



**Australian Government**  
**Productivity Commission**

# Regulatory Impact Analysis: Benchmarking

## Productivity Commission Research Report

November 2012

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# Foreword

Good public policy — policy that achieves desirable ends in cost-effective ways — demands good policy making processes. By providing a better evidentiary basis for regulatory decision making, including through the testing of alternative approaches and consulting with those affected, regulatory impact analysis seeks to deliver regulations (or other policy solutions) that provide the greatest benefits to the community. The value of regulatory impact analysis processes is accepted by all Australian governments. However, the extent to which these processes have been implemented and embraced has been variable.

This study, part of the Commission’s regulatory benchmarking stream, responds to a request from governments for the Commission to assess the performance of jurisdictions’ regulatory impact analysis processes, including at the level of the Council of Australian Governments (COAG), and to identify leading practices. The report is to inform jurisdictions on ways of improving their systems, drawing on practical examples from other jurisdictions. The study contributes to the ‘regulation making and review’ component of COAG’s *National Partnership Agreement to Deliver a Seamless National Economy*.

The study was overseen by Commissioner Robert Fitzgerald AM and Associate Commissioner Paul Coghlan. They were supported by a team in the Commission’s Canberra office led by Rosalyn Bell. The study benefitted from discussions and submissions from a variety of stakeholders in the government, business and community sectors. It was especially assisted by responses to a detailed survey on experiences with regulatory assessment processes within governments. The Commission is very grateful to all those who contributed to this study.

Gary Banks AO  
Chairman

November 2012

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## Terms of reference

I, Mark Arbib, Assistant Treasurer, under part 3 of the *Productivity Commission Act 1998*, hereby:

The Productivity Commission is requested to undertake a study to benchmark the efficiency and quality of Commonwealth, state and territory and Council of Australian Governments (COAG) Regulatory Impact Analysis (RIA) processes, as at January 2012.

The Commonwealth and each state and territory have well established individual RIA processes to guide decision makers in respective jurisdictions in considering proposals for new or amended regulation, with the broad objectives of ensuring that such regulation is efficient, effective and supports well functioning markets. RIA processes also apply in respect of proposals for new or amended national regulatory initiatives being considered at the COAG level.

A number of initiatives have been pursued through COAG in recent years with a view to identifying opportunities to strengthen jurisdictions' RIA processes to better meet these objectives. In its 2010 regulatory review *Australia: Towards a Seamless National Economy*, the OECD noted that regulatory management practices in Australia were at or close to international best practice, but that there may be opportunities to strengthen arrangements, particularly so as to ensure that new barriers to doing business nationally are not created.

During 2010, under the auspices of COAG's Business Regulation and Competition Working Group (BRCWG), jurisdictions assessed their RIA processes against an agreed set of design criteria that were broad ranging but put particular weight on the OECD recommendation regarding the national market implications of regulatory proposals. Following this exercise, jurisdictions agreed to review their RIA processes during 2011 to consider opportunities to enhance current arrangements in five broad areas:

- to ensure implications for national markets are given appropriate consideration when new or amended regulation is proposed and/or proposals to remake sunseting regulation are being considered;
- the establishment of objective criteria for evaluating proposals to remake sunseting regulation;
- the publication of Regulation Impact Statements (RISs) or equivalent at or close to the time of policy decision;
- fostering cultural change in regulation making; and
- the use of common commencement dates as a device for reducing the regulatory burden on business.

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In undertaking this study, the Commission is to closely examine and assess the efficiency and effectiveness of the key features of the variety of RIA processes that apply across jurisdictions to provide a basis for establishing best practice so that individual jurisdictions can learn from the experience of others and to enable existing processes to be refined where appropriate to maximise their effectiveness. The purpose of the benchmarking study is not to develop a harmonised approach to RIA processes, but to compare processes and identify leading practices, including the practical effectiveness, integration and policy influence of RIA processes with regard to:

- the mechanisms in place to ensure accountability and compliance with RIA processes;
- specific evidence of where the RIA process has resulted in improved regulation;
- how and when in the decision-making cycle Ministers, or other decision makers, engage with RISs; and
- whether there are leading practice examples in RIA that might usefully inform reform consideration by individual jurisdictions.

