

# Chapter 8. Conclusion

**Peter Carroll**

As noted, the bulk of the chapters in this book other than the introduction and this conclusion were presented originally as separate conference papers on a related theme. Hence, while each of the papers addresses an aspect of the second or third waves of regulatory reform that have taken place in Australia since the mid-1980s, focused on reforms to processes, they were not designed to fit together in a coherent whole as chapters in a book. Moreover, the papers were presented before COAG had reached any final agreement on the National Reform Agenda (NRA) — the third wave of reform. Nevertheless, as we hope the reader will agree, they do provide a valuable set of perspectives about the various processes of regulatory reform as a whole, as well as important, specific issues that have arisen. In this context three broad conclusions reached in the chapters are identified and, as far as possible, related to the final COAG agreement on the NRA.

The first is that while the reforms have improved the quality of the processes associated with the making of regulation, the level of improvement has been variable in both extent and impact. The second is that reform should continue, as has been agreed by COAG, in terms of both building on the established achievements as well as remedying the reforms that have been less successful. The third is that the primary focus of regulatory reform in Australia, at least at the federal level, has focused on regulatory simplification and efficiency, rather neglecting the issue of how to manage regulatory complexity.

With regard to the first conclusion, the main vehicle of process reform has been the RIS system, though with variable results. Perhaps the fundamental and inevitable difficulty its proponents face is that policy-making is an inherently political process — one that is embedded in a liberal-democratic system of government. This is a difficulty — perhaps an insurmountable one — as the wishes of the electorate do not always coincide with the requirements of a rational decision-making process such as that at the core of the RIS process. Rather, politics involves constantly changing activities and processes arising from the interaction of individual and group values, motivations and actions, notably in situations of scarce human and physical resources. Both conflict and cooperation can result and, while conflict is not an inevitable result of such interactions, it is a very frequent characteristic, especially where individuals and groups compete, successfully and unsuccessfully, for the scarce resources they see as necessary to achieve their goals or where they compete in relation to values (or both). It often requires a series of compromises between the competing parties

before agreement can be reached as to the content of a new or modified regulation.

When the set of compromises that constitute a regulation are subject to rational analysis in terms of the more rigorous criteria utilised in a cost-benefit analysis, they are likely to 'fail' to meet the criteria or tests mandated under RIS. But RIS does not test for the merits of the compromises underlying the regulation. It is silent as to whether a regulation meets the criteria for political success. Hence, it is not surprising that ministers, their minders and senior public servants have reservations about the value of RIS, reservations that are visible in their varying degrees of commitment to the process. However, it is important that all of these actors, as well as the constituencies they represent, are made aware of the costs and the benefits of the compromises they have reached. In a very real sense, a good RIS — one that includes a rigorous financial analysis or cost-benefit analysis — indicates the cost of politics for a democratic system: costs that should always be born in mind by decision-makers.

While not explicit, elements of the above view about the constraints imposed upon rational decision-making by the political system are contained within COAG's 2007 Communiqué regarding the NRA (COAG 2007). This is most obvious in relation to two areas: one, the requirement for a new system of annual reviews where each government conducts annual, targeted reviews; and two, an agreement for an intergovernmental, benchmarking study of the compliance costs of regulation (COAG 2007: 9-10).

The annual reviews of selected regulation are to involve a public inquiry and reporting process that provides opportunities for input from a range of stakeholders, with the review recommendations to be acted upon by each government (COAG 2007: 9). While this will not avoid the inevitable politics associated with the making of regulation, it will, if successful, help ensure that the compromises, costs and benefits of significant regulatory decisions as embodied in the selected regulation, will be reviewed in a public context and on a regular basis. The result, hopefully, will be regulatory compromises that impose least costs on the community, if not perfectly rational regulation.

The benchmarking proposal will have a salutary impact on the politics of regulation as it will make public the relative costs of the compromises embodied in comparable regulation in each of the member governments, notably the state governments. In particular, the comparative costs to business of complying with regulation will be made available. While the impact of such knowledge is uncertain, it is not difficult to imagine a number of scenarios. One might be the 'regulatory competition' scenario. In this scenario 'benchmarking data' will lead to a demand from business for new or modified regulations that impose either no greater cost, or less cost, than the comparable regulations in the other jurisdictions, as shown by the bench mark studies. While the specifics of business

demands will vary, firms and their industry associations will tend to put forward the argument that they are, or will be disadvantaged by competition from products or services produced in the other jurisdictions where the cost of regulation is less.

