

Chapter 3. Measuring Regulatory Performance

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Introduction

The aim of this chapter is to describe and assess the development and use of the system of regulatory performance indicators (RPI) by the Commonwealth Government in the period 1998–2006. The RPI were designed to provide decision-makers with standardised, system-wide data on the largely RIS-related processes by which departments developed regulation with regard to business. As such, they were early examples of a more general, international move to improve regulatory quality and performance, in line with the urgings of the OECD (see, for example, OECD 2004a; and 2004b).

The chapter concludes that the value and use of the RPI was limited, although the experience gained should prove valuable in current attempts to improve existing systems of performance indicators. The chapter is divided into three parts and a conclusion. The first part describes the context in which the system of RPIs was developed. The second identifies and discusses some of the major design limitations of the final set of nine RPI that were developed. The third assesses the performance of departments as indicated by the RPI, including an assessment of the value of the RPI themselves.

Context: the RIS, the RPI and the nature of the RPI challenge

The origins of the existing system of RPI in the Australian national government can be found in two sources: firstly, in the more general concern to ensure successful regulatory reform by improving and making more rigorous the processes for formulating new or modified regulation; and secondly, in the greater emphasis placed by Prime Minister Howard on the need to reduce the regulatory burden on small business, a theme he stressed in the 1996 election campaign (Howard 1997: iii). On gaining office a National Small Business Summit was called, meeting in June, 2006. The summit endorsed a 'Charter of Principles', in relation to the government regulation of business, endorsed by all levels of government, with the tenth principle asserting that Australian governments should develop a system of performance indicators to measure the efficiency of their regulatory regimes (SBDTF 1996: 150).

A major outcome of the recommendations of the National Summit was the establishment in 1996 of the Small Business Development Task Force (SBDTF)

to review the 'compliance and paper burden imposed on small business'. The Task Force reported in November 1996 (SBDTF 1996: vii). The report referred to RPI in three contexts: one, in relation to the need to establish a set of performance indicators that would enable both the government and small business to track Government's performance in implementing the report's recommendations; two, in relation to the need for the development of a set of benchmarked, nationally comparable performance indicators for regulation that would enable more effective management of the growing regulatory burden by providing accurate information; and three, related to the second, the need for more detailed, varying sets of indicators at the departmental and agency level (SBDTF 1996: 131-34, 148). The report recommended 10 performance indicators relating to: transparency; accessibility; appropriateness; predictability; flexibility; lower cost to business; administrative efficiency; fewer and simpler forms; better instructions; reduction in perceived burden; and cultural change (SBDTF 1996: 131).

The Government's response to the report was generally positive. In particular, it agreed to one recommendation (number 62) that a national set of performance indicators and benchmarking strategy should be developed (Howard 1997: vii, 81-82). It noted that a meeting of small business ministers and the Australian Local Government Association already had agreed that the adoption of appropriate performance indicators was crucial and that a working group of officials would develop policy options for implementing comparable performance indicators for consideration at the next Small Business Summit (Howard 1997: 82). In addition, it noted that the Commonwealth Government had stressed the need for all departments and agencies to continue to develop 'meaningful and measurable' performance indicators capable of demonstrating the following properties:

- meeting essential regulatory objectives without unduly restricting business;
- regulatory decision-making processes are transparent and lead to fair outcomes;
- consultations with industry and the public have been implemented that are ongoing, accessible and responsive;
- information about the content of, and compliance with regulation is widely available to, and understood by small business;
- new or revised regulation confers a net benefit on the community; and
- a predictable regulatory environment is created so business can make decisions with some certainty (Howard 1997: 82).

While expressed rather differently, the latter six indicators covered all of the areas recommended in the SBDF Report with two exceptions: the indicator intended to measure the achievement of a 'lower cost to business'; and, the indicator for administrative efficiency. The Government noted only that there

was a need for an indicator capable of demonstrating that new or revised regulation would confer 'a net benefit on the community' without any mention of reducing costs to business, although this could reasonably be inferred, given the context of the Prime Minister's message (Howard 1997: 82). It made no mention of an indicator related to administrative efficiency and provided no explanation as to why indicators for these two areas had been omitted.

