

Business
Council of
Australia



Submission to the Department of
Finance and Deregulation on the
Independent Review of the
Australian Government's Regulatory
Impact Analysis Process

NOVEMBER 2012

About the BCA

The Business Council of Australia (BCA) brings together the chief executives of 100 of Australia's leading companies.

For almost 30 years, the BCA has provided a unique forum for some of Australia's most experienced corporate leaders to contribute to public policy reform that affects business and the community as a whole.

Our vision is for Australia to be the best place in the world in which to live, learn, work and do business.

Summary

This submission relates to the government's preliminary response to the independent review of the Australian Government's Regulatory Impact Analysis (RIA) process.

The Business Council of Australia commends the government for commissioning this important review through an independent process and publicly releasing it. While government processes for scrutiny of the impact of regulation receive limited public attention, these processes are critically important to Australia's productivity and competitiveness.

With Australia currently ranking 96th out of 144 nations for regulatory burden on the World Economic Forum's Global Competitiveness Index, there are considerable gains to be made from institutionalising more disciplined regulatory gatekeeping at all levels of government.

The BCA has recently released its *Standards for Rule Making*, which encapsulate the BCA's expectations of an efficient regulatory system. The standards emphasise that the regulatory impact statement process should be designed to ensure that rigorous analysis is undertaken up-front to properly understand the problem that government is seeking to manage, and the impact of a range of solutions.

The independent review raises some serious concerns regarding the extent to which agencies and ministers apply the RIA process in practice to meet these objectives.

While we accept that the government's final response may differ from the review's recommendations in some detailed technical aspects of the RIA process, it will be critical that the government supports and implements the broad thrust of the review's recommendations.

The BCA supports a strong and swift response to the review and the implementation of as many of its recommendations as possible.

In relation to some of the specific recommendations, we believe that the government's final response to the review should:

- Acknowledge the seriousness of the issues raised in the review and provide a strong commitment from all ministers to lift the performance of the regulatory system and drive a more effective culture of good regulation (Recommendation 1).
- Support the implementation of the proposed two-stage RIA process (Recommendation 3). The new process should also be underpinned by two stages of stakeholder consultation and the early and active engagement of the Office of Best Practice Regulation (OBPR) by agencies to ensure that the problem and risks are well-defined and rigorously analysed before seeking to regulate.
- Support the tightening up of exemption arrangements and ensure that agencies avoid seeking exemption unless it is absolutely essential (Recommendation 6).

- Support initiatives to enhance the transparency of government performance on consultation (Recommendation 7), including reporting periodically on examples of best practice and undesirable practice in terms of consultation.
- Highlight that the recommendation for a board has merit and is worthy of further consideration (Recommendation 8). The board could have a strategic role and meet periodically to provide independent oversight of the performance of the RIA process, consider systemic issues being confronted by agencies and the OBPR and oversee efforts to address these issues.
- Support an enhanced role for annual regulatory plans (Recommendation 9).
- Support all legislation that has more than a minor regulatory impact on business and the not-for-profit sector being subject to statutory review every five years (Recommendation 14).

The BCA's position in relation to each of these recommendations is outlined in further detail below.

An improved culture of regulation (Recommendation 1)

As the review notes, there is a "... low degree of inculcation of the RIA process in agency culture despite RISs being required in some form or another for government regulatory decisions since the mid-1980s."

This suggests that regardless of the nature of the enhanced RIA processes that are adopted, attempts to improve RIA performance will ultimately fail if there is not a major change in the way ministers and agencies commit to and engage with the RIA process.

For this reason, we believe that the final government response should acknowledge the seriousness of the issues raised in the review at the outset and provide the "unequivocal commitment" suggested to lift the performance of the regulatory system and drive a more effective culture of good regulation.

Revised RIA approach (Recommendation 3)

We are supportive of a two-stage RIA process, which is in line with the BCA's standards.

If implemented effectively, this should see a more careful and considered examination of the risk or problem at hand and a range of options to address it before pursuing regulation. It should avoid the current situation where proposed regulatory interventions are often based on a weak analysis of the problem at hand, with subsequent options and impact analysis linked to this flawed starting point.

