

Chapter 1. Introduction

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The aim of this monograph is to examine successive attempts by the Commonwealth government to improve the quality of the processes by which business regulation is made. Those attempts took place, for the most part, within three broader waves of microeconomic and regulatory reform that have occurred over the last 25 years. The first of these, which is not examined in this book, commenced in the early 1980s under the first of the Hawke ALP governments and was marked by major developments such as the floating of the dollar, substantial reform of financial market regulation (including de-regulation) and the rapid reduction of protective tariff barriers (Kelly 1992). The second wave of reform commenced during the Hawke and Keating Governments of the later 1980s and early 1990s and continued into the twenty-first century, under the auspices of the Council of Australian Governments (COAG) and the Howard Coalition governments. It was marked by two broad sets of reforms: one encompassed by the several hundred reviews of legislation and policy under the National Competition Policy (NCP), focusing on policy content; and the other related to reforms of the processes for making regulation, with the aim of ensuring that, in the future, new and modified regulation was not subject to the weaknesses that stimulated the NCP reviews. It is, as noted above, the 'process' reforms that constitute the primary focus on the book, as the NCP has been subject to considerable examination (with regard to NCP see, for example, Hollander 2006; Charles 2001; Deighton-Smith 2001; Butler 1996; Thomas 1996; Churchman 1996; Harman 1996). The third wave of reform commenced in 2006, often described as the National Reform Agenda, so it is somewhat premature to describe it as a major wave of reform, although that is its intent.

The remainder of this chapter is divided into three parts: the first and second parts provide brief overviews of the second and third waves of microeconomic reform in order to give a sense of perspective to the narrower concern with regulatory process that is the major concern of the book; the final section provides a brief description of the chapters of the book.

The second wave of reform: microeconomic reform in a federal state

The 1980s saw a growing concern in OECD countries for their poor economic performance since the early 1970s. It was a concern that found articulate and persuasive voice in the OECD's publication, 'Structural Adjustment and Economic Performance' (1987). The study argued that while the poor economic performance of member states certainly had been adversely influenced by the dramatic rise

in oil prices during the 1970s, other major causes could be identified within domestic arenas, especially the failure of national governments to undertake those microeconomic reforms needed if their economies were to become more efficient. The study, in effect, endorsed and gave weight to those in Australia who had begun to push for a systematic program of microeconomic reform. Hence, it is not surprising, for example, that the Industry Assistance Commission (IAC), announced a two year inquiry strategy aimed at enabling it to identify impediments to microeconomic reform and improved national economic efficiency (IAC 1987: iv).

In Australia, in the more general context of economic reforms that had commenced in the 1970s and intensified in what became the first wave of reform under the Hawke Governments of the 1980s and early 1990s, the OECD concerns were reflected in a rising national concern for microeconomic reform (often described as structural adjustment or reform). As well as the more dramatic reforms associated with the floating of the Australian dollar, the rapid reduction in tariff barriers and the deregulation of the financial sector, there was evidence of a concern to ensure that, in future, the quality of regulation would be improved, with less negative economic impacts. This concern took institutional shape in the creation of a number of special purpose regulatory review units at both the state and federal levels, led by the Victorian Government. In 1986, for example, the Commonwealth's Business Regulation Review Unit (BRRU), was established. BRRU was given responsibility for reviewing existing and proposed Commonwealth legislation with regard to business (Wanna, Forster and Head 1991). This concern for the reform of regulatory processes was noted in Prime Minister Hawke's ALP Policy speech for the 1987 election and in his address to the Business Council of Australia, where he emphasised the need to re-shape economic institutions in order to meet the challenges of the 1990s (McAllister and Moore, 1991: 147; Hawke 1987: 1598).

It was a concern taken up by then Treasurer, Paul Keating in the same year and took on further significance with the transfer of the Industry Assistance Commission (IAC, now the Productivity Commission), to the Treasury portfolio. The significance lay in the fact that the Commission had begun to emphasise the inefficiencies that resulted from government regulation at both state and federal levels and the need for their reform and, with its transfer to the Treasury portfolio, it now had the ear of that powerful department and its very influential minister (see, for example, IAC 1986: 7, 8, 13-14, 18-19). The IAC made the need for regulatory reform the centrepiece of its 1988 annual report, in which it cited the OECD's 1987 study as evidence of the need for such reform (IAC 1988). In summary, it argued that the poor performance of the Australian economy was caused, in large part, by excessive protection and too much inappropriate regulation. In turn, protection and regulation were, for the most part, the responsibility of vested interests who 'sought preferment at the expense of the

wider community’, thereby hindering reform (IAC 1988: 4). It also stressed that ‘progress in key areas is dependent on action by the States’, drawing attention to the particular and frustrating difficulties of microeconomic reform in a federal state where much constitutional authority for business regulation lay in the hands of state governments (IAC 1988: iii, 15; 1989: 5-6). It emphasised what it saw as:

... a proliferation of ad hoc groups and permanent agencies advising on policy, each concerned with a particular part of the microeconomy and not always apparently bringing an economy-wide perspective to bear (IAC 1989).