While the members of the SBDF and their supporters inside and outside government might well have been satisfied with their success in gaining acceptance for the bulk of their recommendations there were, with the exception of the 'lower cost' and administrative efficiency indicators, limitations and significant challenges in what they had proposed and what the government endorsed. Four stand out as of particular importance. The first, as noted above, was the failure to specify an indicator in relation to business costs, although any calculation of the net benefit to the community of regulation (see the fifth dot point above), if sufficiently rigorous, would necessitate the calculation of business costs as part of the calculation.

The second limitation was the neglect of any recommendations for indicators that would enable departments, agencies and, ultimately, cabinet, to measure the performance of existing business regulation in actually achieving its specified objectives. This was in marked contrast to its very clear view that the existing systems and processes for indicating the quality of *new* and *modified* regulation needed improvement. The neglect may have been deliberate — an implicit acknowledgement of the difficulties of such a task — but it was a limitation that left the government (and, importantly, the working party of officials charged with developing policy options as well as federal departments and agencies) free from the explicit requirement to consider and recommend how such a system might be developed and implemented. This was unfortunate for, in a parallel development, departments at this time were increasingly being required to introduce systems of output and outcome plans and budgets with associated performance indicators, within which any desired RPI could have been embedded (Department of Finance and Administration 1999; and 2007; Department of the Prime Minister and Cabinet 2007).

The third limitation was the failure of the government, as noted above, to specify indicators of administrative efficiency in relation to the implementation of regulations. This may have been because it was realised that several systems were already in place — or being put in place — and that these were regarded as sufficiently informative. Examples included the annual parliamentary reviews of departmental expenditures, the performance audits of the Australian National Audit Office and departmental annual reports. The latter contained the departments' report of their performance against their outputs and outcomes, using performance indicators specified in the PBS — but not the desired RPI —

although there was nothing to prevent such indicators being developed and used by departments. It is interesting that they have not included RPI because, in conjunction with the PBS performance reports, they would have provided a fuller picture of regulatory performance.

The fourth limitation was the SBDF's failure to recommend that responsibility for RPI at the 'broad policy level' be established under the control of the existing Office of Regulation Review (the ORR). As the ORR was a unit in the influential Productivity Commission — and located, therefore, within the broader Department of the Treasury portfolio — this might have provided it with an important source of power in relation to the design, implementation and use of RPI.

In summary, while the move to develop a set of RPI that would enable the comparison of regulatory performance across departments and agencies was a marked step forward in the effort to improve regulatory quality, the relative lack of focus on: the development of indicators for specific businesses compliance costs; the achievement of regulatory objectives; administrative efficiency in implementing regulations; and an appropriate organisational location, suggested that any resulting RPI system would be less than optimal.

Design limitations of the RPI system: regulatory coverage, integration and type of RPI

In the course of 1997-98 two Government commissioned studies of performance indicators were undertaken. The first was by the government's then Industry Commission (now the Productivity Commission). Because the study was not established to provide information and recommendations for the government in relation to the recommendations of the *Bell Report*, its terms of reference confined it to the examination of national and comparative performance indicators for local government. The origins of the study, in fact, predated the *Bell Report* and it did not include indicators for State and Territory governments except insofar as the latter used indicators with regard to local government performance. The report's conclusion was that a consistent, national approach to performance measurement for local government was not 'warranted', at that time (Industry Commission 1997a: vii). It did, however, note that further discussion might, in time, lead to 'nationally consistent' approaches (Industry Commission 1997a: vii). This must have been a disappointment for the government — given the Prime Minister's wish that such indicators be developed — however, it had neither the constitutional or statutory authority to impose its will on either the state or local governments (Howard 1997).