In assessing the efficiency and quality of both COAG and jurisdictional RIA processes, the Commission should have regard to the following considerations:

- whether RIA processes place appropriate weight on the national market implications of regulatory proposals;
- the extent to which RIA requirements are mandatory;
- the ‘regulatory significance’ threshold, and related thresholds, such as impacts on specific sectors and regions, at which mandatory RIA processes are triggered;
- guidance in regard to consultation processes and other features to enhance transparency such as publication of RISs and the assessment of RIA adequacy;
- whether RIA applies to primary and subordinate legislation, legislative and non-legislative instruments and quasi-regulation;
- whether RIA requires consideration of competition impacts;
- whether RIA requires consideration of the evaluation and review arrangements following the implementation of proposals, including whether or not policy objectives remain appropriate;
- quality assurance processes, such as the independence and level of seniority for RIS sign-off;
- requirements for consideration of both regulatory and non-regulatory options in RIA processes;
- requirements for regulation that includes sunset clauses to also include guidelines for evaluation of the case for maintaining that regulation; and

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- the extent to which the benefits and costs of options are robustly analysed and quantified and included in a cost benefit or other decision-making framework.

The Commission should consult as appropriate. The final report is to be completed within nine months of receiving these terms of reference. The Commission is to provide both a draft and final report, and the reports will be published.

MARK ARBIB  
ASSISTANT TREASURER

[received 28 February 2012]

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- RIA agency survey
- RIA agency survey responses
- RIA oversight body survey
- RIA oversight body survey responses

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# Abbreviations

AASB	Australian Accounting Standards Board
ACCI	Australian Chamber of Commerce and Industry
AFGC	Australian Food and Grocery Council
AFMA	Australian Financial Markets Association
ANAO	Australian National Audit Office
ARP	Annual Regulatory Plan
BCA	Business Council of Australia
BCC	Business Cost Calculator
BIA	Business Impact Assessment (Vic)
BRCWG	Business Regulation and Competition Working Group
BRO	Better Regulation Office (NSW)
BRS	Better Regulation Statement (NSW)
CAN	Compliance Assessment Notice (WA)
CBA	Cost benefit analysis
CIE	Centre for International Economics
CMPA	Construction Materials Processors Association (Vic)
COAG	Council of Australian Governments
CRC	COAG Reform Council
Cwlth	Commonwealth of Australia
DCCEE	Department of Climate Change and Energy Efficiency (Cwlth)
DFD	Department of Finance and Deregulation (Cwlth)
EC	European Commission
ECA	European Court of Auditors
ERU	Economic Reform Unit (Tas)
FTE	Full time equivalent
GBE	Government Business Enterprise
IAB	Impact Assessment Board (EU)
IAC	Industries Assistance Commission
IC	Industry Commission
IPAA	Institute of Public Administration Australia
IPART	Independent Pricing and Regulatory Tribunal (NSW)

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LRC	Legislative Review Committee (NSW)
MBA	Master Builders Australia
MPU	Microeconomic Policy Unit (ACT)
NAO	National Audit Office (UK)
NSSB	National standard setting body
OBPR	Office of Best Practice Regulation (Cwlth)
OECD	Organisation of Economic Co-operation and Development
OIRA	Office of Information and Regulatory Affairs (US)
ORR	Office of Regulation Review (Cwlth)
PC	Productivity Commission
PCA	Property Council of Australia
PIA	Preliminary Impact Assessment
PIR	Post Implementation Review
QCA	Queensland Competition Authority
QOBPR	Queensland Office of Best Practice Regulation
RAS	Regulatory Assessment Statement (Qld)
RGU	Regulatory Gatekeeping Unit (WA)
RIA	Regulatory Impact Analysis
RIC	Regulation Impact Committee (NT)
RIS	Regulation Impact Statement
RIU	Regulation Impact Unit (NT)
RPC	Regulatory Policy Checklist (Qld)
RPU	Regulation Policy Unit (ACT)
RRB	Regulatory Review Branch (Qld)
RRC	Reducing Regulation Committee (UK)
SARC	Scrutiny of Acts and Regulations Committee (Vic)
SBAC	Small Business Advisory Committee (Cwlth)
SBDC	Small Business Development Corporation (WA)
SBV	Small Business Victoria
SLA	Subordinate Legislation Act
SLC	Subordinate Legislation Committee (Tas)
SNE	Seamless National Economy
TPSCSL	Tasmanian Parliamentary Standing Committee on Subordinate Legislation
UK RPC	Regulatory Policy Committee (UK)
VCEC	Victorian Competition and Efficiency Commission



