In most jurisdictions, red tape-cutting programs or targets have been implemented and these initiatives are welcomed. However, processes that merely respond 'after the fact' to reduce red tape do not stem the tide of future bad regulation. There needs to be a comprehensive model that incorporates both prospective and retrospective reforms to prevent bad regulation from being made in the first place.

It is difficult to measure the overall regulatory burden on business. If the creation of new regulation is not controlled there is a greater risk that important aspects of regulation-making processes may be overlooked, such as 'evidence-based' decisions, cost-benefit analysis and appropriate consultation with affected stakeholders. Ultimately, it is the outcomes and quality of regulation that are important.

Red tape is important because it affects Australia's economic performance and therefore community wellbeing. If regulations continue to be announced without due process then very damaging consequences for business and the economy can ensue. BCA members and other prominent business figures have, for example, expressed their concern about the damaging consequences of the mining tax proposal – such as the sovereign risk effects (see Exhibit 1). A consultative approach with cost-benefit analysis and buy-in from stakeholders can avoid the damaging consequences of regulatory proposals and ensure regulations do not impose unnecessary costs and burdens on the economy.

Exhibit 1. The mining tax proposal – regulation made in isolation can have damaging economic consequences

- *'Certainly the feedback that I've had from markets offshore is that they regard Australian sovereign risk as having increased as a result of the proposal, even though that proposal may be watered down or altered or even not proceeded with.'* – Malcolm Broomhead, Chairman Asciano and Director BHP Billiton
- *'Sovereign risk is on one hand reality, and on the other hand perception ... And perception can be a reality. And there is a perception floating around that sovereign risk in Australia has increased.'* – Wal King, Chief Executive Leighton Holdings Limited

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- *'The feedback I've got, and I've been to Canada recently, is that it was regarded as a sudden shift in direction and a change in direction by Australia, which did in fact spook, I think, miners and financiers overseas.'* – Tony Shepherd, Chairman Transfield Services
- *'Australia has done some damage, that damage could be lasting to its reputation as a safe haven for investors.'* – Evy Hambro, Joint Chief Investments Officer, Global Mining Investments Limited

Sources: 'Business Chiefs Urge Tax Reform', *The Australian*, 16 August 2010, pp. 1 and 4; 'Resource Tax Undermining Australia', *The Australian Financial Review*, 18 August 2010, p. 1.

Overall, the 2010 Scorecard demonstrates that:

- while regulation-making processes may have in general improved across the jurisdictions since 2007, many of those improvements have been from a low base
- the reforms that the BCA called for in 2007 in the areas of accountability and transparency have not been achieved
- there has been a disappointing trend of downward performance at the Commonwealth level.

The Commonwealth and Victoria have long been leaders of regulatory reform initiatives in Australia and have therefore acted as an example to other jurisdictions. The Commonwealth administers some of the most prominent business regulation including in relation to taxation, corporations, trade and competition. The BCA is therefore disappointed at the declining state of regulatory process delivered at a Commonwealth level. The Commonwealth has been assessed as having declining performance based on various factors such as the move of the Office of Best Practice Regulation (OBPR) out of the Productivity Commission, which we consider has reduced its independence, and recent changes to the Regulation Impact Assessment (RIS) process, which we consider undermines the robustness of information provided by departments to ministers.

What is clear from the 2010 Scorecard report is that while regulation-making processes have improved somewhat across the jurisdictions, reforms that the BCA called for in 2007 in the areas of 'accountability' and 'transparency' have not been achieved. There is little point developing a good system, if checks and balances are not present to force agencies to comply. In this respect, the BCA emphasises the need for better accountability and transparency mechanisms across all the jurisdictions, to ensure that regulation-making processes are followed and will increase the likelihood that good regulation will be produced.

A benchmarking system to examine regulation-making processes around Australia is very important. Examination acts as an accountability mechanism and also identifies progress and further improvements that can be made. Part of the problem is the lack of external agencies or 'watchdogs' to ensure that government reform commitments are followed through with specific actions.

The BCA supports the Productivity Commission review, agreed through COAG, to assess the efficiency and quality of both COAG and jurisdictional regulation impact assessment processes in 2012. However, it is our understanding that this is not intended to be a regular review or aimed at assessing outcomes or compliance with regulation-making processes.

The BCA considers that the Productivity Commission should be tasked with regularly undertaking an assessment of regulation-making systems, compliance by all jurisdictions with their regulation-making processes and the outcomes.