The second study was organised through the Office of Small Business (the OSB), located in the Department of Industry Tourism and Resources. The OSB worked with line departments and the ORR to develop a set of nine RPIs for the Federal

Government (DITR 2006: 2). Not only was the task intrinsically difficult, there were also contentious issues in relation to the specific objectives of the exercise, such as: the number and type of indicators that should be developed; the potential for overlap with other indicators; the extent to which indicators should be incorporated within a modified RIS process; and, which organisation should be responsible for the indicators. Nevertheless, a set of nine RPI was developed and agreed to by the government. These were designed to provide performance information in relation to the six objectives specified by the Prime Minister (Howard 1997: 82):

- to ensure that all new or revised regulation confers a net benefit on the community;
- to achieve essential regulatory objectives without unduly restricting business in the way in which these objectives are achieved;
- to ensure that the regulatory decision-making processes are transparent and lead to fair outcomes;
- to ensure that information and details on regulation and how to comply with it are accessible and understood by business;
- to create a predictable regulatory environment so business can make decisions with some surety of future environment; and
- to ensure that consultation processes are accessible and responsive to business and the community (DITR 2006: 3-4).

As with the Prime Minister's 1997 statement, this final set of RPI did not contain a specific indicator intended to measure the achievement of a 'lower cost to business' (although this might be estimated from the calculation as to net benefit to the community), or an indicator for administrative efficiency.

The promised study of comparable performance indicators for state and territory governments did not eventuate at this time and no formal explanation has been found by the author for this omission, other than the conclusions of the Productivity Commission report noted above. Officers interviewed indicated that it might have 'fallen between the cracks'. It is worth noting that, in 2006, following the government's acceptance of the *Banks Report*, the Productivity Commission was directed to undertake a study of performance benchmarking for business regulation (Productivity Commission 2006).

Coverage of the indicators

The coverage of the RPI was to be limited to *new* or *modified* primary, secondary or quasi-regulation related directly or indirectly to business and that would have a significant impact on business but excluding tax regulation. While this seemed to neglect both the very large stock of *existing* regulation and the importance of tax regulation — a matter of some concern for all businesses — this was not entirely the case, for all of the Australian governments had agreed

to review existing regulation impacting on competition as part of the National Competition Policy review process (Carroll 2006b; Harman 1996). In relation to the exclusion of tax regulation the argument was that public consultation on new or modified taxation measures could be used by taxpayers to avoid or minimise their tax obligations. It was also argued, less convincingly, that it was difficult to assess the impact of specific tax measures in isolation from their implications for the overall tax system (Industry Commission 1997b: 32). The fact that public consultation on new or modified taxes, especially where they might increase the overall tax burden, tends to have negative electoral impacts was not noted, at least in government publications.

The coverage of the RPI was further restricted by applying them only to regulation that was subject to the RIS process managed by the ORR in the year in question (DITR 2006: 4). The RIS process, in turn, excluded regulation of a minor or 'machinery', nature and involved only regulation for which the Federal Government or the Council of Australian Governments (COAG) was responsible, excluding state, territory and local government regulation. The decision to exclude minor and machinery changes in regulation, largely on the grounds of the high administrative costs of reviewing all such regulation, was understandable from the perspective of both the departments and the ORR. However, the exclusion meant that it would not be possible to assess the cost of the cumulative regulatory burden on business — a question of considerable concern for individual businesses and peak associations.

While the considerable restrictions on the coverage of RPI may seem somewhat unreasonable, they were intended to focus the attention of those monitoring and reviewing regulatory performance on performance that was deviating, positively or negatively, from regulatory objectives at an *aggregate*, whole-of-department or whole-of-government level. They were not intended to provide detailed information about regulatory performance at the level of specific regulations, which should be provided, more appropriately, by detailed indicators at the departmental level. As noted above, departments were being encouraged to either introduce, or to improve such detailed indicators at this time in relation to the PBS. While not the topic of this chapter, it should be noted that departments have, in practice, developed and incorporated very few specific RPI within their PBS reports.