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## OVERVIEW

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## Key points

- Regulatory impact analysis (RIA) requirements in all Australian jurisdictions are reasonably consistent with OECD and COAG guiding principles. However, shortcomings in system design and a considerable gap between agreed RIA principles and what happens in practice are reducing the efficacy of RIA processes.
  - The number of proposals with highly significant impacts that are either exempted from RIA processes or are not rigorously analysed is a major concern.
  - Public consultation on policy development is often perfunctory or occurs only after development of draft legislation.
  - Public transparency — through advising stakeholders of revisions to policy proposals and information used in decision making, or provision of reasons for not subjecting proposals to impact analysis — is a glaring weakness in most Australian RIA processes.
- While RIA processes have brought some isolated but significant improvements from more thorough consideration of policy options and their impacts, the primary benefits of RIA have been forfeited through a lack of ministerial and agency commitment.
  - One of the main challenges in implementing RIA requirements is the announcement of policy decisions and an associated closing off of policy options by ministers or ministerial councils prior to commencement of the RIA process.
  - Where ministers or ministerial councils do not adhere to RIA principles, agencies see RIA as an administrative burden that adds no value and as a 'retrofit' justification of the policy decision.
- In all jurisdictions, greater attention to leading practices for monitoring, reporting and accountability would go a long way toward improving the efficacy and rigour of RIA processes. In particular:
  - transparency measures such as a draft regulation impact statement (RIS) for early consultation, and publishing all RISs and RIS adequacy assessments, would better inform stakeholders of regulatory impacts and motivate rigour in analysis
  - requiring ministers to provide reasons to parliament for non-compliance with the RIA process and for the granting of exemptions, could encourage greater commitment to the RIA process and facilitate further discussion on the impacts of proposals
  - accountability measures such as: the auditing of agency decisions on the need for a RIS; the auditing of regulatory oversight body adequacy assessments; and post implementation reviews undertaken through an independent process, would, in time, invoke more effective scrutiny of regulatory proposals.
- The efficiency of RIA processes would also be improved by more effective targeting of RIA resources through: streamlined assessment of the need for a RIS; devolving responsibility for determining the need for a RIS to agencies (subject to appropriate oversight); and review of subordinate legislation in conjunction with its overarching primary legislation.

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# Overview

Governments face complex financial, environmental, infrastructure and social policy challenges and regulation is a key instrument drawn on to address these. Achieving better regulation requires that the case for it is well-made and tested, with rigorous assessment of alternative policy options.

Regulatory impact analysis (RIA) is a process to examine and provide relevant information to decision makers and stakeholders about the expected consequences of proposed regulation and a range of alternative options which could address the government's policy issues. By providing a better informed, objective, evidentiary basis for making regulations, RIA seeks to ensure that the policy development process consistently delivers regulations (or other policy solutions) that provide the greatest benefit to the community, relative to the overall costs imposed. The documentation of RIA is generically referred to by the Commission as a regulation impact statement (RIS).

