

Business
Council of
Australia



Response to the ANAO Performance Audit - Implementing the Deregulation Program: Cutting Red Tape

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The Business Council of Australia (BCA) is a forum for the chief executives of Australia's largest companies to promote economic and social progress in the national interest.

About this submission

The Business Council welcomes the opportunity to provide input to the Australian National Audit Office's (ANAO's) performance audit of the Australian Government's Deregulation Program.

Introduction

The Business Council is strongly supportive of the government's work to improve the efficiency and effectiveness of regulation, including the deregulation program.

As outlined in the 2013 Business Council publication *Improving Australia's Regulatory System*, 'regulation has an important role to play in upholding critical rights and providing legitimate safeguards but, to be effective, regulation must be properly thought through and applied sensibly'.¹

A critical enabler of efficient regulatory outcomes is a proper process that carefully considers the impact of new regulatory proposals, and continually assesses the effectiveness of regulation that is already on the books.

The government's deregulation program has instituted a comprehensive framework to look back at the current regulatory stock, comprising:

- a commitment to reduce the cost of regulatory compliance by at least \$1 billion every year, including the reservation of at least two full parliamentary days each year for the repeal of legislation that does not encourage efficient regulation
- the institution of mechanisms within government departments to incentivise better regulation
- the establishment of a framework to measure, assess and report on regulator performance, and reduce the regulatory burden resulting from administration
- strengthening existing regulatory impact assessment processes to improve consideration of new regulatory proposals.

This submission focuses on the whole-of-government processes underpinning deregulation and regulation impact assessment. We suggest these processes have greatly improved regulatory outcomes but need to be strengthened, to avoid eroding the benefits of deregulation.

¹ Business Council of Australia (BCA), *Improving Australia's Regulatory System*, BCA, Melbourne, November 2013.

Key findings and observations

1. The deregulation agenda is reducing the red tape imposed on business and has made good progress to date.
2. Good progress has been made in the implementation of the deregulation agenda within departments, although there is room for more consistent application of the regulator performance framework (RPF) across all regulators.
3. Recently, there have been a number of regulatory proposals or new pieces of legislation that could adversely impact on productivity and competitiveness. The robustness of regulatory impact assessment processes must be maintained to reduce the risk of new regulation reversing the benefits of the deregulation agenda.
4. All three portfolios (Communications; Health; Industry and Science) have undertaken deregulation that has generated benefits to the economy.
5. There has been mixed adoption of the Business Council's suggested policy priorities for deregulation, particularly in the Industry and Science portfolio.

Deregulation should continue to be progressed and deepened

The deregulation agenda has made significant progress in reducing the red tape imposed on business.²

According to the Annual Deregulation Report for 2014, the net savings resulting from deregulation through to 31 December 2014 total \$2.3 billion.³

If the deregulation agenda is to improve on this performance, the government will need to take on more challenging deregulation opportunities and also ward against the risk of introducing costly new regulation unless it is very well justified.

To date, the deregulation program has arguably focused on reducing administrative burdens. The benefits of deregulation in the future will need to be generated from the implementation of more challenging and substantive reforms. These should include:

- microeconomic reforms, for example, the proposals in the Competition Policy Review for reforming shipping, taxis and pharmacy regulation
- working with the states and territories, for example, on better planning approval processes and more consistent retail trading hours or occupational licensing
- removing costly regulations implemented by the former government that were not subjected to proper scrutiny, for example, Australian Industry Participation Plans under the Australian Jobs Act.

There have also been a number of recent regulatory proposals or new pieces of legislation that risk reversing the benefits of the deregulation agenda to date. These

² BCA, *Statement on Autumn Repeal Day*, BCA, Melbourne, 18 March 2015.

³ Australian Government, *The Australian Government Annual Deregulation Report 2014*, Australian Government, Canberra, 18 March 2015.

include: the implementation of unfair contract terms legislation for business-to-business contracts; possible changes to misuse of market power provisions supported by the Minister for Small Business; and proposed regulation affecting foreign investment, food labelling, telecommunications and financial sectors.

The Business Council's view is that the current best practice framework is a good foundation to support continuing, positive reform but it will require the government to remain focused and resolute in its application. The Business Council makes some suggestions for its improvement later in this submission.

Regulator performance assessment should be outcomes-focused

There has been good progress in the implementation of the deregulation agenda across all agencies, however, there would appear to be room for improvement in the implementation of the Regulator Performance Framework (RPF).

The RPF is a mechanism for building greater understanding of how the administration and operation of regulators impacts on regulated businesses.