An integrated set of regulatory performance indicators

It is clear is that the new system of RPI was not put in place as part of a comprehensive system for measuring regulatory performance. Rather, they were one element in a loosely coordinated set of changes introduced over a period of several years from the later 1990s. The other major changes were: a requirement for annual regulatory plans (the OSB 2003), an improved and somewhat better resourced RIS system (Productivity Commission 1998: 27-8) and the PBS noted

above (Department of Finance and Administration 1999). The danger in such a situation is that the information provided by RPI might be considered in isolation from other performance indicators, thereby reducing their value to senior decision-makers, rather than being an important part of an integrated set of indicators enabling more systematic assessments and appropriate, timely, remedial action in relation to regulatory performance. The probability of this occurring was increased with the decision to divide responsibility for the various reform elements among several departments and agencies. Annual regulatory plans were to be developed by departments although, initially, these would be coordinated by the OSB. The annual PBS to be developed by departments, would include appropriate indicators to be reported on in their annual reports. The strengthened RIS was to remain with the ORR. Overall responsibility for the RPI was given to the Office of Small Business, although responsibility for collecting, monitoring and assessing relevant data was split between the ORR (with regard to RPIs 1, 2, 3, 8) and the OSB (RPIs 4, 5, 6, 7, 9), with the ORR providing relevant data to the OSB for collation into an annual report on the RPIs (DITR 2006: 3).

The decision to allocate responsibility for PBS outputs, outcomes and indicators to the departments could hardly have been otherwise, given the extent of the planning task involved and the need for a detailed knowledge of the relevant regulation. However, the decision to split responsibility for RPI between the OSB and the ORR was questionable. On the one hand the ORR was collecting relevant performance data as part of its established RIS process, so it would be inefficient for that to be replicated by the OSB. On the other hand, splitting responsibility for parts of the process increased coordination costs and, possibly, would introduce a degree of friction between the two agencies involved. However, given that the development of RPIs had commenced within the context of small business policy and pressures from small business, it might have been felt that it was politically appropriate to vest at least partial carriage of responsibility for the reform of regulatory systems with the Department of Industry — the department with responsibility for small business policy at the federal level. It is instructive to note that, following a further review of business regulation in 2006, responsibility for RPI was moved from the OSB to a reorganised and renamed ORR, in the shape of the Office of Best Practice Regulation.

The types of RPI

RPI fall into a variety of types, addressing various stages or dimensions of the regulatory process, such as those related to input, process, content, output and outcome. Some indicators provide information about more than one stage, as with RPI 3 and 4 in Table 3.1. The nine RPI put in place were, as Table 1 indicates, very much focused on process, with none directly addressing input,

content or outcome and only two addressing output, so that they provided no direct information as to whether or not a regulation was achieving its objectives.

The nine RPIs were defined as follows:

- RPI 1: the proportion of regulations for which the RIS documentation 'adequately addressed net benefit to the community';
- RPI 2: the proportion of regulations for which the RIS adequately justified the compliance burden on business;
- RPI 3: the proportion of regulations which provide businesses and stakeholders with some appropriate flexibility to determine the most cost effective means of achieving regulatory objectives;
- RPI 4: the proportion of cases in which external review of decisions led to a decision being reversed or overturned;
- RPI 5: the proportion of regulatory agencies whose mechanisms for internal review of decisions meet prescribed standards for complaints handling;
- RPI 6: the proportion of regulatory agencies having communications strategies for regulation, or formal consultative channels for communicating information about regulation;
- RPI 7: the proportion of regulatory agencies publishing an adequate forward plan for introduction and review of regulation;
- RPI 8: the proportion of regulations for which the RIS documentation included an adequate statement of consultation; and
- RPI 9: the proportion of regulatory agencies with organisational guidelines outlining consultation processes, procedures and standards.

The lack of outcome-focused indicators is understandable, as it is an inherently difficult task, as the voluminous literature on policy evaluation demonstrates. Also, the primary intent of the reformers at this stage was to improve the quality of the processes involved in making regulation impacting on business, based on the assumption that good regulation-making processes will tend to result in more effective regulation — although they were well aware that good processes did not necessarily lead to good regulation. In retrospect, it is disappointing that the opportunity was not taken to develop at least some outcome indicators, or to at least commence planning for their development. At the least it suggests that, at the time, departments either did not have performance data about regulatory outputs and outcomes, or, if they did possess such data, that it could not be aggregated in a meaningful fashion to provide useful performance information — or, more cynically, that they were fearful that their regulatory performance would be disappointing. Yet, as noted above, the introduction of the PBS system in the same period as the development and introduction of the RPI — with the former's requirement that departments introduce clearly defined outputs, outcomes and related performance indicators, linked to planned and

actual expenditures — provided just such an opportunity to develop useful output and outcome indicators.

