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## **Rethinking Regulation: an assessment of the Report of the Taskforce**

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### **Abstract**

After several years of pressure from key business associations and the Productivity Commission, in 2005 Prime Minister Howard established the Regulation Taskforce on reducing the Regulatory Burden on Business. In its 2006 Report 'Rethinking Regulation', the Taskforce identified some '100 reforms to existing regulation', that were needed and another fifty to be investigated in further depth. It laid the blame for the sharp increase in the regulatory burden on an increasingly risk averse society and a 'regulation first, ask questions later', culture within government departments and agencies. The aim of this paper is to assess the Report and its recommendations. It argues that while, as suggested by the Taskforce Report, an increasing trend to risk averseness in Australian society might have some influence, a range of other factors are at least as important, including the ideological motives of some of those involved, unrealistic expectations in regard to the existing system of Regulation Impact Statements (RIS), the varying regulatory capacities of departments and agencies and the division of responsibility for regulatory reform among several departments and agencies, making coordination difficult.

### **Introduction**

The aim of this paper is to assess the Report of the Commonwealth Government's Taskforce on Reducing the Regulatory Burden on Business (the Banks Report), released in April 2006, and its recommendations. It indicates that, while, as the Banks Report argues, risk averseness and cultural factors might be major factors in causing a rapid growth in the regulation of business, a range of other factors are at least as important, including the ideological motives of some of those involved in the regulatory reform movement, unrealistic expectations as to what the existing system of Regulation Impact Statements (RIS) can achieve, the varying capacities of departments and agencies and the division of responsibility for regulatory reform among several departments and agencies, making coordination difficult. The paper is divided into five sections: the first outlines the origins of the Banks Report; the second summarises its core arguments; the third assesses the core argument; the fourth describes the RIS system; and the fifth comments on the Report's assessment of RIS.

### **The Banks Report: origins**

The origins of the Commonwealth Government's 2005 decision to establish the Taskforce on Reducing the Regulatory Burden on Business can be found in the Government's long-standing commitment to a minimum of effective, least-cost business regulation as a primary means of ensuring the international competitiveness of the Australian economy (see, for example, Howard 1997). In significant part this

commitment was a response to the personal conviction of members of the Australian Cabinet and ongoing, if variable, pressures from peak business associations such as the Australian Chamber of Commerce and Industry (ACCI), and the Business Council of Australia (BCA), and, especially, from the Productivity Commission (see, for example, ACCI 2005a, 2005b, BCA 2005a, 2005b, Productivity Commission 2003, 2004, 2005, Banks 2003a, 2003b, 2004). In turn, both peak associations and the Productivity Commission make frequent reference to the OECD and, more recently, World Bank publications, their status being drawn upon in order to support the case for ongoing and more rigorous reform of the existing stock of business regulation, as well as for a 'best practice', set of processes and related institutions for making new regulation (see, for example, OECD 2001, 2005, World Bank 2004, 2005).

This combination of personal belief, business pressure and Productivity Commission (or one of its predecessors), influence reaches a cyclical peak roughly every ten years, with business and government leaders expressing serious public concern for the adverse consequences of business regulation, resulting in the launching of a new 'wave', of regulatory reform. In 1985-86, for example, the ALP Hawke Government established the first Commonwealth Business Regulation Review Unit, with responsibility for coordinating and reporting on a new regulatory impact statement (RIS), process aimed at subjecting proposals for new or amended business regulation to more rigorous analysis, following concerns expressed by both business and the then Industries Assistance Commission (IAC), and the Confederation of Australian Industry (CAI), (IAC 1984, 1985, CAI 1980). Similarly, in 1996, the first of the Howard Governments, following on the widespread review of Commonwealth and state government business regulation agreed to in the National Competition Agreement, undertook a review of progress in regard to business regulation in the shape of two, key reports, the Bell Report, and the interim Productivity Commission 'Stocktake on progress in Microeconomic Reform', followed by a number of reforms based on their recommendations (Bell 1996, Industry Commission 1996). In this context, the increasing concerns voiced by the Productivity Commission, its chair Gary Banks, and peak business associations, followed by an announcement of a further review of business regulation in October 2005, was merely the latest episode in an ongoing saga, whose immediate, primary cause was a recognition of the need to refresh the continuing process of review of business regulation, given the near completion of the reviews undertaken as part of the National Competition Agreement (ACCI 2005a, 2005b, BCA 2005a, 2005b, Productivity Commission 2003, 2004, 2005, Banks 2003a, 2003b, 2004). This, combined with views that the volume of business regulation was again growing too rapidly and, in addition, that the RIS process aimed at ensuring an appropriate volume and quality of regulation, was not performing at a sufficiently high level of performance, brought about the appointment of the Taskforce, chaired by Productivity Commission chair, Gary Banks (see Banks 2003a, 2003b, Productivity Commission 2005).