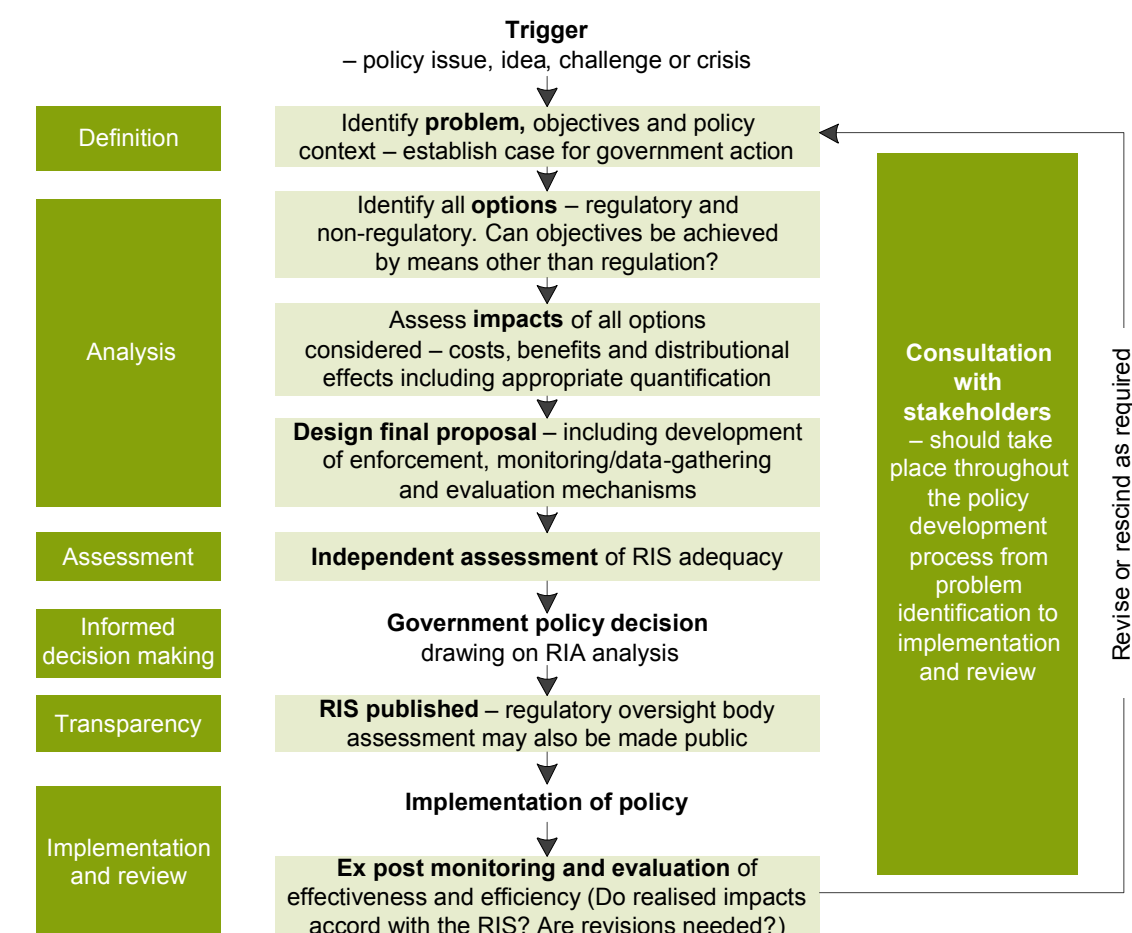
The Commonwealth, each state, territory and COAG (the 'ten jurisdictions') have all established RIA processes for developing new and amending existing regulation. These processes vary considerably (in requirements and in practice) between jurisdictions but broadly include the key elements depicted in figure 1. In practice, the progression of RIA processes is rarely as linear as depicted; instead, they follow a complex sequence of steps that intertwine with political and stakeholder negotiations, use of other policy development tools such as 'green papers' and other policy-specific reviews. Furthermore, the requirements of RIA processes often conflict with political pressure for a swift response to emerging issues and confidentiality on considered options and their impacts. Nevertheless, the existence of a RIA system in each jurisdiction is indicative of the widespread acceptance that deliberate effort is required by governments to ensure regulatory frameworks deliver high quality outcomes and minimise unnecessary regulatory burdens on communities and businesses.

The terms of reference for this study directed the Commission to benchmark the efficiency and quality of Commonwealth, state and territory and COAG RIA processes. The Commission was to have regard to:

- when RIA is required and the factors to be taken into consideration in analysis;
- the mechanisms in place to ensure accountability and compliance with RIA processes;
- how and when decision makers engage with the RIA process;

- specific evidence of where RIA processes have improved regulation;
- whether there are examples of leading practice in RIA that might usefully guide reform consideration by individual jurisdictions.

Figure 1 **Stylised schematic of the RIA process**



The study compared RIA processes of the ten jurisdictions with each other and identified aspects within these (and from overseas) which are likely to be leading practices.<sup>1</sup> These leading practices draw, where possible, on the latest OECD recommendation on regulatory impact assessment and COAG-agreed best practice principles. Most reflect a practice that is already implemented in an Australian or overseas RIA process. The study also drew on the Commission’s recommendations in past regulatory studies including, most recently, *Identifying and Evaluating Regulation Reforms*. The overall purpose of the benchmarking was to enable individual jurisdictions to learn from the experiences of others and identify ways in

<sup>1</sup> The benchmark point for comparison of RIA processes is January 2012. Changes to processes since this point in time are noted, where relevant, throughout the report.



which the existing processes might be refined to improve their efficiency and effectiveness.

The Commission found that RIA processes in Australia's ten jurisdictions are broadly consistent with the OECD and COAG best practice principles. There are, however, substantial and fundamental differences between jurisdictions in the way, and the extent, to which appropriate practices were implemented (as at January 2012) to put these broad principles into effect (table 1).