Table 3.1 Types of RPI

RPIs	Input	Process	Content	Output	Outcome
RPI 1		*			
RPI 2		*			
RPI 3		*		*	
RPI 4		*		*	
RPI 5		*			
RPI 6		*			
RPI 7		*			
RPI 8		*			
RPI 9		*			
Total	0	9	0	2	0

The RPI — performance and practice

In this section the aim is to provide an assessment of the RPI in practice, covering the period from 1998 to 2006. It is divided into a number of sub-sections each of which focuses on one or more of the RPI in relation to the objective in question.

Objective 1: to ensure that all new or revised regulation confers a net benefit on the community

Progress in relation to this objective was measured by RPI 1, the proportion of regulations for which the RIS documentation ‘adequately addressed net benefit to the community’. The assessment of the adequacy with which a regulation’s net benefit was calculated was the responsibility of the ORR, which then submitted it to the OSB for inclusion in its annual report on RPI. Over the period 1998-99 to 2004-05, the average annual percentage score for all departments and agencies for RPI 1 was 88% , with a range from 81% to 92% (see Table 3.2). It should be noted that the ORR increased the rigour with which it assessed performance over the period, as departments gained familiarity with the RPI, so that it is not possible to compare year to year performance with any degree of precision, although, where the annual performance increased year by year, despite the increased rigour of the assessments, then performance is likely to have increased.

The use of the phrase ‘adequately addressed net benefit’ in RPI 1, was a clear indication that its designers were well aware of the substantial difficulties involved in costing the likely or actual impact of a regulation. The phrase implies, for example, that cost benefit analysis will be the means for calculating net benefits but it does not specify or require that this must be the case, leaving considerable discretion in the hands of those submitting a proposed regulation to the RIS process. In addition, the use of the word ‘adequate’, rather than more specific criteria for the assessment of net benefit, enables a wide range of

calculations of net benefit, more or less precise, to be judged as ‘adequate’. While this might have been realistic, it meant that the value of this measure was distinctly limited for those concerned to see if regulations were likely to achieve a net benefit to the community. It was of somewhat more use for indicating broad trends over time, especially combined with the increasing rigour of the ORR’s assessments. Unfortunately, as indicated in Table 3.2, performance as measured by RPI 2 fell somewhat over the period, suggesting that there was no significant improvement in the estimates of net benefit incorporated in the RIS assessed by the ORR.

Table 3.2 Aggregate RPI scores for all agencies, 1998-2005

	No of RIS	RPI 1	RPI 2	RPI 3	RPI 4	RPI 5	RPI 6	RPI 7	RPI 8	RPI 9
1998-99	270	88	91	39	31	77	91	27	92	59
1999-0	225	92	94	77	61	67	100	47	96	74
2000-1	167	92	92	66	70	50	100	73	91	68
2001-02	225	92	94	77	61	67	100	47	96	74
2002-03	139	81	85	82	70	65	88	70	87	58
2003-04	115	91	91	86	62	75	95	76	91	48
2004-05	83	82	81	100	58	72	89	78	82	56
Average	175	88	90	75	59	68	95	60	91	62

Source: the OSB Annual Reports 1998-99 to 2004-05

In practice, the ORR in its publication *A Guide to Regulation*, did specify the type of costs and benefits to be included by departments in their RIS documentation. It noted that there were considerable difficulties in gaining precise, quantitative estimates of costs and benefits but encouraged departments to at least identify and, where possible, assess the fullest range of costs and benefits, although admitting that quantification was not always possible or necessary — although the onus of proof was on the department to defend the lack of quantification (the ORR 1998: D10).