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Overall findings

The BCA's assessment of the overall performance of each of the states' regulation-making systems reflects an assessment against the four key benchmarks: principles, accountability, transparency and review.

The 2010 Scorecard found that overall much more can be done at all levels of government to ensure that regulation-making processes are robust and deliver good regulatory outcomes. While some jurisdictions have improved their performance, all jurisdictions must continue to reform their processes to ensure that regulation is subject to appropriate 'checks and balances', consultation and transparency.

The BCA also assessed whether the regulation-making systems in each jurisdiction are being developed in such a way that reforms are likely to lead to 'excellent' ratings in the future. The BCA has been able to identify significant reforms that are needed in all jurisdictions to improve their regulatory process. Accordingly, no jurisdiction can yet be considered to be on a path towards excellence.

Jurisdiction	Overall assessment (2010)	Overall assessment (2007)	Overall trend performance since 2007	Systems in place creating a strong path to excellence	Indicative score within the ratings band
Victoria	Good	Good		✗	7
Commonwealth	Adequate/Good	Good	▼	✗	6
New South Wales	Adequate/Good	Poor	▲	✗	6
Queensland	Adequate/Good	Adequate – but with clear room for improvement	▲	✗	5
Western Australia	Adequate/Good	Poor	▲	✗	5
South Australia	Adequate/Good	Adequate/Good		✗	5
Northern Territory	Adequate/Good	Adequate – but with clear room for improvement	▲	✗	5
Tasmania	Adequate – but with clear room for improvement	Adequate – but with clear room for improvement		✗	4
Australian Capital Territory	Adequate – but with clear room for improvement	Adequate – but with clear room for improvement		✗	3

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The Key: explanation of the benchmarks

Rating	Description
Excellent 9–10*	All aspects of a sound system of regulation-making are present, operational and there is no significant improvement required in those processes. There have been no deviations from the established process. A significant demonstrated reduction in the regulatory burden on business is evident.
Good 7–8*	A sound, systemic regulation-making process that includes (but with some possible scope for improvement in some areas): <ul style="list-style-type: none"> • a comprehensive framework of principles for good regulation-making • accountability mechanisms including independent review and public reporting on regulation-making processes • mandatory regulation impact statement (RIS) systems for proposals that will have a significant impact on business and processes to ensure that consultation is conducted with all business in a timely and effective way • processes of regular review of regulations (e.g. sunset clauses and annual red tape reviews) to ensure that regulations remain efficient and effective over time, with a demonstrated red tape reduction shown.
Adequate/Good 5–6*	An adequate system that incorporates many of the requirements of good process has been established. However, the system has not been set up in a way that is likely to achieve the desired outcomes needed from the process – such as compliance by policy makers. For example, while guiding principles, oversight mechanisms, consultation guidance and review processes might be present, some of those processes have not been established in a way that would ensure compliance.
Adequate – but room for improvement 3–4*	An adequate, systemic regulation-making process that incorporates some, but not all, of the requirements of good process and therefore requires review and improvement in the system. For example, there may be good guiding principles, but limited accountability or transparency mechanisms to ensure that they are implemented.
Poor 0–2*	A poor regulation-making process that requires much to be done, in particular: <ul style="list-style-type: none"> • the establishment of comprehensive principles and RIS requirements supported by mandatory RIS processes and oversight mechanisms • timely, active and effective stakeholder consultation that includes the opportunity for all relevant businesses to participate in the consultation • the establishment of review processes, for example through formal reviews and sunset clauses.

***Numerical ratings:** Recognising that there is a variation in performance across jurisdictions within a given ratings band, we have allocated numerical indicators to provide a more fulsome representation of performance by jurisdictions. For example, a number of jurisdictions have received an adequate/good rating. However, within that rating, some jurisdictions may have developed a more comprehensive regulation-making system. For this reason a higher numerical rating has been given to those jurisdictions to recognise their reform efforts. Where jurisdictions have received the same numerical rating, however, this should not be taken to indicate that they have the same regulation-making system or the same areas for improvement. All of the regulation-making systems differ across the country and each jurisdiction will need to consider its reform objectives on its own merits.