The Business Council has been asked to comment on the development and implementation of the RPF for several departments and regulatory agencies.

While all regulators are issued with the same guidance materials, in our experience, the actual implementation of the RPF has been somewhat inconsistent across regulators in terms of the types of indicators used to measure performance and their number.

Institutions that develop indicators of regulator performance that are outcomes-based will be best placed to align performance measurement with the impact on regulated entities. Best practice metrics should clearly link to the desired *outcomes* of regulation (rather than focus on *inputs* or *outputs*) and should be measurable and specific, to compare performance across multiple years.

Processes to assess new regulation should be strengthened

A robust regulatory impact assessment framework is needed to prevent the risk of new regulatory proposals eroding the benefits of deregulation.

Some recently proposed or implemented regulation that could represent a significant addition to the regulatory burden include:

- proposed changes to the country of origin labelling system (announced but not yet implemented)⁴
- the extension of unfair contract terms to small business (currently before the parliament)
- regulation of telecommunications companies originating from the Attorney-General's portfolio, including data retention (passed the parliament in March 2015), a new online copyright infringement scheme (passed the parliament in June 2015) and telecommunications sector security reform (currently before the parliament)

⁴ Note: this originates from the Industry and Science portfolio.

- changes to the misuse of market power provisions of the *Competition and Consumer Act 2010* (proposed in the Competition Policy Review in 2015)
- lowering the Foreign Investment Review Board threshold for agricultural land (implemented) and agribusinesses (currently before the parliament).

Although the majority of these proposals do not originate from the portfolios under examination by the ANAO, these proposals would impact many businesses in the health, communications or industrial sectors.

The deregulation agenda should require these regulatory proposals to be subject to best practice regulation and a full regulatory impact assessment. This means the proposer of the regulation must clearly define the problem, assess the regulatory and non-regulatory options for addressing the problem, and only proceed with a regulatory solution if it is demonstrated that the highest net benefit would be achieved from doing so. The processes around these proposals has not always followed that ideal.

Some policy proposals have followed 'best practice', such as the proposed changes to the coastal shipping regulations.

A number of steps would assist with strengthening the regulatory impact assessment process:

- encouraging greater use of co-design of regulation with stakeholders, going beyond simple consultation
- encouraging use of long-form Regulatory Impact Statements (RISs), as much as possible
- increasing scrutiny and transparency of short-form RISs through:
 - automatically publishing all short-form RISs, redacting any sensitive information if required
 - only allowing agencies to use short-form RISs, where there is a less than material impact on the economy, and only with the Office of Best Practice Regulation's (OBPR's) agreement
 - limiting the ability to use short-form RISs only to 'matters or urgency', instead of the current ability to use them for matters of 'national security, public safety, natural disaster or pressing event'. This would ensure that scrutiny can be applied to any national security, public safety or natural disaster regulatory proposals that are not time-sensitive (with information redacted if necessary)
- giving greater support to agencies on costing the benefits and costs of regulatory options
- requiring OBPR agreement before agencies can certify a non-RIS document as meeting the requirements of a RIS, to allow scrutiny of all regulatory proposals regardless of how they are prepared

- requiring cost–benefit analysis for all regulatory options, rather than just the preferred option
- increasing independence in the regulatory assessment process, especially for cost–benefit analyses.

These improvements would strengthen the regulatory impact assessment process and encourage full consideration of the benefits and costs of regulatory options.

Consideration should be given to capturing the cumulative impact of regulation

Regulation across portfolios

Currently, the burden of regulation is measured on a portfolio basis. However, businesses are subjected to the cumulative impacts of regulation from multiple portfolios, for example:

- a telecommunications provider may be subject to specific regulation from the Communications; Treasury (through the ACCC); and Attorney-General's portfolios, in addition to economy-wide regulation
- a food manufacturer may be subject to specific regulation from the Agriculture; Health; and Industry and Science portfolios, in addition to economy-wide regulation.

Duplication or inconsistency between portfolios provides opportunities for deregulation. Mechanisms for greater collaboration across portfolios should be established, so that deregulatory opportunities that will reduce the cumulative impact on regulated entities can be identified.

Regulation across the federation

Duplicative, inconsistent or unclear regulation between the federal and state or territory governments can generate a significant regulatory burden.

This is especially important in portfolio areas with federated responsibility, such as health, or energy (contained within Industry and Science).

There is the possibility for the deregulation agenda to support better regulation across all levels of government.

