

BUSINESS CHECKLIST FOR COMMONWEALTH REGULATORY PROPOSALS



Australasian Investor Relations Association



Introduction

On 15 August 2006, the Treasurer announced the Commonwealth Government's ('the government') final response to the report of the Taskforce on Reducing the Regulatory Burden on Business (the Banks Taskforce). The Banks Taskforce recognised that reform of the systemic regulation making system was crucial to stem the tide of regulation and was welcomed by business as a blueprint for serious action to address its regulatory concerns. Included in the recommendations were various improvements in the RIS process and consultation processes for regulation making.

Following from the government's announcement, a new and more rigorous process to ensure that the government implements and applies its commitments with respect to regulation making has been developed.

With this in mind, a Business Checklist for Commonwealth Regulatory Proposals has been developed which will enable the business community to monitor the government's compliance with regulation making reforms against some established benchmarks.

The checklist is designed to guide the assessment by business of whether specific new regulatory proposals have followed the government's new regulation making process. The checklist can be used by business early in the regulation making process to set out its expectations of the process that should be followed. The checklist can also be used later in the process to test whether advanced regulatory proposals have complied with the government's commitments. Finally, the checklist also provides the basis for systemic assessments across government to test the extent to which the government's new processes are being followed.

The checklist is not designed to assess the merits of specific regulatory proposals, but rather to assist business to respond to those proposals by highlighting the extent to which government agencies championing new regulation have, or have not, followed the government's new process.

The checklist has support from a range of business and professional associations (see Appendix B). Through the use of the checklist by a range of participants, it is hoped that there will be consistent monitoring of the government's behaviour in this area.

Principal Government Commitments

The government has endorsed the six principles of good regulatory process set out in the Banks report, namely:¹

- establishing a case for action;
- examining alternatives to regulation;
- adopting the option that generates the greatest net benefit to the community;
- providing effective guidance to relevant regulators and affected stakeholders;
- reviewing regularly to ensure the regulation remains relevant and effective; and
- consulting effectively with stakeholders at all stages of the regulatory cycle.

The government has also committed to reducing the regulatory burden by ensuring that systems are in place to guard against the introduction of unnecessary regulation and to improve the quality of existing and new regulation. Government ministers will be responsible for ensuring that these strengthened processes are implemented in their respective portfolios.

The Office of Regulation Review within the Productivity Commission has been strengthened and reoriented, becoming the Office of Best Practice Regulation (OBPR). Its role will be to work closely with government agencies as they develop policy proposals, in order to prevent the generation of unnecessary new regulation. The government has also mandated the use of a 'Business Cost Calculator' by all agencies to quantify in dollar terms the compliance cost of proposed regulatory options. Finally, the government has agreed to undertake annual reviews to examine the cumulative stock of regulation and identify an ongoing red tape reduction agenda.

The OBPR will be playing an educative role for government agencies implementing the new regulation making system, with the standard for adequacy criteria being progressively raised after 1 July 2007. Whilst recognising that there is a learning curve, the use of this checklist may also assist in monitoring the implementation by government agencies of the new system.

¹ Treasurer of Australia, *Report of the Taskforce on Reducing Regulatory Burdens on Business – Final Government Response*, Media Release, 15 August 2006 (referred to subsequently as 'August Press Release').

A Checklist

It is proposed that the following checklist may be used to determine whether specific new regulatory proposals are being, or have been, developed in accordance with the government's commitments.

1 Has a case for action been established?

The government has committed to "*enhanced analysis of the issue sought to be remedied by regulation*".² In other words, new regulatory proposals should not be brought forward unless there is a clear case made out for regulatory intervention.

The government has also agreed to "*reviewing regularly to ensure the regulation remains relevant and effective*".³ Review is essential to ensure the benefits argued as justification for regulatory intervention are actually realised and the desired results are achieved effectively and efficiently.

In assessing whether new regulatory proposals comply with this requirement, business will examine the following matters.

- 1.1 Has a problem been identified and sufficiently demonstrated?
- 1.2 Has that issue that the regulation is being proposed to address been described clearly?
- 1.3 Has evidence been provided that the issue is current and requires an immediate response from government?
- 1.4 Has evidence been provided for why existing Commonwealth or state regulation is not sufficient to deal with the issue?⁴

2 Have the alternatives to regulation been thoroughly examined?

The government has committed to "*examining alternatives to regulation*",⁵ including the "*analysis of the costs of regulatory options*".⁶ In other words, regulatory proposals should not be put forward without an examination of the alternatives to regulation (including the alternative of taking no action and of non-, self- and co-regulatory responses). Alternative options, along with the regulatory proposal, should be fully costed (see also criterion 3).

In assessing whether new regulatory proposals comply with this requirement, business will examine the following matters.

- 2.1 Have alternatives to regulation been clearly identified (for example, in a regulatory impact statement)?
- 2.2 Have the relative costs and benefits of these alternatives been thoroughly assessed (bearing in mind that the new procedure applies a four-step approach to regulatory analysis which is commensurate with the impact on business and individuals in the economy. A RIS or full Business Cost Calculator (BCC) costs analysis may not be required where, for example, the impact on business and individuals or the economy is low or nil)?
- 2.3 Were those likely to be affected by government proposals consulted on the relative costs and benefits of alternatives?

2 Australian Government, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (Australian Government's Response), August 2006 (referred to subsequently as 'Government's Final Response'), p. 76.

3 August Press Release.

4 Consideration could also be had to whether the proposal harmonises regulations, in which case the proposal may be acceptable.