Hence, it was quite possible that the ORR might judge the calculation of net benefit in an RIS as ‘adequate’, even where little or no quantitative data or assessment was included. If those relying on such performance data were aware of such limitations, it could be argued that at least it gave a rather crude, largely qualitative indicator of some value, although the lack of an upward trend in performance over the period was disappointing. However, even this limited value has to be questioned as, in practice, what was reported in the annual OSB report was only that proportion of a department’s regulations judged as ‘adequate’ in the year in question, in the form of a simple percentage figure, for example, 75%, with very little further explanation or clarification. Further, given that in any one year a department might have submitted only one or two RIS, then the value of providing a percentage indicator as a measure of performance was of questionable value for senior decision-makers and, of course, for Parliament, business and the community.

Objective 2: to achieve essential regulatory objectives without unduly restricting business in the way in which these objectives are achieved

Objective 2 was measured by two indicators, RPI 2 — the proportion of regulations for which the RIS adequately justified the compliance burden on business — and RPI 3 — the proportion of regulations which provide businesses and stakeholders with some appropriate flexibility to determine the most cost effective means of achieving regulatory objectives — both to be monitored by the ORR. Over the period 1998-99 to 2004-05, the average annual percentage score for all departments and agencies for RPI 2 was 90%, with a range of 81% to 94%, and for RPI 3 was 75%, with a very large range of 39% to 100%. While the average of 90% for RPI 2 might have been reassuring, in the three years previous there was an increased variation with regard to the annual performance, to a low of 81% in 2004-05, which was of concern. In contrast, performance in relation to RPI 3 increased dramatically over the period, even with the increase in the rigour of the ORR's assessments. Unfortunately the OSB annual reports provide no indication as to why performance improved (or fell), for any of the indicators.

If, as indicated above, it was difficult to provide accurate estimates of the costs and benefits of proposed regulation, then RPI 2 at least required departments to provide clear, logical arguments to support their proposals and (perhaps) to think through the compliance implications for business. If backed up by accurate, quantitative estimates of compliance costs and benefits, so much the better. In practice, its value, as with RPI 1, was limited by the lack of specific criteria against which adequacy would be judged (although the ORR did provide advice to departments in this regard) and the lack of quantitative estimates provided in practice by departments. As the ORR's annual reports very clearly indicate, departmental estimates of regulatory costs and benefits were often unsatisfactory. Indeed, the Chairman of the Productivity Commission (of which the ORR is a unit), Gary Banks, indicated that in 2004 only 20% of tabled RISs contained even an attempt at quantifying the costs related to proposed regulations (Banks 2005: 10). If Banks was correct in his estimate, then it is difficult to see how, for example, 82% of all regulations assessed in 2004-05 could be assessed as adequate in relation to RPI 1 and 81% in relation to RPI 2 despite the fact that 20% of all RIS did not even attempt to quantify the costs related to the proposed regulations (the OSB 2006:38). It suggests a very flexible interpretation as to the meaning of adequacy and, importantly, makes the value of both RPI very questionable as reliable measures of regulatory performance.

RPI 3 was based on whether or not a department's RIS contained any one or more of the following measures:

- a performance or outcome based standard which did not prescribe how a business was to comply with the standard;
- provision for a business to seek acceptance of an alternative mechanism for achieving compliance than that prescribed in the regulation;
- the use of a market-based mechanism such as tradeable permits to allow businesses flexibility in determining a compliance strategy; and
- offered a range of means for businesses to have flexibility in deciding what steps to take in compliance (Department of Industry Tourism and Resources 2006: 14).

While the intent of RPI 3 is clear — being a measure of the degree of flexibility that a proposed regulation allows businesses in their compliance with regulation — the assumption it contains of the attractiveness of regulatory flexibility to business is problematical. A small business, for example, has limited resources of both money and time. Hence, the use of those resources to determine how it should comply with a regulatory performance or outcome based standard, rather than simply complying in a way prescribed in a regulation, is not necessarily attractive. At the least, it requires the business to design an appropriate strategy, or to purchase a ready-made strategy, or to employ a consultant to design the strategy. Faced with such choices, how many small businesses would not welcome a helpful regulatory prescription as to the required strategy, assuming the prescription is cost effective and meets compliance needs?