**Table 1 Examples of RIA practices by jurisdiction**

	<div><div></div>Fully implemented</div>	<div><div></div>Partially implemented</div>	<div><div></div>Not implemented</div>										
				<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld<sup>a</sup></i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
RIA requirements apply to election commitments					..								
Exemptions granted only by head of government													
Agencies determine need for RIS with oversight body monitoring													
Two-stage RIS process													
Guidance requires recommended option give greatest net benefit													
Publish RISs — primary legislation													
— subordinate legislation													
Central listing of published RISs													
Public annual compliance monitoring and reporting													
Adequacy assessments published													
Adequacy assessments include reasons or qualifications													
Oversight body has operational independence													
Ministerial explanation for exempt/non-compliant proposals proceeding													
PIR required for all exempt and non-compliant proposals													

<sup>a</sup> The creation of the Queensland Office of Best Practice Regulation within the statutory body, the Queensland Competition Authority, in July 2012, increased the operational independence of the Queensland regulatory oversight functions and introduced new transparency and accountability features for future RIA activity.

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The gap between agreed RIA principles and what happens in practice limits the capacity for RIA objectives to be achieved. But such weaknesses do not undermine the need or potential for sound assessment of regulatory impacts. Rather, jurisdictions should consider improvements that would enhance the efficiency of the processes for both agencies and oversight bodies, and the effectiveness in delivering improved regulatory outcomes. After all, RIA processes simply aim to enshrine and reinforce good public policy decision making, an objective of all governments.

## **Does RIA improve regulation and policy development?**

A starting point in benchmarking RIA processes is to determine the extent to which these processes are successfully meeting their overarching objectives. That is, have Australia's ten RIA processes provided a better informed, objective, evidentiary basis for making regulations, so that these regulations might deliver the greatest benefit to the community relative to the overall costs they impose? Such an objective could be met, for example, through use of RIA to: stop the progression of poor regulatory proposals or reduce unnecessary regulatory burdens; influence the design of regulation to increase its net benefits; or discourage agencies from putting forward poor proposals in future. To best achieve any of these outcomes, it is necessary that RIA be fully integrated into the policy development process.

In a minority of agencies, RIA is appropriately viewed as integral to structuring and informing the policy development process. This is the case typically in those jurisdictions which have had RIA in place for several years and have some noted successes from its use (such as Victoria and COAG) and in some national standard setting bodies and Commonwealth regulators (such as the Australian Securities and Investments Commission), which undertake a number of RISs each year. It was also evident in some instances where longer term regulatory reforms were planned and there was time to embrace RIA steps.

For the majority of agencies, however, RIA was presented to the Commission as merely a formal framework for consultation (which in some cases would have been undertaken anyway as part of good policy making processes) or, alternatively, as a requirement to be 'ticked-off' at the end of the policy development process in order to get legislation introduced. Some agencies considered adoption of RIA to have been forced on them by their central agency. In such an environment, RIA is seen as either an additional compliance burden for agencies or becomes little more than an ex post justification for a policy decision already taken. Where these circumstances prevail, the benefits of RIA for the decision making process have been lost.

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Consistent with this view of RIA:

- over 90 per cent of agencies and oversight bodies reported in the Commission's survey that less than one in ten regulatory proposals were modified in a significant way or withdrawn as a result of RIA processes;
- only 40 per cent of agencies reported that RIA had been effective in improving the quality of regulation;
- only 40 per cent agreed that RIA had been effective at reducing unnecessary regulatory impacts.

Despite many agencies reporting RIA as burdensome or having little impact, the majority nevertheless confirmed that RIA has not simply replaced existing policy development processes, but has led to a more thorough analysis of the nature of the policy problem, a more systematic consideration of costs and benefits and improved decision makers' understanding of regulatory impacts. Furthermore, amongst regulatory oversight bodies there is agreement that RIA has helped ensure government intervention is justified and led to consideration of a broader range of options than would otherwise have occurred.

While the Commission found limited publicly available evidence of either the impact of RIA processes on decision making and regulatory outcomes or the costs of having such processes in place, oversight bodies in every jurisdiction had examples of proposals withdrawn from Cabinet agendas or changed because of RISs. Only the Victorian Competition and Efficiency Commission (VCEC) systematically collects information on the influence of RIA, although the Australian Government's Office of Best Practice Regulation (OBPR) reported such information in the past. Publication of more RIA 'success stories' would provide tangible evidence of the value of RIA, boost commitment to its use and facilitate refinements to the process over time.

Overall, the Commission considers that RIA processes have brought some isolated benefits but their primary benefits have been forfeited through a lack of commitment. If implemented well, with appropriate transparency and accountability measures and supported by high level political commitment, RIA processes could assist in delivering substantial improvements in regulatory outcomes.