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Assessment against the benchmarks

In constructing this scorecard, the BCA has established four key benchmarks as a basis for a good regulation-making process¹ and measured jurisdictions' red tape reform processes against those benchmarks. These benchmarks are based on the elements of a good regulatory process that the BCA believes are important and which were used to make the same assessment in the 2007 Scorecard. They are:

- **principles of regulation-making** – a comprehensive framework for regulation-making that includes: the need to consider alternatives to regulation, articulation of clear policy objectives, cost–benefit analysis, consultation with business, effective and proportional responses, and review
- **accountability** – mechanisms to ensure that the principles are implemented properly and that regulators are held to account for their performance
- **transparency** – mechanisms to ensure that decisions are made and policies developed in a transparent manner and that those potentially affected have an input into the process
- **review** – mechanisms so that regulations are subject to review to ensure they remain relevant and efficient over time.

The BCA wrote to the Commonwealth Government and the premiers and chief ministers of each state and territory in December 2009, asking for information about their regulation-making processes against the four key BCA benchmarks. The BCA has also drawn on BCA member feedback, information from consultation with jurisdictions and publicly available sources such as the 2010 report by OECD on regulatory reform, *Australia: Towards a Seamless National Economy*.

1. Principles of good regulation-making

Underpinning an effective regulatory framework is a sound set of guiding principles for regulation-making. There have been several efforts at articulating the important guiding principles. At the COAG meeting in April 2007, it was agreed that all governments would ensure that regulatory processes in their jurisdictions would be 'consistent' with the eight guiding COAG principles; however, the principles implemented continue to remain different across jurisdictions.

Jurisdiction	Assessment (2010)	Assessment (2007)	Change
Commonwealth	Good	Not assessed	N/A
New South Wales	Good	Not assessed	N/A
Victoria	Good	Good	
Queensland	Good	Adequate- but with clear room for improvement	▲
Western Australia	Good	Adequate – but with clear room for improvement	▲
South Australia	Good	Good	
Tasmania	Adequate/Good	Adequate/Good	
Australian Capital Territory	Good	Good	
Northern Territory	Good	Adequate/Good	▲

¹ See for example pages 37 to 54 of the BCA *Business Regulation Action Plan for Future Prosperity*, 2005.

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2. Accountability

While it is important for good principles of regulation-making to be established, without accountability mechanisms to ensure that those principles are followed and sanctions imposed for non-compliance, ineffective and inefficient regulations will continue to be introduced. To establish frameworks that encourage agencies to comply with regulation-making procedures, the BCA considers that three main accountability elements should be included in a regulatory framework: an independent oversight body, a cabinet-level gatekeeper and a champion of better regulation.

Of primary importance for enforcement of compliance and imposition of credible sanctions for non-compliance, is the establishment of a truly independent oversight body. An independent oversight body can take roles such as review of RISs and independent and public reporting on compliance with regulation-making processes. The BCA also sees the independent body being able to conduct broader economic analysis and review and advice on future regulatory reform priorities. Independence ensures that analysis is conducted without influence by politicians or the host department, that regulatory principles are followed and that there are public consequences/sanctions if they are not followed. There are a number of ways that independence of an oversight agency can be achieved. A clear and proven mechanism is to establish a separate statutory body such as the Productivity Commission.

Jurisdiction	Assessment (2010)	Assessment (2007)	Change
Commonwealth	Adequate/Good	Not assessed	N/A
New South Wales	Adequate/Good	Not assessed	N/A
Victoria	Good	Good	
Queensland	Adequate/Good	Adequate – but with clear room for improvement	▲
Western Australia	Adequate/Good	Poor	▲
South Australia	Adequate/Good	Adequate/Good	
Tasmania	Adequate/Good	Adequate/Good	
Australian Capital Territory	Adequate – but with clear room for improvement	Adequate – but with clear room for improvement	
Northern Territory	Adequate – but with clear room for improvement	Adequate – but with clear room for improvement	

3. Transparency

Decision-making about regulatory proposals must be conducted in a manner that is transparent, and that enables those potentially impacted by existing or new regulation and other relevant stakeholders to provide input and assistance in the process. This benchmark is predicated on whether:

- a. all regulation that may affect business is subject to a regulation impact statement (RIS) process that analyses alternative options
- b. it is compulsory for the RIS process to include a proper cost–benefit analysis
- c. there is a process to ensure there is adequate consultation on the draft RIS and Exposure Draft of significant regulation (including set minimum periods for consultation of at least 30 days)
- d. publication of the final RIS is required before the regulation is passed.