We do believe that the success of the two-stage process will be underpinned by:

- Both the options RIS and the detailed RIS being subject to stakeholder consultation. This means that stakeholders have the opportunity for meaningful consultation before a particular regulatory model has been 'locked in', but it also means that stakeholders can carefully assess the detailed impacts of the preferred option, including the reasonableness of estimates of business costs.
- Early and active engagement by agencies of the OPBR on the options-stage RIS. If agencies do not engage actively with the OPBR at this early stage, then many of the benefits of a two-stage process could be lost, particularly the efficiencies gained through agencies obtaining early feedback from OBPR rather than waiting until analysis and regulatory options are far more advanced.

Prime ministerial exemptions (Recommendation 6)

The BCA has been concerned by the significant increase in the number of prime ministerial exemptions in recent years. On this basis, we strongly support measures to tighten up this process, including narrowing the criteria for exemptions and making transparent the reasons why an exemption has been given. Agencies should not be seeking an exemption unless it is absolutely essential.

While the preliminary government response does not support deeming exemptions to be “non-compliant”, we would encourage a requirement that agencies and ministers very clearly and publicly communicate that the policy direction has not been tested through the analysis, public consultation and debate of the RIA process.

Consultation (Recommendation 7)

The review recommends that if consultative practices are not adequate then this should be publicly reported by the OBPR. While the initial government response notes that the OBPR does not have a role in assessing the adequacy of stakeholder consultation for legislation, the BCA considers that there would be merit in some form of public reporting on consultation by the OBPR or another suitable body. For example, the OBPR could include in its annual report examples of best practice and undesirable practice in terms of consultation, as done in other jurisdictions.

Advisory board for OBPR (Recommendation 8)

We note that the government’s preliminary response suggests that the role of an advisory board needs further consideration and that a board may not prove effective in providing advice regarding the adequacy of RISs because of the short, five-day time frames proposed for investment.

While this may be the case, the recommendation for a board is still worthy of further consideration. The board could usefully have a strategic role and meet periodically to provide independent oversight of the performance of the RIA process, consider systemic issues being confronted by agencies and the OBPR, and oversee efforts to address these issues.

Annual regulatory plans (Recommendation 9)

The BCA strongly supports government attempts to enhance the role of annual regulatory plans in providing an early indication to the community of the government’s intentions to introduce new regulation, amend existing regulations and undertake deregulatory initiatives throughout the year.

An important part of these plans should be to compare the actual regulatory activities undertaken in the previous 12 months with what was highlighted in the previous plan. This provides a strong indication of the relevance of the regulatory plans along with the extent to which an agency’s regulatory activities are strategic as opposed to reactive in nature.

Sunset and review mechanisms (Recommendation 14)

The BCA acknowledges that it is problematic for automatic sunset provisions to apply to primary legislation due to uncertainty and because of the considerable parliamentary and legislative drafting workload that would be involved.

While different regulatory and legislative systems architecture may limit the applicability of international jurisdictions’ sunset regimes to Australia, in the longer term, the BCA does consider that it would be worthwhile examining approaches such as those recently adopted by the UK Government.

These arrangements will see regulation that is a net burden on business or the community subjected to a statutory five-year review, allowing for amendment and remaking of regulations ahead of a seven-year automatic sunset.

The UK arrangements do subject primary legislation and legislative instruments to these requirements but limit the scope by excluding certain instruments and limiting the sun-setting provision to the elements of the legislation that give rise to the regulatory burden on business and civil society organisations.

This policy has only recently been introduced in the UK, but there is merit in Australian governments monitoring its effectiveness in practice to assess its relevance to Australian arrangements.

If the government does not support all legislation that has more than a minor regulatory impact on business and the not-for-profit sector being subject to sunset provisions, then legislation should be subject to statutory review every five years.

There would be obvious exceptions from these requirements, including legislation:

- that is critical to the ongoing functioning of government, such as the Budget
- relating to matters of national security or emergency response
- upon which consistent and certain application is absolutely critical to upholding justice, democratic institutions, community safety and security.

The government's preliminary response suggests that legislation introduced since 2007 has generally been subject to review. If this is the case, then it would appear that requiring statutory reviews would serve to reinforce and institutionalise current practice rather than creating additional burdens.

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