In summary, RPI 2 and 3 provided a rather mixed message for decision-makers, suggesting that regulations were providing an increase in the flexibility with which businesses could comply with regulations but, worryingly, a decline in the extent to which departments provided an adequate justification for the regulations in question. When the trend for RPI 2 is combined with the downward trend in RPI 1 — performance related to the calculation of net benefits — it suggests, if rather speculatively, that the efforts of the ORR and the OSB to encourage departments to improve regulatory quality in these important dimensions was unsuccessful, despite their increased efforts owing to a boost to their resources following the *Bell Report*.

Objective 3: to ensure that the regulatory decision-making processes are transparent and lead to fair outcomes

This was to be measured by RPI 4 — the proportion of cases in which external review of decisions (as defined) led to a decision being reversed or overturned — and RPI 5 — the proportion of regulatory agencies whose mechanisms for internal review of decisions meet standards for complaints handling outlined in ‘Principles for Developing a Service Charter’ published by the Department of Finance and Administration. Departments and agencies were to provide the relevant information to the OSB for inclusion in its annual report. Over the period

1998-999 to 2004-05, the average annual percentage score for all departments and agencies for RPI 4 was 59%, with a range from 31% to 70%, but a declining trend from 2002-03. This was a disturbingly poor level of performance. The average annual score for RPI 5 was 68%, with a range from 50% to 77%, with a slight upwards trend in the latter three years, following an initial and very sharp fall in performance. In the case of RPI 5, where departments had only to meet the standards for complaints handling quite clearly specified by the Department of Finance and Administration, the average score of 68% was surprisingly low.

Unlike RPI 1 to 3, RPI 4 focused attention on the performance of departments in administering regulations. In particular, departments were assessed on their adherence to due process rather than administrative efficiency. The assumption was that if the proportion of cases where a decision was reversed or overturned by an external body was low, then the quality of the decision process, at least with regard to due process, was relatively high. While there is no doubt that RPI 4 might provide a valuable, more objective indicator of due process performance, two limitations need to be considered: one, limitations as to the sources of external decisions to be considered and reported upon; two, small business resource limitations.

With regard to the sources of external decisions to be included, the formal advice to departments was that they should only consider decisions of external review agencies that were empowered to overturn or reverse the department's decision (Department of Industry Tourism and Resources 2006: 7-8). This meant that, for example, complaints from businesses to the Commonwealth Ombudsman would not be considered, even if the Ombudsman supported the complaint, as the Ombudsman had no power to overturn or reverse decisions. In addition, decisions resulting from departments' internal review processes were excluded, even if they supported the complainant. In this latter case, while a degree of concern as to the objectivity of reviews from internal review sources is not surprising, it is surprising that they were not to be considered, even, for example, where they might have led to the overturning of an earlier decision. If they had been included as a source of performance data, this might have encouraged departments to adopt internal review processes where they did not exist and, where they did exist and indicated poor levels of performance, to improve their procedures and related decisions, especially if such information was made public in the RPI reports.

The second limitation springs from the limited resources small businesses have to take complaints about regulation and its implementation to external review bodies such as the courts or the Administrative Review Tribunal. Faced with this reality, the decision to exclude from consideration those decisions overturned within the potentially less costly and less formal internal review processes of

departments was unduly restrictive. In part, the impact of this restriction might have been mitigated by RPI 5, the proportion of regulatory agencies whose mechanisms for internal review of decisions met standards for complaints handling outlined in the *Principles for Developing a Service Charter*. Some 12 criteria had to be satisfied in order to meet these standards, as determined by the Department of Finance and Administration (Department of Industry Tourism and Resources 2006: 8-9). The assumption was that if a department's processes satisfied these criteria then it was likely that its internal processes were at least adequate insofar as complainants were concerned. Thus, departments were required only to answer 'yes' or 'no' with regard to RPI 5 and to provide a brief description of their internal review processes in their first report but not thereafter. It hardly needs pointing out that having sound processes does not guarantee good decisions and, given that the average annual score for all departments for the whole period for RPI 5 was only 68% (on a self-declared basis) then there is room for legitimate concern as to the adequacy of departmental performance in ensuring transparency or fair outcomes — the very objective measured by RPI 4 and 5.