The Taskforce, despite being chaired by Gary Banks, was not a Productivity Commission project, the latter being noted for their balanced, objective presentation of a range of community views. Rather, it was a project designed to identify the views of business, for the benefit of business, as the terms of reference put it,

...to identify practical options for alleviating the compliance burden on business from Commonwealth Government regulation. The Taskforce will examine and

report on areas where regulatory reform can provide significant immediate gains to business (Banks Report 2006a, A1).

The Taskforce's Issues Paper was quick to note that the focus was on reducing the 'compliance burden on business', not on reducing regulation per se, so as not to generate unrealistic expectations, and that, given the short time frame involved, only three months, the aim was not to critically assess all regulation impacting on business, but to

- recommend reform to some key areas of regulation (and possibly to some individual regulations) which warrant immediate action;
- identify other areas of existing regulation where there appears to be a case for abolition or modification, but for which further examination is warranted; and
- discuss mechanisms to deal with compliance burden problems arising from new or amended regulation (Taskforce 2005, 1).

It was also made up of persons drawn entirely from the business community and, while the Taskforce called for submissions from the entire community, it was clear that its focus was on gaining the views of business. Indeed, most of the information that it requested be contained in the submissions could be provided only by those familiar with business operations. The result was the Banks Report, delivered to the Government on 31 January 2006, and released, together with the Government's Interim Response to its recommendations, on 7 April (Banks 2006, Australian Government 2006).

### **The core arguments of the Banks Report: a summary**

The Report is composed of eight chapters. The first puts the Report's endeavours into context and describes the review process. The second argues that the regulatory burden has risen sharply, is of variable quality and is costly, both for government, but, particularly, for business in complying with the increasing burden. It concludes by identifying the causes of the increase in regulation and making a case for its reform. The third chapter outlines the major proposals put forward in the business submissions received and how the Taskforce selected and prioritised its own proposals. The fourth chapter, containing eighty three recommendations, and the fifth chapter, containing sixty two recommendations, examine specific areas of regulation, with the fourth focusing on health, labour markets, consumers, building and the environment and the fifth on finance, corporations, taxation, superannuation and trade. The sixth contains only four recommendations and examines the interface between business and government, with a focus on the administration of regulation, especially issues related to the accessing of information, presenting information in a business-friendly manner, exploiting information technology for communication purposes, and minimising the duplication of reporting by standardising data collection and streamlining business registration systems. The seventh chapter, with twenty nine recommendations, proposes a series of reforms intended to improve the whole system for making and implementing regulation in Australia, primarily for the federal government, but also for state and local government where there is potential for reducing unnecessary overlap and creating greater regulatory harmonisation. Chapter eight is a brief, concluding chapter that, mindful of the importance of effective implementation if its ninety nine specific reforms, fifty one reviews and twenty eight institutional reforms were to be achieved, indicates what the authors think should be the priorities and work program, assuming its recommendations were accepted.