If we assume that the demands of business for the lower cost regulation are accepted, then the governments involved have a number of options. At the simplest level this might involve little more than a simple copying of regulation from the 'least cost' state, perhaps for a decrease in the fees charged to business. However, at times more substantial policy innovation will be necessary in designing new and less cost regulation, imposing greater workloads on the policy developers involved. If local policy design capacity is limited, or an existing regulatory design seems most efficient, then there is likely to be an increase in the policy transfer of less costly regulation from the states with less costly regulatory regimes to the states with more costly regimes. Policy innovation by means of policy transfer — or copying from other states — is already commonplace, but benchmarking may increase its frequency, given the need for rapid policy responses in a competitive regulatory environment. It might also lead to a greater role for COAG in determining whether or not a regulation should be harmonised across all member governments.

Indeed, there are dangers in this regard as the costs of developing the necessary innovative regulatory capacity might be seen as too great at the state government level, leading to a tendency to encourage and support a system for harmonising regulation that draws less heavily upon their limited resources. This might be an appropriate response where the regulation that is harmonised is the most effective, least-cost option. However, those who support the value of competitive markets would point out that a system of 'managed' harmonised regulation that lacks the stimulus of competition is not likely to be the most efficient or effective. Rather, it would tend to exhibit the costly features of a cartel-type arrangement.

A final decision on the benchmarking exercise will not be made by COAG until after the results of the Productivity Commission studies are known. However, assuming that the results are convincing, the benchmarking of the regulatory costs of similar regulation in place in each jurisdiction might stimulate the production of more effective and efficient regulation — provided that it does not lead to the cartel-like situation noted above.

The second conclusion — that reforms to regulatory processes and associated techniques should continue, building on its successes, as well as remedying its failures — is one that was endorsed by COAG in the context of the National Reform Agenda (NRA). It is evident, for example, in the agreements for annual reviews and regulatory benchmarking. In addition, it can be seen in the agreements that all members would:

... establish and maintain effective arrangements at each level of government that maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition by:

(a) establishing and maintaining 'gate keeping mechanisms' as part of the decision-making process to ensure that the regulatory impact of proposed regulatory instruments are made fully transparent to decision-makers in advance of decisions being made and to the public as soon as possible;

(b) improving the quality of regulation impact analysis through the use, where appropriate, of cost-benefit analysis; better measurement of compliance costs flowing from new and amended regulation, such as through the use of the Commonwealth Office of Small Business' costing model;

(c) broadening the scope of regulation impact analysis, where appropriate, to recognise the effect of regulation on individuals and the cumulative burden on business and, as part of the consideration of alternatives to new regulation, have regard to whether the existing regulatory regimes of other jurisdictions might offer a viable alternative; and

(d) applying these arrangements to Ministerial Councils (COAG 2007).

While the specific means by which each jurisdiction is to achieve the above aims is not specified, each member has provided a progress report against an 'Intergovernmental Action Plan', on the actions it has taken — or plans to take — to implement the aims (COAG 2006; and 2007: 15-22). Their reports indicate substantial variation in their interpretation of the meaning of the agreements as well as some variation in their progress in implementation. With regard to the latter, most governments indicated that the agreed changes to process and techniques have, or would be put in place in 2007, with the exception of Tasmania (which provided no indication of expected completion dates).

With regard to variations in interpretation, the Commonwealth government, for example, has adopted a very 'hard line' as regards the adoption of gate-keeping mechanisms by requiring that its Cabinet Secretariat not circulate final submissions or memoranda to cabinet members without an adequate RIS or compliance cost assessment other than in 'exceptional circumstances' (COAG 2007: 15). Judgements about the adequacy of RISs are to be made by the Productivity Commission's Office of Best Practice Regulation. In contrast, the NSW Government, in relation to gate-keeping requirements, will require an assessment of adequacy by a new Better Regulation Office and a certification of adequacy by a minister with specific responsibility for regulatory reform (COAG 2007:17-18). It makes no mention as to whether or not regulatory proposals that

are judged 'not adequate' or 'not certified' will be submitted to cabinet for consideration. In further contrast, the WA Government's report notes only that 'enhanced gate keeping arrangements' will be put in place, without indicating what will be the case if submissions are not adequate or complete (COAG 2007: 21). The key question to be asked is whether or not the combination of progress reports and peer pressure will result in significant progress in the improvement of regulatory processes in all jurisdictions. This is a question that cannot be answered, in all fairness, until more time has elapsed.