Objective 4: to ensure that information and details on regulation and how to comply with it are accessible and understood by business

This was to be measured by RPI 6 — the proportion of regulatory agencies having communications strategies for regulation, or formal consultative channels for communicating information about regulation. Over the period 1998-99 to 2004-05 the average annual percentage score for all departments and agencies for RPI 6 was 95%, with an initially impressive performance falling away somewhat after 2001-02.

Departments and agencies provided: a simple 'yes' or 'no' answer to the question of whether they had communication strategies or formal consultative channels; a brief description of the strategy or channels in question; and, where the department had a formal, written strategy, a copy of that document was submitted to the OSB. Where such strategies existed but had not been in place for the full reporting period, departments were advised to answer 'yes' to the question (Department of Industry Tourism and Resources 2006: 11). In practice, there seems to have been no little or no checking by either the ORR or the OSB as to whether the strategies or consultative channels actually enabled businesses to access and understand information on regulations other than as demonstrated in relation to RPI 8 and 9, below. In other words the value of RPI 6 was limited, focusing only on the achievement of procedural targets rather than any assessment of whether or not businesses found the consultative channels accessible or the information provided about regulations understandable. However, assuming that adequate processes might encourage accessibility and

understanding, then an average performance level of 95% for the period was reassuring, even with the slight downward trend after 2001-02.

Objective 5: to create a predictable regulatory environment so business can make decisions with some surety of future environment

This was to be measured by RPI 7, the proportion of regulatory agencies publishing an adequate forward plan for introduction and review of regulation. Departments and agencies were to provide the relevant information to the OSB for inclusion in its annual report. Over the period 1998-99 to 2004-05, the average annual percentage score for all departments and agencies for RPI 7 was only 60%, with a range from 27% to 78%, although some reassurance could be gained from the consistently upward trend in performance after 2001-02. In other words, assuming that this RPI did provide a reliable indicator as to the 'surety of future environment', there was a substantial lack of surety for those businesses affected by the 40% of regulatory agencies that did not publish an adequate forward plan in the period under consideration. In addition, the extent to which such a predictable regulatory environment can be anticipated on the basis of a business knowing that a regulatory review is planned, is questionable, given that the planned reviews could result in substantial change, with at least short term uncertainty.

Objective 6: to ensure that consultation processes are accessible and responsive to business and the community

This was to be measured by RPI 8, the proportion of regulations for which the RIS documentation included an adequate statement of consultation (to be monitored and assessed by the ORR) and RPI 9, the proportion of regulatory agencies with organisational guidelines outlining consultation processes, procedures and standards, with departments and agencies to provide the relevant information to the OSB for inclusion in its annual report. In part, RPI 8 and 9 overlap with RPI 4, above, providing additional information as to the adequacy of consultation processes, based on the assessment by the ORR of the documentation provided in the RIS process. Over the period 1998-99 to 2004-05, the average annual percentage score for all departments and agencies for RPI 8 was 91%, with a range from 82% to 96%, but a worrying, downward trend from 2001-02, to a figure of 82% in 2004-05. The average annual score for RPI 9 was only 62%, with a range from 48% to 74% and a downward trend after 2001-02. Again, RPI 8 and 9 provide performance information only in relation to departmental processes, not their actual impact on business, that is, whether they actually result in accessibility and responsiveness. Hence, given that the average level of process performance for RPI 9 was only 62%, one might speculate

that the actual accessibility and responsiveness of consultation processes used by departments was of a rather low order, both for business and the community.

Conclusion

In summary, the performance information provided by the nine RPI for the period under consideration was certainly interesting, of varying degrees of value and, for RPI 3 and 7, showed improving regulatory performance by departments and agencies. The other RPI, however, suggested that regulatory performance in relation to process was at best variable and as indicated for several RPI, in a downward trend. Combined with the coverage and design limitations noted above, they indicate that the Australian system of RPI, while a step forward, was of limited value. Perhaps of most concern for proponents of regulatory reform, its limited success suggested that the decades-long effort to improve the international competitiveness of the Australian economy by improving the capacity of regulation-making processes to reject anti-competitive, regulatory proposals, had been of only very limited success.

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