The IAC’s views bore fruit in August 1989 when Prime Minister Hawke announced the creation of a new body, the Industry Commission (IC), based on the IAC but including the BRRU and the Inter-State Commission, with closer coordination between the work of the new IC, the Bureau of Industry Economics and the Australian Bureau of Agricultural and Resource Economics — a coordination helped by the appointment of a senior Treasury official, Tony Cole, as chairman of the IC (IAC 1989: iii).

While greater administrative attention to regulatory reform was important, it needed substantial and public support from ministers at both the national and state levels if it was to be effective. This came in the shape of, first, a special series of Premiers’ Conferences aimed at improving national efficiency and international competitiveness followed by the creation of the Council of Australia Governments (COAG). They signalled what soon came to be called a ‘new federalism’, designed in large part as an institutional mechanism to cope with the demands of widespread regulatory reform (see Carroll and Painter 1995; and Painter 1998 for more detailed elaborations). Within this promising political context three major developments resulted:

- one, the National Competition Policy (Productivity Commission 2005: xv for a fuller list of the NCP reforms);
- two, a parallel but separate series of reviews of regulations and related institutions, several leading to intergovernmental agreements and new, intergovernmental bodies such as the National Food Authority, National Grid Management Council and National Training Authority; and,
- three, the substantial strengthening of the Commonwealth’s processes for making regulation, centred on the regulatory impact statement process (RIS).

While the first two were primarily concerned with reviewing existing policy and institutions, reforms to the process of making regulation aimed to ensure that future new or modified regulation would minimise regulatory burdens on the economy and businesses. Taken together, the three formed the core of what was now a widespread, national process of reform — one that continued into

the new century (Fels 1995; Charles 1995; Harman 1996; Painter 1998; Hollander 2006).

There was considerable anticipation that, on coming to office in 1996, the first Howard Government would continue the Hawke-Keating reforms. Howard's 'neo-liberal' governments were not expected to disrupt the general thrust of the national process of reform set in train by the ALP at the state and national levels as, for the most part, Howard had been an ardent supporter of regulatory reform since his period as Treasurer in the last Fraser Coalition Government. More importantly, as Opposition Leader, Howard had criticised the Hawke and Keating Governments for not proceeding more rapidly with reform, albeit with differences in emphasis, rather than general intent (Quiggin 2004: 171). One of the more marked differences in emphasis in the early years of his first government, was in relation to the need to reduce the regulatory burden on small business, a sector he avidly courted in the 1996 election campaign. However, this proved an easy 'fit' in the ongoing program of regulatory reform. Greater differences did, of course, emerge in later Howard governments, notably in 2005, with the introduction of 'Work Choices', a dramatic change to the industrial relations system in Australia, aimed at freeing up labour markets and reducing the power of trade unions in what Howard proclaimed was one of the last major pieces of unfinished business in transforming the Australian economy (Howard 2005). Howard's efforts to further deregulate the labour market followed limited moves in this direction by previous Labor governments. The last Hawke Government and by the Keating Government in 1993 introduced measures to decentralise enterprise bargaining and Keating, in particular, had overseen a reduction in the power of the AIRC, the introduction of enterprise bargaining and had permitted registered collective agreements in the non-union sector.

The third wave of reform: 2006 and the future

The second wave of reform faded away somewhat unevenly and, with varying degrees of success, given the differing life spans of the three major developments, National Competition Policy (NCP) reform, regulatory reviews and process reform, based around the preparation of Regulatory Impact Statements (RIS). The reviews conducted as part of the NCP process are still ongoing as of the time of writing but for the most part are completed (Productivity Commission 2005). The various, separate, large scale, individual reviews were implemented at various times after 1996 and the RIS-focused reforms to the making of regulation were implemented by the Commonwealth in the 1996-8 period (Carroll 2006). Hence, the minds of decision-makers began to focus on the future: on the question of what to do next, with discussion focused in the Productivity Commission, COAG and, more generally, in the federal and state political executives, notably in the Victorian Government's 'Shared Future' project (Allen Consulting Group 2004; Banks 2004; Bracks 2005; COAG 2005; 2006a; 2006b; 2007).