The Report's core arguments for reform are contained in chapters one, two and three. In summary, chapter one sets the scene by noting that all societies need an appropriate level of regulation, that there have been substantial gains from regulatory reform over the past twenty years, but that there has been a rapid increase in both the volume of regulation, some justified, some not, with rising concern from business as to the increasing cost of compliance, leading to the need for a new wave of reform. A wave already set in motion by the Commonwealth Government, with the appointment of the Taskforce intended to identify areas for further action. Chapter two expands on the basic arguments put forward in chapter one, stressing, in addition, that, while much of the new regulation might be appropriate, some was not and, importantly, that it was the cumulative burden of regulation on individual businesses that was of especial concern, leading to increasing compliance costs and the displacement of time and resources that otherwise could be spent on more creative and innovative behaviour (Banks 2006, 5). It then puts forward the core of its argument in favour of reform, arguing that the fundamental cause or driver of increasing regulation was '...increasing risk aversion in many spheres of life' (Banks 2006, 14). In turn, the Report argues, while an effective regulation making and administrative system should 'mediate', the impact of the increasing demands that arise from an increasingly risk averse society, this was not happening, for four basic reasons (Banks 2006, 15),

- The real costs of regulation are 'hidden', from view as they are the 'off-budget', costs of business and society compliance with regulation.
- The cumulative cost of regulation is not often considered as most departments and agencies have responsibility only for specific regulation, and little concern for its cumulative nature.
- The culture of some regulators fosters excessive and poor regulation, as they respond to incentives to 'protect', consumers, with heavy handed, prescriptive, legalistic enforcement, a government knows best attitude and a general distrust of business people.
- The regulation impact statement (RIS), system, introduced to minimise the above, helped but was often circumvented or treated as an afterthought.

Thus, there is a pressing need, notes the Report, for the reform of regulation, both specific regulations, as well as regulation making processes, with an emphasis on reducing the compliance burden (Banks 2006, 15-16). It is a need heightened, says the Report, by the new challenges of an aging society, increased competition from low cost, lightly regulated industries in China and India, as well as the established limitations of small scale operations in a small economy, with substantial distances between domestic and international markets and, the increasing rate of regulatory reform taking place in other countries such as the UK and the USA (Banks 2006, 16).

### **Evaluating the core argument in the Banks Report**

It is not possible in a paper of this length to comment in detail on the many arguments presented by the Banks Report to justify its call for widespread regulatory reform. Hence, the aim in this section is to comment on its core argument, the notion that the rapid growth in regulation in the last two decades was caused, predominantly, by an increasingly risk averse Australian society.

In drawing upon largely the views of the business community and government departments and agencies, the Report argues that a fundamental cause of what it

regards as the unreasonable growth and cost of sometimes inappropriate regulation, is a risk-averse society, following earlier, pre-Report comments by Gary Banks, and noting in support of this fairly dramatic claim, similar views in regard to British society expressed by Prime Minister Tony Blair, (Banks 2005: 4, 2006a, 14). Whatever strength this view has, it is markedly lessened by three basic flaws. The first is the Report's failure to explain adequately how such an increasingly risk-averse society could have permitted and accepted the major series of regulatory reforms in the microeconomic area that characterised Australian governments at federal and state level during the later 1980s, 1990s and the earlier part of the 2000s, in precisely the same period as social risk-averseness, allegedly, was growing (Banks 2006, i). This is not to deny that there may well have been a rise in the extent and type of regulation in recent decades, but this is as likely to have arisen because of established, if variable, patterns of interest group pressure (including from business), as it has been from a change in the risk tolerance of Australian society. The second is the Report's failure to produce systematic, empirical evidence as to past and present trends in the 'risk averseness', of Australian society to support its argument.

The third flaw is the somewhat circular nature of the risk averseness argument, with the cause of the increasing volume and poor quality of some regulation being identified as risk averseness, and the only 'evidence', of risk averseness being the growth in volume of regulation. The Report does provide some fascinating statistics to illustrate and support its claim for the growth in volume of regulation, noting that federal Parliament had passed more pages of legislation since 1990 than it had in the first ninety years of federation (Banks 2006, 6). While the Report does go on to note that the growth in the number of pages does not necessarily indicate a similar, dramatic growth in regulations, the statistics clearly are meant to impress the reader and imply that there has been a similar, if not quite as dramatic growth in regulation. However, it could as convincingly be argued that the spectacular growth in volume in the 1990s, at the height of the microeconomic reform movement, was a result, at least in part, of the re-writing and improvement of existing regulation, often in 'plain English', to make its intent clearer and more specific, as well as new regulation. The use of 'plain English', while important, does not bring with it any necessary reduction in the number of words needed to expound complex regulation.