The third conclusion, that the capacity of Australian governments to manage regulatory complexity needs to be improved, has not been directly addressed by COAG in the NRA. Rather, its general goal with regard to regulation is to reduce what is seen as the regulatory burden on business imposed by the three levels of government (COAG 2006). It could be argued (although COAG's reports do not do so) that: one, the NRA's general goal of improving regulatory performance does include an implied commitment to improving the governments' capacity to manage regulatory complexity, a complexity that will continue even where the regulatory burden is reduced and simplified; two, that this is the primary responsibility of the Australian Public Service Commission (APSC). However, a detailed examination of the COAG agreements reveals no recognition of the need to improve the management of regulatory complexity, nor any reference to any related role of the APSC in pursuing such improvements. Instead, there is only a continuing emphasis on regulation-making and review, but not day to day management. Similarly, a perusal of two recent, major APSC documents, the 'Building Better Governance', guidelines, and the 'Tackling Wicked Problems' report, both released in 2007, make no reference to the National Reform Agenda, the role of COAG in that regard, or how the guidelines might support the achievement of the improved management of regulatory complexity (APSC 2007a: 2007b).

In 2007 a new Australian Labor Party government under Prime Minister Kevin Rudd came into office. It is 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). In relation to regulatory processes three significant changes were introduced by the new Government in late 2007 that signified its reform commitments: one, the renaming of the existing core Department of Finance and Administration as the Department of Finance and Deregulation (DFD); two, the transfer of responsibility for regulatory reform from Treasury to the DFD; three, the relocation of the Office of Best Practice Regulation (OBPR) from the Productivity Commission to DFD, within its Financial Management Division, with a new Minister Assisting the Finance Minister on Deregulation,

Dr Craig Emerson. In essence, the three changes constituted a centralisation within one organisational location of the previously separate areas largely responsible for regulatory reform in the Commonwealth administration. Moreover, the DFD, with its long tradition of rigorous assessment of the budgets and financial management practices of the line departments, was in a position to add both experience and increased competence to the scrutiny of departmental RIAs. The decision to use the term 'deregulation', in the department's title is significant, implying a commitment to cut what many see as the increasing regulatory burden on business, not merely to engage in regulatory reform. It sends a clear and very sympathetic signal to the peak business associations and the Productivity Commission that had been arguing for more effort in this regard, although the extent to which deregulation actually occurs remains to be seen.

In conclusion, the last three decades have seen repeated attempts to improve Australia's regulatory processes and systems based on the assumption that better regulatory outputs and outcomes can best be achieved by improving the capacity and design of the systems for making and modifying regulation. Those attempts have had varying degrees of success and, while the most recent, third wave of reform is the most ambitious in its scope, committing all COAG members to a wide range of activities aimed at further improvement, its outcome is likely, again, to be variable, although the new Rudd government is clearly committed to those reforms.

## References

- APSC 2007a, *Building Better Governance*, viewed on 12 November 2007, at <http://www.apsc.gov.au/publications07/bettergovernance.pdf>
- APSC 2007, *Tackling Wicked Problems*, viewed on 12 November 2007, at <http://www.apsc.gov.au/publications07/wickedproblems.pdf>
- Australian Government 2006a, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business Interim Response*, as at 28 June 2006, at [http://www.pm.gov.au/news/media\\_releases/media\\_Release1869.html](http://www.pm.gov.au/news/media_releases/media_Release1869.html)
- Australian Government 2006b, 'Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business Australian Government's Response'.
- COAG 2004, 'Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies', viewed on 12 November 2007 at [http://www.obpr.gov.au/\\_data/assets/pdf\\_file/0011/69662/coag.pdf](http://www.obpr.gov.au/_data/assets/pdf_file/0011/69662/coag.pdf)

- 2006, *Council of Australian Governments' Meeting 10 February 2006*, viewed on 12 November 2007, at <http://coag.gov.au/meetings/100206/index.htm#reform>
  - 2007, *COAG Regulatory Reform Plan*, viewed on 12 November 2007, at [http://coag.gov.au/meetings/130407/docs/coag\\_nra\\_regulatory\\_reform.pdf](http://coag.gov.au/meetings/130407/docs/coag_nra_regulatory_reform.pdf)
- Emerson, C, 2007. 'Lifting productivity growth by reducing business regulation', as at the Australian Labor Party website at 9 January 2008, at [http://www.alp.org.au/download/now/lifting\\_productivity\\_growth\\_by\\_reducing\\_business\\_regulation\\_22apr07.pdf](http://www.alp.org.au/download/now/lifting_productivity_growth_by_reducing_business_regulation_22apr07.pdf)