In one sense, the answer to the question of what to do next had been partly determined by the results of the second wave of regulatory reform, notably by its less successful elements and those areas of regulation that it had not encompassed, suggesting that they now needed attention. Gary Banks, the Chair of the Productivity Commission, for example, in reviewing the NCP, concluded that it had yielded substantial benefits across the community but that the implementation process had not been perfect, that the public interest tests of existing regulation had not always been rigorously applied, that the independence of some reviews had been questionable and their conduct less than transparent and the outcomes of several key reviews rather problematic (Banks 2004). His view was reflected in the Productivity Commission's detailed assessment of the NCP Reforms a few months later (Productivity Commission 2005). Against this background, he suggested that:

- infrastructure reform must continue to be a high priority, especially in relation to energy, water and transport;
- not all anti-competitive regulation had been properly addressed — notably in relation to anti-dumping and cabotage regimes — as well as 'second round' reviews of wheat marketing, compulsory third party and workers' compensation insurance and the pharmacy sector;
- Australia's competition and regulatory architecture could be further improved, with an emphasis on improving regulatory processes, anti-competitive legislation, pricing regimes and consumer protection;
- coordinated national reform should extend beyond the current NCP to include health care and natural resource management but with a lower priority for aged care, education and training;
- health care and natural resource management were the highest priorities, particularly with regard to the overlapping responsibilities of the federal and state governments; and
- tax policy and labour market reforms should continue, building on what had been achieved (Banks 2004).

Banks' views were in several respects similar to those held by the Victorian Government of Premier Bracks. Some months earlier, in May 2004, the Allen Consulting Group had prepared a report for the Victorian Government that emphasised the need for a major new series of national, coordinated reforms in health and education, as part of the government's 'Shared Future', project (Allen Consulting Group 2004). These were endorsed by Premier Bracks and became the centrepiece of a new, national reform initiative he submitted to COAG, emphasising, in contrast to the earlier period of microeconomic reform, the need for reforms to human capital, constituting what he described as a 'third wave', of reform (Bracks 2005). The vision was described as one:

... of not only a strong economy, but also a healthy, skilled and motivated population where all enjoy the opportunity and incentive to be full and active participants in the life of the nation (Bracks 2005: 7).

It highlighted, in common with the views of Banks, the need for further development of economic competitiveness by undertaking regulatory reviews and building world-class infrastructure and the need for an improved health system but, in contrast, also the need to improve levels of educational and training achievement and the need to remove disincentives and barriers to labour force participation (Bracks 2005: 8). Interestingly, as with the OECD's 1987 report, the influence of the OECD on Australian policy debates again can be seen in Premier Bracks drawing upon an OECD report to support his case for a further wave of reform: a report that argued that Australia needed to achieve significant increases in productivity and participation if it was to rise to the never-ending challenge of international competition (Bracks 2005: 10, drawing upon OECD 2005).

In addition, Premier Bracks' vision differed somewhat from that of Banks with regard to the details of the institutional framework that would be necessary to achieve this 'third wave' of reform. Bracks' view was that, while COAG would retain primary responsibility for setting strategic directions, a National Reform Council should be established to guide the process. The Council might be assisted by bodies such as the Productivity Commission and it would appraise progress and make recommendations on funding flows according to a formula determined by COAG (Bracks 2005: 40-41). Also, it would be an independent body making recommendations to COAG on the funds needed for further work, albeit on the basis of a formula to be determined by COAG (Bracks 2005: 11, 40-47). Banks, in contrast, stressed that the successful implementation of the proposed reforms would require both leadership and inter-governmental cooperation on the basis of 'robust' arrangements that included well-articulated reform objectives and underlying principles, were based upon a rigorous analysis of options and provided means for the independent monitoring of progress (Banks 2005; Productivity Commission 2005). However, he had not provided any further detail, which came in the Productivity Commission's assessment of NCP reforms (2005, especially chapter 12).

The Commission, while supporting the general need for an effective institutional framework for the new wave of reforms, recommended that it be divided into two related parts: one, for reforms that were a continuation of those commenced under the NCP, the existing framework should continue to be used, focused on the National Competition Council and COAG; and two, for the reforms in health care and vocational education, 'stand-alone', sectoral programs should be developed. However, monitoring and reporting on reform progress and outcomes should be undertaken by a body or bodies independent of those responsible for

policy development and implementation (Productivity Commission 2005: 380). In other words, progress and outcomes should be monitored by a politically neutral body, not any of the governments involved.