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This benchmark assesses the jurisdictions against all of the criteria above. Adequate performers in this category did not perform well in some aspects of a transparent process. For example, a jurisdiction may have had a good RIS process in place that applied to all types of regulation, but may have had inadequate consultation mechanisms. Most jurisdictions are assessed as needing to improve in the area of transparency and no jurisdiction receives a 'good' rating.

Jurisdiction	Assessment (2010)	Assessment (2007)	Change
Commonwealth	Adequate/Good	Not assessed	N/A
New South Wales	Adequate/Good	Not assessed	N/A
Victoria	Adequate/Good	Adequate/Good	
Queensland	Adequate – but with clear room for improvement	Poor	▲
Western Australia	Adequate/Good	Poor	▲
South Australia	Adequate – but with clear room for improvement	Adequate – but with clear room for improvement	
Tasmania	Adequate – but with clear room for improvement	Adequate – but with clear room for improvement	
Australian Capital Territory	Adequate/Good	Adequate/Good	
Northern Territory	Adequate/Good	Poor/Adequate	▲

4. Review

Good regulation-making processes require that regulations be subject to review to ensure that they continue to remain relevant and efficient over time.² A good review system would require regulators to consider the process of keeping regulation up to date (e.g. by considering this issue in the RIS process), incorporating mandatory sunset clauses and undertaking regular red tape reviews to reduce the regulatory burden on business.

Jurisdiction	Assessment (2010)	Assessment (2007)	Change
Commonwealth	Adequate/Good	Not assessed	N/A
New South Wales	Good	Not assessed	N/A
Victoria	Good – with some improvement shown	Good	▲
Queensland	Good	Good	
Western Australia	Adequate/Good	Adequate – but with clear room for improvement	▲
South Australia	Good – with some improvement shown	Good	▲
Tasmania	Adequate – but with clear room for improvement	Adequate – but with clear room for improvement	
Australian Capital Territory	Poor	Poor	
Northern Territory	Adequate	Adequate – but with clear room for improvement	▲

² See Productivity Commission, *Performance Benchmarking of Australian Business Regulation*, Research Report, Melbourne, 2007, p. 125.

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Conclusion

In addition to assessing the performance of individual jurisdictions, the scorecard clearly demonstrated that even with improvements in individual regulation-making processes, there continues to be a lack of consistency across jurisdictions. In the absence of a national, coordinated approach to red tape reform, it is apparent from the 2010 Scorecard that jurisdictions are in fact creating more regulatory complexity through developing differing regulation-making processes (making it difficult for business to feed into the process of policy making) as well as continuing to develop inconsistent regulations over time. A national approach must include consideration of consistency across the state and Commonwealth governments.

BCA members have indicated that despite improvements in regulation-making processes, a lack of accountability and transparency for regulatory actions has meant that good processes are not always followed. The BCA has highlighted in the 2010 Scorecard report many options for improving accountability and transparency mechanisms (and these are supported by the Productivity Commission), including:

- creating, or enhancing, the independence of oversight agencies
- incorporating a robust and quantified 'consultation' RIS in the regulation-making process
- requiring the independent oversight agency to extend its monitoring and reporting role to the quality of consultation that has been undertaken
- using confidential consultation processes only in limited circumstances where transparency would clearly compromise the public interest.³

The 2010 Scorecard assesses the regulation-making processes that have been developed by jurisdictions across Australia. However, such an exercise is not of itself amenable to assessing whether jurisdictions are actually complying with their regulation-making processes. In our view, much of the poor regulation that has been produced in recent years has been the result of rushed implementation of regulatory ideas, with a lack of consultation and therefore a lack of understanding of the practical impacts of regulatory proposals.

The BCA supports the Productivity Commission review, agreed through COAG, to assess the efficiency and quality of both COAG and jurisdictional regulation impact assessment processes in 2012. However, it is our understanding that this is not intended to be a regular review or aimed at assessing outcomes or compliance with regulation-making processes.

Recommendation: The BCA considers that the Productivity Commission should be tasked with regularly undertaking an assessment of regulation-making systems and compliance by all jurisdictions with their regulation-making processes.

In conjunction with this, a permanent advisory council, made up of representatives from across business and other affected groups, could be established, which would inform the assessment and be able to provide information about the regulatory outcomes in the jurisdictions.

³ See Productivity Commission, *Annual Review of Regulatory Burdens on Business: Business and Consumer Services*, Research Report, Canberra, August 2010, p. xxiii.

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BUSINESS COUNCIL OF AUSTRALIA

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