The Report also lays great stress on the increasing compliance cost, direct and indirect, to business of the growth in regulation that has occurred, indicating that the unnecessary cost '...may well total billions of dollars' (Banks 2006, 13). It provides estimates from various studies that indicate the total, annual cost is anywhere from \$11 billion to \$86 billion, indicating its preference for the more conservative estimates (Banks 2006, 14). However, the value of presenting such wildly differing estimates, other than to convince the less-informed reader of the cost of regulation, is highly questionable, especially given the Report's own views that none of the studies quoted estimate the net cost of regulation in relation to the objectives of the regulation in question, and that they should not be viewed as 'robust estimates' (Banks 2006, 13-14). Which begs the question as to why they were included, if not to shock?

### **The RIS system outlined**

The Report notes that the explosive growth in regulation and its cost was not sufficiently restrained by existing regulation making and administration processes, notably the RIS system, a factor examined at length in chapter seven of the Report to

provide a detailed analysis and set of recommendations for the improvement of regulation making and administration. In this section the aim is to describe the major features of the existing RIS system, to provide necessary context for the next section's discussion of the Report's analysis. Those familiar with it should move to the following section, that comments on the Report's analysis of the value of RIS and its recommendations for improvement.

RIS is both a document and, most importantly, the result of a mandated process and approaches to policy analysis intended to improve the quality of policy making in the Australian federal government in relation to the regulation of business. The process commences with the production of annual regulatory plans by departments and agencies, in which they specify new or modified regulation to be introduced in the year ahead. Next, at the heart of the process, as described by the Commonwealth's Office of Regulatory Review (ORR), are seven key elements that, when successfully completed, should provide the decision maker with the information needed to make an informed decision. The seven key elements constitute a simple, rational, process-based model of policy making that is familiar to all policy analysts, laying out the major tasks to be undertaken at each stage of the process, as follows,

- A description of the problem or issues which give rise to the need for action and broad goal of the proposed regulation;
- A specification of the desired objective(s);
- A description of the options (regulatory and/or non-regulatory), expressed as a regulatory form or type, that may constitute viable means for achieving the desired objective(s);
- An assessment of the impact, including costs and benefits, on consumers, business, government and the community of each option, with each impacted group identified, noting impacts on competition, small business and trade;
- a consultation statement detailing who was consulted, with a summary of views from the main affected parties, or specific reasons why consultation was inappropriate;
- a recommended option, with an explanation of why it was selected and others were not; and
- A detailed strategy for the implementation and review of the preferred option (Office of Regulation Review 1998, A2).

Finally, not only RIS, but the performance of government in relation to other regulatory developments, is noted in annual Regulation Performance Indicators (RPI).

In general, RIS is mandatory for all reviews of existing regulation, proposed new or amended regulation, and proposed treaties involving regulation which will directly affect business, have a significant indirect effect on business, or restrict competition. This includes primary legislation and subordinate legislation, and also quasi-regulation, the latter referring to a wide range of rules or arrangements where governments influence businesses to comply, but which do not form part of explicit government regulation, for example, industry codes of practice, guidance notes, industry-government agreements and accreditation schemes (Office of Regulation Review 1998, A2-3). The Commonwealth RIS does not apply to state, territory or local government in the Australian federal system, except in so far as any one or more of them are a party to a regulation developed on an intergovernmental basis within the Council of Australian Governments (COAG), although most have RIS-type systems of their own. A RIS system is applied by COAG, being largely identical with the federal

RIS. In addition, RIS does not apply to tax regulation (although a modified type of RIS is used in this regard) and it is not applied in a number of relatively minor areas (Office of Regulation Review 1998, A4).