As might be expected, given a fair degree of policy consensus, the ALP state governments and the Coalition Government of John Howard had little difficulty in agreeing on the need for further reform if the Australian economy was to remain competitive. They had somewhat more difficulty in agreeing on exactly what should be done, notably, as regards institutional arrangements and funding. Compromise was reached in the form of a three-pronged reform agenda in 2006, with the announcement of a new 'National Reform Agenda', focusing on human capital, competition and, yet again, regulatory processes (COAG 2006a; 2006b). While it has excited surprisingly limited public and media attention to date, there is little doubt that the work it undertakes will become of increasing importance in the years ahead. This was made clear by the new Commonwealth government of Kevin Rudd that came to office in late 2007. It was committed to a continuing program of regulatory reform, including those put forward by the Taskforce on Regulation in 2006, arguing that the Howard governments had failed to continue the microeconomic reform process instigated by Labor governments in the 1980s and 1990s, with the result that the regulatory burden had grown and Australian productivity had fallen (Emerson 2007).

Rudd's critique of Howard seemed to imply that regulating reform was more rhetoric than reality; followed a pattern of 'punctuated equilibrium' followed by relative inertia; and proved difficult for governments to accomplish in the long term. We investigate these themes in the remainder of this book.

The structure of the book

As described above, this chapter has provided a brief introduction to the origins and development of the waves of regulatory reform that have characterised the work of Australian Commonwealth governments over the last 25 years. Chapter Two examines the development and performance of the Commonwealth government's Regulatory Impact Statement (RIS) system, designed to improve regulation-making processes in the somewhat ambitious hope that its output — regulation — would be of better quality and impose less cost in achieving the desired impacts on business. It argues that, in practice, the performance of RIS has been variable and less than was hoped — a performance explained by a number of factors, especially the fluctuating levels of ministerial and head of department/agency commitment to the system, a sometimes less than adequate integration of RIS with existing policy development processes and varying standards of analysis, particularly as regards the costing of regulatory proposals.

Chapter Three examines in more detail a neglected aspect of the Commonwealth's system for ensuring regulatory quality, the development and use of a system of

regulatory performance indicators (RPIs) in the period 1998-2006. It provides a case study of the government's attempts to improve regulatory quality and performance, in line with the urgings of the OECD. Its conclusion is that the value and use of the RPIs was limited, although the experience gained should prove valuable in current attempts to improve existing systems of performance indicators (see Productivity Commission 2007).

Chapter Four, by ex-public servant turned academic, Chris Walker, argues that the processes of regulatory reform that have occurred since the early 1990s, with their emphasis on the need for regulatory uniformity and simplicity, have neglected the need to improve our capacity to manage complex regulatory and operational systems. Indeed, he suggests that one of the results of the reforms of the 1990s was the creation of more complex regulatory systems, which he illustrates with reference to railway systems and the role of the National Transport Commission. Rather than setting targeted programs of reform that strive for the holy grail of regulatory simplicity, he suggests that COAG should be seeking to transform arrangements within policy sectors so that agencies and stakeholders can better manage and respond to inevitable regulatory complexity.

Chapter Five is the first of three chapters that look forward, rather than back, in introducing the National Reform Agenda as proposed by the Victorian Government and endorsed by COAG. Its author, Helen Silver, played an important role in its development and promulgation. She argues the need for a further wave of reform at both state and federal level if Australia is to meet the major social and economic challenges it is facing, emphasising the need for cooperative reform within the COAG structure.

Chapter Six, by Peter Carroll, provides a critical assessment of the Commonwealth's Rethinking Regulation Program, based on the recommendations of the Banks taskforce and the government's response to its principal recommendations — a major plank in the third period of regulatory reform. Carroll's overall assessment is that while there is much in the report to be commended, the need is for greater commitment and support for existing systems for making and implementing business regulation rather than a fundamental rethinking of the system for making business regulation.

Chapter Seven, by consultant and ex-public servant Rex Deighton-Smith, notes that recent decades have seen a substantial move by regulators in Australia, as in many other OECD countries, to adopt performance-based and process-based regulation, in preference to traditional prescriptive regulation. This is a shift actively encouraged by regulatory reformers and the author argues that recent experience increasingly reveals a range of regulatory quality and regulatory governance concerns arising as a result of this trend. They include problems relating to transparency, public accountability and regulatory complexity and

a set of recommendations are developed suggesting what might be done to improve performance.

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