Possible suggestions for consideration include:

- setting a deregulation target for the Council of Australian Governments (akin to the governments \$1 billion deregulation target, but applying across all governments)
- establishing an Australian Council for Competition Policy, as proposed by the Competition Policy Review, to progress regulatory reform across all jurisdictions⁵
- state and territory governments adopting targets for cost reductions from deregulation

⁵ The Australian Government Competition Policy Review, *Competition Policy Review Final Report*, Australian Government, Canberra, March 2015.

- better allocation of costs of new regulatory options when states and territories are involved. The current RIS processes allow for the costs resulting from a regulation driven by the Commonwealth to be allocated across all jurisdictions, thus dramatically reducing the Australian Government's share of the costs for the purpose of requiring offsets (for example, unfair contract term protections). The processes could better encourage deregulation if a larger share of the costs were allocated to the jurisdiction that proposes regulation
- incentives for Commonwealth departments to work with state and territory departments to generate regulatory benefits at the jurisdictional levels (for example, staff performance incentives linked to deregulatory savings). Currently, existing incentives only encourage Commonwealth officials to generate deregulatory savings in their own organisation.

Portfolio-specific insights

General observations on deregulation

Some departments have been committed and successful in implementing the deregulation agenda (for example, Environment) and others have not implemented significant deregulatory initiatives: one department, in fact, has gone backwards (Attorney-General's).

Table 1 outlines the net deregulation savings, as at December 2014, and the total regulatory stock, according to the government's annual deregulation report.

Table 1: Net deregulation savings (\$m) and total regulatory stock (\$m) from selected portfolios

Portfolio	Net red tape savings – Dec 2014 (\$m) ⁶	Stock of regulation as at 2013 (\$m) ⁷
Attorney-General's	-16.0	249.0
Communications	94.6	1,346.4
Environment	546.4	711.4
Health	152.2	383.2
Industry and Science	205.7	2,145.0

Feedback from Business Council members would also suggest:

1. Members are encouraged by the commitment of some departments in the deregulation progress. In some instances (such as the Communications portfolio), processes are in train to generate significant reductions in the regulatory burden in future, even if net red tape savings to date appear to be relatively small.
2. While members in the health sector noted deregulatory activity at the federal level, they are still subject to a large overall regulatory burden (mostly at the state and territory level), especially on private health insurers.

⁶ Australian Government, *The Australian Government Annual Deregulation Report 2014*, Australian Government, Canberra, 18 March 2015.

⁷ *ibid.*

Specific observations on identified portfolios

The ANAO has asked the Business Council to nominate regulations that were identified at the start of the deregulation program as priorities.

Table 2 provides an overview of current Business Council deregulation priorities that may be of interest to the ANAO. These priorities have been raised previously, either through direct engagement with government or in Business Council reports and submissions.⁸

Some of these priorities were direct deregulation; others had a deregulatory component that may have counted towards the overall red tape reduction target.

Table 2: Deregulation priorities from 2013 relating to the Industry and Science Portfolio

Key			
✓ = well underway or complete	– = partially underway	x = not underway	

Deregulation priority	Portfolio	Status	Comments
Repeal the Australian Jobs Act 2013, which requires private investment projects over \$500 million to have a government-approved Australian Industry Participation Plan.	Industry and Science	x	Business Council members worked constructively with the Department of Industry and Science to provide costs. No action has been taken to date.
Reset policy settings to lower costs associated with carbon abatement requirements.	Industry and Science	–	Underway.
State governments to complete outstanding energy market reforms.	Industry and Science	x	No substantive action taken.
Streamline project planning and environmental approvals for energy resources project.	Industry and Science; Environment	✓	Well underway. Significant progress has been made, mostly in the Environment portfolio. Work is continuing.
Develop strategic approach to liquid fuels market, including investment in import terminal capacity and fuel storage and distribution infrastructure, and phasing in neutral fuel excise arrangements for all transport fuels based on full energy content.	Industry and Science	–	Acknowledged by the government's Energy White Paper.
Harmonise intellectual property frameworks across the publicly funded research sector.	Industry and Science	x	No substantive action taken. May be addressed in Productivity Commission review.

⁸ Business Council of Australia (BCA), *Action Plan for Enduring Prosperity*, BCA, Melbourne, June 2013.

Deregulation priority	Portfolio	Status	Comments
Government to realise benefits of the digital economy. <i>(Note: deregulatory benefits would be expected from individuals and businesses facing lower reporting burdens or cost savings in engaging with government).</i>	Communications	–	Underway. The Digital Transformation Office began operation on 1 July 2015, but the government is yet to realise substantive benefits.
Strengthen collaboration between industry and research bodies, including CSIRO.	Industry and Science	–	Underway. Industry growth centres have been established. Review of research policy and funding arrangements commissioned.

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