In regard to the relevant, mandated stages of RIS,

- Departments, agencies and statutory authorities considering regulation that may impact on business are required to consult the ORR at an early stage in the policy development process. It is ORR that has the authority to decide, in normal circumstances, whether or not a RIS is required.
- Departments and agencies are required to consult with the ORR when developing terms of reference for reviews of existing legislation or regulations that impact on business.
- All RISs are to be developed in consultation with the ORR.
- Draft RISs are to be sent to the ORR for comment and advice.
- ORR advises departments and agencies when a draft RIS complies with the Government's requirements and, importantly, whether or not they contain an adequate level of analysis.
- ORR receives all Cabinet submissions proposing regulation or treaties and report to Cabinet on compliance with the RIS process and on whether or not the level of analysis is adequate.
- The Productivity Commission reports annually on departmental and agency performance in regard to RIS, both as to process and as to quality of analysis.
- The Office of Small Business (OSB), from 1999, has also published a set of regulation performance indicators (RPIs), for departments and agencies, assisted by ORR, and comments on regulation impacting on small business (Office of Regulation Review 1998, A10-14)

While the RIS process is mandatory, ORR's judgement as to the adequacy of a RIS process or analysis does not invalidate, or necessarily lead to the rejection of a proposed regulation. That responsibility resides with the decision maker involved, notably Cabinet and the Prime Minister (Office of Regulation Review 1998, A12).

### **The Banks Report and RIS**

The Report is somewhat ambiguous in relation to RIS, on the one hand clearly identifying its weaknesses as a major factor contributing to the growth of regulation and its cost, but, on the other hand, noting that it is '...sound in principle', but, unfortunately, had not been consistently applied (Banks 2006, 15). In summary, the Report identifies five broad factors that had hindered the value of the RIS system,

- Pressures arising from a risk-averse society, as discussed above.
- RIS system design factors.
- Varying degrees of failure to integrate RIS into traditional departmental and agency policy development processes.
- Limitations as to analytical expertise.
- Varying levels of political commitment and support (Banks 2006, chapter seven).

The latter four factors are discussed below, followed by a discussion of factors not noted by the Report, but that have had some impact on the effectiveness of RIS.

### *RIS system design factors*

The business submissions to the Report expressed strong support for the RIS system, but also noted that it needed strengthening, a view that the Taskforce endorsed in recommending that: one, the standard of analysis considered acceptable for a regulation impact statement should be increased for the regulation in question to be approved; two, that it should be made harder for a regulatory proposal to proceed to a decision if the government's requirements for good process had not been adequately discharged; three, that several basic elements of the system needed substantial strengthening (Banks 2006, vi).

The Report expressed serious concern regarding inadequacies in consulting with business, noting, in particular, a survey undertaken by the Australian Public Service Commission that found that only twenty five per cent of regulatory agencies had engaged with the public when developing regulations (Australian Public Service Commission 2005, 56, as noted in Banks 2006, 152). Not unreasonably, it was felt that less than adequate consultation tended to result in poorer quality regulation and the Report recommended that the government develop:

- a whole of government policy on consultation, with detailed principles to be followed by all departments and agencies.
- For major, proposed regulation, the preparation and release of an initial 'green paper', to all relevant parties, followed by successive 'exposure', drafts to test out options with business interests.
- A business consultation website that would automatically notify, on a voluntary basis, registered businesses and government agencies of new developments (Banks 2006, 154).

The authors of the Report seem not to have appreciated the irony of calling for greater and more effective consultation, that is, in enabling more effective participation in government, at the same time as it was suggesting that existing practices had resulted, in part, in too much inappropriate regulation from a risk averse society. It seems to have been felt that business groups were not so risk averse, that their greater participation would lead to greater business influence and, hence, an increase in better quality regulation, but a decrease in the total volume. While a cynic might feel otherwise, the call for more systematic consultation is appropriate, given the somewhat surprising lack of consultation identified, provided that safeguards are built in to the system to ensure that those being consulted do not 'capture', the regulators to the extent that their views become those embodied, untested, in regulation. In part to provide such a safeguard, the Report recommended the establishment of standing consultative bodies consisting of representatives from stakeholders, for each regulation with a major impact on business, and the development of a consultation code of conduct, modelled on the UK's new system (Banks 2006, 165).