5 August Press Release.

6 Government's Final Response, p. 76.

3 Was the 'Business Cost Calculator' used to determine costs?

The government has developed a new 'Business Cost Calculator' designed to provide officials with a standardised model for determining the costs to business of regulatory proposals. All proposals are required to undergo a preliminary assessment to establish whether it is likely that there will be business compliance costs. A full assessment of these costs must then be undertaken unless the impact is low or nil.⁷

Use of the 'Business Cost Calculator' (or equivalent) is mandatory.⁸

In assessing whether new regulatory proposals comply with this requirement, business will examine the following matters.

- 3.1 Has the Business Cost Calculator been used to determine the likely costs to business of proposed regulation?
- 3.2 Have the alternatives to regulation also been fully costed?
- 3.3 Was business consulted on input into the above cost calculations?

4 Did effective consultation with stakeholders occur at all stages of preparing the regulatory proposal?

The government has committed to "*consulting effectively with stakeholders at all stages of the regulatory cycle*"⁹ and to "*improving mechanisms for consultation with industry*".¹⁰

For effective consultation, business and other stakeholders need to be consulted before decisions are made on whether government intervention is necessary, and if so, in what form. Business should also be consulted on estimates by officials of the likely cost to business of regulatory and other alternatives (for example, when the Business Cost Calculator is used).

As the detail of regulatory proposals will affect the ultimate cost of compliance for business, business and other stakeholders should also be consulted on the final legislation, before it is introduced into Parliament. The government has also accepted the Banks Taskforce's recommendation that, for matters of major significance:¹¹

"an initial policy 'green paper' should be made available to relevant parties; and, prior to finalisation, the details of complex regulations should be tested with relevant business interests, including through exposure drafts for significant matters."

In assessing whether new regulatory proposals comply with this requirement, business will examine the following matters.

- 4.1 Was business consulted on the need for government intervention before the decision to develop regulation was made?
- 4.2 Was business consulted on the cost assumptions used for the Business Cost Calculator assessment?
- 4.3 Was business consulted on the final legislation before it was introduced into Parliament?

7 Productivity Commission, *Business Cost Calculator User Guide*, 26 October 2006, p. 4.

8 August Press Release; Government's Final Response, p. 77.

9 August Press Release.

10 Government's Final Response, p. 78.

11 Government's Final Response, Recommendation 7.6, p. 78.

- 4.4 Was the time period for consultation for significant proposals sufficient (e.g. as guidance, at least 30 days but longer for very lengthy or complex proposals)?
- 4.5 Was feedback given to business about how the consultation was used to make a regulatory decision?

5 Was an adequate Regulatory Impact Statement prepared?

The government has agreed that unless there are exceptional circumstances, a regulatory proposal with material business impacts cannot proceed to Cabinet or other decision-maker unless it has complied with the government's RIS requirements, where a RIS is required.

- 5.1 In assessing whether new regulatory proposals comply with this requirement, business will examine whether a RIS has been prepared where required?

6 Review

The government has agreed to ensure that reviews of regulation are considered by regulators, and in certain circumstances selective post-implementation review will be conducted¹². Whilst the *Legislative Instruments Act* provides for a 10 year sunset clause, regulators must turn their minds to the appropriate review process that is required. Business needs to be made aware about the decision made by regulators on the issue of the review process for the specific piece of regulation.

- 6.1 Is there evidence that the regulator has considered and made a decision about the review process to be used for the proposed regulation?

Scoring

The checklist has been designed to allow business and its representatives to score the performance of specific regulatory proposals. In effect, the checklist allows business to give a 'score out of 6' for regulatory proposals and their level of compliance with the government's commitments. While at one level this is glib, it does provide a succinct way of evaluating the degree to which the government's commitments are being implemented when actual regulatory proposals are under consideration.

¹² See for example: Government's Final Response, responses to Recommendations 7.26, 7.27 and 7.28.

APPENDIX A —Business Checklist for Commonwealth Regulatory Proposals

1 Has a case for action been established?

- 1.1 Has a problem been identified and sufficiently demonstrated?
- 1.2 Has that issue that the regulation is being proposed to address been described clearly?
- 1.3 Has evidence been provided that the issue is current and requires an immediate response from government?
- 1.4 Has evidence been provided for why existing Commonwealth or state regulation is not sufficient to deal with the issue?

2 Have the alternatives to regulation been thoroughly examined?

- 2.1 Have alternatives to regulation been clearly identified (for example, in a regulatory impact statement)?
- 2.2 Have the relative costs and benefits of these alternatives been thoroughly assessed?
- 2.3 Were those likely to be affected by government proposals consulted on the relative costs and benefits of alternatives?

3 Was the ‘Business Cost Calculator’ used to determine costs?

- 3.1 Has the Business Cost Calculator been used to determine the likely costs to business of proposed regulation?
- 3.2 Have the alternatives to regulation also been fully costed?
- 3.3 Was business consulted on input into the above cost calculations?

4 Did effective consultation with stakeholders occur at all stages of preparing the regulatory proposal?

- 4.1 Was business consulted on the need for government intervention before the decision to develop regulation was made?
- 4.2 Was business consulted on the cost assumptions used for the Business Cost Calculator assessment?
- 4.3 Was business consulted on the final legislation before it was introduced into Parliament?
- 4.4 Was the time period for consultation for significant proposals sufficient (e.g. as guidance, at least 30 days but longer for very lengthy or complex proposals)?
- 4.5 Was feedback given to business about how the consultation was used to make a regulatory decision?

5 Was an adequate Regulatory Impact Statement prepared?

- 5.1 In assessing whether new regulatory proposals comply with this requirement, business will examine whether a RIS has been prepared where required.

6 Review

- 6.1 Is there evidence that the regulator has considered and made a decision about the review process to be used for the proposed regulation?

APPENDIX B — GROUPS IN SUPPORT OF THE CHECKLIST



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