

Australian Productivity Commission's Regulator Audit Framework: Will it produce real change at the ACCC?

If adopted by the Australian Federal Government, the Office of Best Practice Regulation (OBPR) (or other appropriate body) will use a framework released by the Productivity Commission on 19 March 2014 (<http://www.pc.gov.au/research/submission/regulator-audit-framework>) to audit the performance of Commonwealth regulators, including the Australian Competition & Consumer Commission (ACCC).

The intended purpose of such audits is to assess the performance of regulators by reference to the compliance costs that their actions impose on business and other regulated entities. It is Federal Government policy that each regulator be audited once during each parliamentary term.

Why audit?

The commitment of the current Federal Government to undertake such compliance cost audits arises from its policy, announced before the 2013 election, to reduce unnecessary regulation to assist in improving productivity.

Under that policy, the Federal Government is committed to reducing regulatory costs for businesses, individuals and the community by at least A\$1 billion per annum.

The Government's policy statement noted that business confidence is

key to investment, productivity and employment growth, but that confidence is undermined by regulators providing incorrect and inconsistent guidance and advice.

To address this, the Government has proposed:

- the Productivity Commission establish a framework for auditing the performance of regulators; and
- the OBPR, now part of the Department of Prime Minister & Cabinet, audit regulators in accordance with the Productivity Commission's framework.

Key issues

- The Federal Government has committed to reducing regulatory costs for business by A\$1 billion per annum
- The Productivity Commission audit framework for regulators such as the ACCC, is seeking to also reduce how such regulators impose costs on business in how they administer regulatory laws
- There should be an opportunity for business to be consulted in how regulators can improve processes and adopt international best practice
- It is hoped the audit will provide a meaningful re-assessment of current ACCC practices.

To business, certainty in the nature of regulation and timely regulatory decision making also improves business confidence to invest in the current flat commercial environment in Australia.

Proposed framework

The Productivity Commission's framework document is of course a general guide only. Its aim is to assist regulators to administer regulation in a way that imposes least cost on business whilst still achieving the objectives of the regulation.

The Productivity Commission framework is not intended to put in place a process to simply measure compliance costs. The framework sets out the principles for the development of an audit plan for each regulator as well as describing the processes to be implemented to ensure that audits are effective and efficient.

The primary element of a regulator's audit plan, which should be publicly available, will be a description of how the regulator will reduce compliance costs and how the achievement of that objective is to be assessed.

The key elements for the carrying out of an audit are:

- to focus on the principles and particular areas of regulator behavior that have the greatest effect on the cost of compliance for regulated businesses;
- the selection of practice indicators for regulator behavior that achieve the dual aim of minimising compliance costs whilst still achieving the objectives of the regulation; and
- provide high level metrics to demonstrate whether indicators have been satisfied.

The importance of engaging with industry

Since its election in September 2013, the Coalition Government's commitment to reducing unnecessary regulatory cost on business, by both removing unnecessary regulation and streamlining the process for administration of regulation, is to be applauded.

It is now up to the Government to consider the Productivity Commission's document. If it is approved, the OBPR (or other

appropriate body) will then undertake the audits that are contemplated by the Productivity Commission.

It will be important that business is involved in this process. The Productivity Commission's framework paper makes clear that an important element of the audit process is to evaluate regulators' engagement with business. Feedback from business may be obtained in a number of ways, including:

- surveys of regulated businesses;
- consultation with industry associations;
- interviews, workshops and/or roundtables with regulated businesses; and
- submissions.

ACCC regulation and engagement with business

The ACCC engages with business in broadly two areas. First in relation to competition and consumer law engagement and second, in relation to regulated industries and infrastructure.

Enforcement

In relation to enforcement and compliance, the ACCC is reasonably transparent in the publication of its Enforcement Policies under the Competition & Consumer Act 2010 (Cth) (CCA) (<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>). It is not appropriate to question the ACCC's desire to enforce the law, but questions arise from business on occasion as to processes and procedural fairness in the ACCC's investigation process and whether there are sufficient checks

and balances on those processes.

In the recent ACCC proceedings issued against Colgate and Cussons in relation to alleged collusion involving laundry products, the grocery retailer Woolworths was also included in the proceedings as the ACCC alleged that Woolworths played a key role in the matter and was therefore knowingly concerned in the alleged contravention. The matter is before the courts and the case is yet to be determined. However, Woolworths not only stated that it would vigorously defend the ACCC's proceedings, but noted it was concerned with the ACCC's approach:

"We are particularly concerned that good process has been compromised by the need to meet arbitrary deadlines set by the [ACCC]... Woolworths has serious concerns about the way the ACCC has engaged with us."

The ACCC does not accept that position and believes that the courts are the appropriate place for Woolworths to defend itself. Nonetheless, in Australia and in most jurisdictions, there is increased focus on investigations and enforcement actions by regulators as to their efficiency and questions of procedural fairness. This issue and the associated costs to business of some of the ACCC's enforcement approaches are potentially worthwhile subjects of audit scrutiny, by an analysis against international best practice.

Section 155 notices

Another example of concern among business is section 155 notices. These are compulsory notices to provide information and documents in relation to possible breaches of the CCA with significant penalties, including jail, for non compliance.

It is always a topic which is difficult to address for companies. These notices are issued to companies from time to time, whether on the basis the company is subject to ACCC investigation or as a third party required to provide evidence.

The relevant question is, should there be increased checks and balances in the issue of section 155 notices? Is it a satisfactory position where the ACCC Chairman can issue a notice on the basis that the Chairman has a reason to believe that a person/company is "capable of furnishing information and producing documents relating to matters that constitute or may constitute a contravention" of the CCA, as opposed to believing that a contravention may have been committed.

Given that, in the year to 30 June 2013 (figures from ACCC's last Annual Report), the ACCC issued 358 section 155 notices (compared to five years ago in 2008/2009 when the ACCC issued 199 notices), should there be a requirement on the ACCC to embark on greater internal processes to consider the burden on business of these highly invasive and costly compulsory notices? Given the significant time and cost in answering such 155 notices, the section 155 process warrants some scrutiny, and an improved process may reduce the burden on businesses in appropriate circumstances.

All that would be required is, as the Productivity Commission suggests for the audit of regulators: "*good practice indicators that best reflect regulator behaviour that minimises compliance costs while still achieving the objectives of the regulation*".

Conclusion

The Government's intention is that the audit plan and each audit for the ACCC will be made publicly available. It is hoped this will prove to be an effective mechanism to assist in reducing the unnecessary costs imposed on industry by the manner in which the ACCC regulates industry.

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*Linda Widyati & Partners in association with Clifford Chance.