The Report also indicated a further RIS weakness in its recommendation for the introduction of a wider range of more valuable, regulation performance indicators (RPI), as administered by the Office of Small Business (Banks 2006, 162-3). A number of senior government sources have indicated to the author that the existing RPI are of little value. They focus largely on the identification of regulation success, rather than failure, a use handy for publicity purposes but of little value in helping to identify weaknesses in regulatory process or content. Moreover, in practice they have been rarely used for problem identification or comparative, benchmarking purposes by departments. In addition, the RPI, whose introduction was not welcomed by

departments, were, for the most part, related to the making of regulation rather than its implementation, in line with the overall focus of RIS, so were of little or no value for evaluating implementation performance, a fundamental weakness given that implementation of existing regulation is by far the major activity of most departments and agencies. Indeed, RPIs are not required at all where a department has not submitted a RIS in any one year. Further, other than the placing of the annual results of the RPI on the Office of Small Business website, as reported by the departments, there is little auditing of either the RPI process or the accuracy of reported performance results. Hence, it is not surprising that the Banks Report recommended that a better range of RPIs be developed for annual reporting, and that where a department or agency lacked a system for internally reviewing regulatory decisions such systems should be established, and that there should be provision for merit review of any administrative decisions that could significantly affect individual or business interests, following the USA's example (Banks 2006, 163).

*The integration of RIS with departmental policy development processes*

A frequently noted cause of poor RIS performance by the Productivity Commission, in both its annual reviews of regulation and by its chair and other senior staff, is a continuing failure on the part of some departments and agencies to fully integrate the RIS system with their established policy development processes (see, for example, Productivity Commission 2005, xx, 25). A number of causative factors are involved. One, a continuing lack of belief in the RIS system and its value by at least some ministers and senior public servants, resulting in less than a full commitment to support and fully integrate RIS and, thus, hardly surprisingly, a lack of effort and enthusiasm by those responsible for undertaking RIS within departments. Two, the continuing lack of experience in the application of RIS by public servants. In the case of any one department only a limited number of RIS are required per annum, and those that are conducted are allocated, very often, to different staff in different divisions within the same department, usually those with responsibility for the regulatory area in question. Hence, unless the department has only the one, centrally-located, policy development unit with staff serving with the unit for several years, which is normally not the case, then it is unlikely that, even over a period of years, any one individual or group of individuals, gains expertise in with RIS, a phenomenon noted by ORR staff.

This varying lack of integration of RIS into departmental systems is identified as an area of major concern in the Banks Report, which urges the adoption of six basic principles for good regulation and a series of twenty eight recommendations that, if agreed to and adopted, it felt would help to ensure a more thorough integration of the RIS process throughout the Commonwealth government (Banks 2006, chapter seven). The Report laid particular stress on its recommendation 7.9, that proposed regulations that did not meet the RIS requirements should not be allowed to proceed to Cabinet, or other decision makers, other than in exceptional circumstances, with a specific Cabinet minister allocated responsibility for overseeing regulatory processes (Banks 2006, 156-7). Somewhat surprisingly, this recommendation was in general agreed to by the Government in its Interim Response to the Report, although the Response noted that the 'existing', RIS system was consistent with the recommendation (and other, related recommendations), and that it would be considered in full in the final response, perhaps suggesting that the recommendation might not result in concrete action (Australian Government 2006, 22-3).

### *Lack of analytical expertise*

Inadequate analysis by departments and agencies, especially of the costs and benefits of the regulatory options identified in the RIS, has continued to be of major concern, with, for example, recent examples including one department not clearly identifying the problem the proposed regulation was to address, another not containing a summary of views received from stakeholders and the community, nor any discussion of how these views had been considered, and another not providing any quantification of regulatory compliance costs (Productivity Commission 2005, 26). Where RISs were prepared but failed the Office of Regulation Review's adequacy test, an inadequate analysis of costs, benefits and impacts on business, small and large, was typically the case (Productivity Commission 2005, 26). Productivity Commission concerns about poor levels of analysis led its chair, Gary Banks, to make the following claim in 2005

In 2004, only 20 per cent of tabled RISs involved an attempt at quantifying compliance costs. Another 70 per cent gave some consideration to compliance cost implications, without seeking to measure them. In the remaining 10 per cent, compliance costs were not even considered. Given indicative estimates of the potential magnitude of compliance costs, this looms as a major deficiency in regulation-making in Australia — and an area where we are behind a number of other OECD countries (Banks 2005, 10).

Similarly, a study of Victorian state government RIS and a small sample of COAG RIS in 2001 found that those conducted on behalf of the state government were clearly superior on all ten of the criteria used in the study to those conducted for COAG (Deighton-Smith 2006).

The lack of analytical capacity and expertise, especially in regard to cost benefit analysis and risk assessment, was identified by the Banks Report. It argued that improvements in this area were one of three key areas where reform was most needed as part of a concerted effort to identify and contain the compliance costs to business of increasing regulation, especially for small business, with recommendation 7.4 asking the government to consider broadening ORR's training and advisory role to include providing technical assistance on cost benefit analysis (Banks 2006, 148-50). The Government's Interim Response agreed to the recommendations in this area and promised a fuller consideration of them in its final response (Australian Government 2006, 22-3). While the appropriate use of cost-benefit analysis can be of value, it is unfortunate that neither the Banks Report, nor earlier Productivity Commission annual reports, note the limitations of the technique (see, for example, Self 1977).

### *Varying, sometimes inadequate, levels of political and high level administrative support*

Political support for RIS varies in extent and intensity over time, a phenomenon not unique to RIS. Variations in intensity of support occur when ministers are faced, for example, with either the potential for an inadequate ORR assessment from the RIS process in regard to new or modified regulation that they favour, or an actual, assessment of inadequacy. In essence, they face a conflict of interest situation, on the one hand committed under the doctrine of collective, Cabinet responsibility to support Cabinet's formal support for RIS, but on the other hand facing the prospect of a failed regulatory proposal if the RIS evaluation is negative. Moreover, the staff of ministerial offices and the heads of department and senior public servants are well aware of this situation. Whatever their personal feelings on the matter, it would be a very brave person who resisted the wishes of a minister by advising that a favoured regulation was not to be recommended and pursued, following an averse RIS assessment from ORR.

Similarly, when judging a RIS to be inadequate, it is difficult, but not impossible, for ORR and Productivity Commission staff, even at the most senior levels, to gain the agreement of the department involved to the need to improve the RIS in question, or, even more difficult, to amend or withdraw the RIS, especially where it has been presented to ORR at the very last minute, and Cabinet awaits its submission (Productivity Commission 2005, 82). In recognising this situation, it is rare for ORR to pursue the matter to the ministerial level, its staff working more informally with departmental and ministerial office staff in an attempt to amend proposed regulations that it identifies as less than adequate, where they have had some success. In 2004-5, for example, ORR was successful in ten of seventy one RIS cases, in getting the preferred regulatory option contained in the RIS modified in some fashion (Productivity Commission 2005, 83). However, as RIS have the status of Cabinet submissions, they are not, at least at the final, submission stage, released for more public scrutiny, so little or no public pressure can be brought to bear on RIS that ORR regard as inadequate (Productivity Commission 2005, 81).

The Banks Report recommended, in part to help deal with the issue of varying ministerial support, that the Minister responsible for RIS be elevated to Cabinet rank, that proposed regulations with 'material business impacts', not be permitted to proceed to Cabinet or any other decision maker unless they have complied with the Government's RIS requirements, other than in exceptional circumstances, and that the extent of discretion to interpret regulation by public servants be reduced by ministers being more specific in terms of regulatory objectives, especially in their second reading speeches in Parliament (Banks 2006, 157-161). In its Interim Response to the Banks Report, the Government accepted the need for greater precision by ministers in regard to regulatory objectives, but, indicative of the more sensitive nature of the other recommendations, made no interim response to them (Australian Government, 2006, 24). At the time of writing the final response to the Banks Report had not been released.

#### *Factors not noted by the Banks Report*

At the heart of the RIS system are the departments and agencies that make and implement Commonwealth policy. The RIS system was imposed upon those departments and agencies by successive governments, on the advice of business and, increasingly, the Productivity Commission. The departments were not enthusiastic about the imposition, with its implication that their existing policy development systems were inadequate. In addition, there was some feeling that the system had an ideological, rather than a regulation improvement purpose, aimed at freeing markets from democratic control without convincing justification for the reform (Head, McCoy 1991). Also, RIS represented, at least in its earlier years, an increased workload and, if it was to be accommodated in the fashion desired by executive government, at least a degree of change to established processes and practices. Such organisational changes welcome or not, take time to implement.

Also not noted in the Banks Report, but of some importance in explaining the performance of RIS, was the Government's decision, when reforming the RIS system in the 1996-97 period, to establish a separate Office of Small Business (OSB), in a line department, with new regulatory review and reporting responsibilities relating to RIS. OSB was to be consulted for all Cabinet submissions that might have an impact on small business, reflecting the Government's electoral promises, including regulations of

all types, and to develop and report annually, on a system of nine regulation performance indicators (Bell 1996). The departments and agencies would monitor the RPIs, with the OSB reporting annually on performance against the RPIs, with the first report to be made in 1999 (Productivity Commission 1999, 12). RPIs were seen as an important adjunct to the RIS system, providing information on the effectiveness with which agencies were implementing regulation reform measures and enabling benchmarking of agency performance. In a somewhat clumsy arrangement, however, with clear coordination costs, the Office of Regulation Review was to be responsible for monitoring agency performance in relation to three of the RPIs and for providing those details to the OSB (Productivity Commission 1999, 12). The situation was made even more awkward in 1998, for Prime Minister Howard committed his second government to the introduction of a system of annual regulatory plans for all departments and agencies in his 'A Small Business Agenda for the New Millennium', again to be reported on by the OSB. The regulatory plans were to provide business and the community with timely access to information about past and planned changes to Commonwealth regulation, with the aim of making it easier for businesses to take part in the development of regulation. Whatever the intrinsic value of RPIs and regulatory plans, the resulting division in responsibility between ORR and the OSB resulted in a coordination cost that need not have occurred.

### **Conclusion**

In conclusion, the Banks Report provides a valuable insight into the reasons for the rapid growth in business regulation in Australia over the last two decades, especially in relation to the performance of the RIS system. However, several of its arguments, especially those relating to the alleged risk averseness of Australian society, are not convincing, at least without further refinement and more reliable data to support them, with the impact of other important factors neglected. In part, this may have been caused by the limited time available for such an important project. It is more convincing when it comes to the assessment of the RIS system, and its recommendations for its strengthening, no doubt drawing in large part upon its chair's knowledge and experience in the Productivity Commission. Despite its limitations, the Report seems to have been influential, if judged by the generally positive content of the Government's Interim Response. At the time of writing, the Government's final response had not been released.

Finally, it has to be remembered that any system for policy making in a democracy, inevitably and continuously, will be subject to competing political forces, from those wishing change for the benefits they hope it will bring, to those who resist change, for fear the benefits that they currently receive will diminish or be eliminated. Policy making – whether or not it is referred to as regulation making – is an intensely political process, an arena in which regulation making is determined as much by the relative power of the participants as by process and the quality of regulatory content. Efforts to promote a greater degree of rationality, such as those provided in the Banks Report, especially as regards RIS, are to be welcomed for any improvements in content and process performance they might bring, but they are not immune from the exercise of power in the policy process. This is the central problem faced by those concerned at the growth of regulation and by RIS and its adherents. It is the reason that popularly elected ministers will always vary in their degree of support for such a system, for they are players in that process, acutely sensitive to its demands and constraints. If they are not, they do not remain as ministers for any length of time.

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