## **What are the barriers to RIA improving regulatory outcomes?**

Stakeholders identified, through consultations, submissions and the Commission's survey, a range of factors related to the way that RIA processes are designed or

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implemented which can hinder the capacity of these processes to influence policy development and regulatory outcomes. These factors include: a lack of commitment to RIA processes; unnecessary administrative burden created through interactions between the regulatory oversight body and agencies; poor analysis for many regulatory proposals; and a widespread lack of transparency in the use of RIA, including belated or inadequate stakeholder engagement and the hidden nature of non-compliance with RIA. These factors constrain, to varying degrees, the implementation of, and benefits from, RIA in all jurisdictions.

## **A lack of commitment to RIA processes**

Commitment by all key parties — heads of governments, ministers, oversight bodies and government agencies — to the use of RIA in the policy development process is crucial to ensuring its intended objectives of improving the quality of regulations. There was widespread evidence that commitment to RIA varies considerably between ministers, agencies and jurisdictions. Where it is lacking, the Commission found this to be one of the main hindrances to effective use of RIA.

### *The challenge of top-down policy making*

The OECD has long emphasised the importance of political commitment for the effectiveness of regulatory processes. The tendency of ministers (and in the case of COAG, Ministerial Councils) to make policy announcements in response to pressure for quick and obvious government action on issues was identified as one of the most fundamental barriers to the use of RIA to better inform policy development. Some of these announcements take the form of election commitments; others reflect the outcome of political negotiations, such as in the case of national/COAG reforms. Either way, the integrity of the RIA process and its value in policy development is weakened when policy options have been determined, narrowed or ruled out by ministers prior to RIA being undertaken.

### *Reliance on exclusions from RIA requirements*

The RIA process in each of the ten jurisdictions has provision for particular types of regulation (such as that for budget measures, correcting drafting errors, standard fee increases, court administration) to be excluded from the RIA processes and this is widely accepted as reasonable. However, in addition to formal exceptions specified in RIA guidelines and, for some regulatory areas, in other legislation, there are other less formal (and less transparent) arrangements whereby some proposals bypass

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RIA requirements — including scope for ministers to ignore the RIA process and simply ‘walk-in’ a proposal to their Cabinet.

The lack of commitment to RIA processes by some ministers and their agencies is also evidenced by formal requests for an exemption from preparing a RIS or requests for an exemption when the drafted RIS is determined unlikely to be assessed as ‘adequate’. This was highlighted in a recent review of the Australian Government RIA process. However, the large number of exemptions and the dearth of explanations surrounding the granting of them, particularly for proposals that are politically sensitive or that business consider to have significant impacts, are recurring criticisms in most jurisdictions.

#### *Lack of incentives for agency development of RIA capacity*

Lack of commitment to RIA processes by agencies developing regulation is most evident where ministers are bypassing the process in decision making. Under such circumstances, agencies see little value in RIA processes and are unlikely to invest adequately in RIA capacity building — this includes the development of key skills (at an appropriately senior level) for examination of regulatory proposals and the establishment of ongoing processes to collect information for use in cost benefit analysis. It is not surprising therefore, that lack of data and in-house skills were identified as key barriers to using the RIA process to better inform policy development.

### **Administrative burden of RIA process**

Agencies reported to the Commission that RIA can be administratively burdensome. An important determinant of agency resources used for RIA is the oversight body’s interpretation of RIA requirements and agency interactions with them on this. The extent to which the oversight body ventures beyond simply assessing compliance of a RIS with RIA requirements to assessing adequacy of the justification for a particular proposal is variable, blurred and contentious in all jurisdictions. It can be a fine line between provision of general advice on what is necessary for a RIS to be adequate and coaching agencies to consider specific options and approaches in order to ensure that a RIS is adequate.

Agencies working within RIA processes are generally satisfied with the oversight of their jurisdiction’s regulatory processes but nevertheless a range of concerns were reported to the Commission, including:

- subjectiveness of the decision on the need for a RIS — agencies provided the Commission with examples of being asked to prepare RISs where they

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considered the impacts were not significant; in contrast, industry groups raised instances of agencies not being asked to prepare RISs when the impacts of a proposal were considered to be significant;

- inconsistent advice on the level of analysis required in a RIS and the low value added from multiple iterations with the oversight body;
- additional analysis requested by the oversight body, particularly for non-preferred options, which sometimes necessitates engagement of a consultant and incurs costs that outweigh the benefits.

### **Inadequate analysis for many proposals with significant impacts**

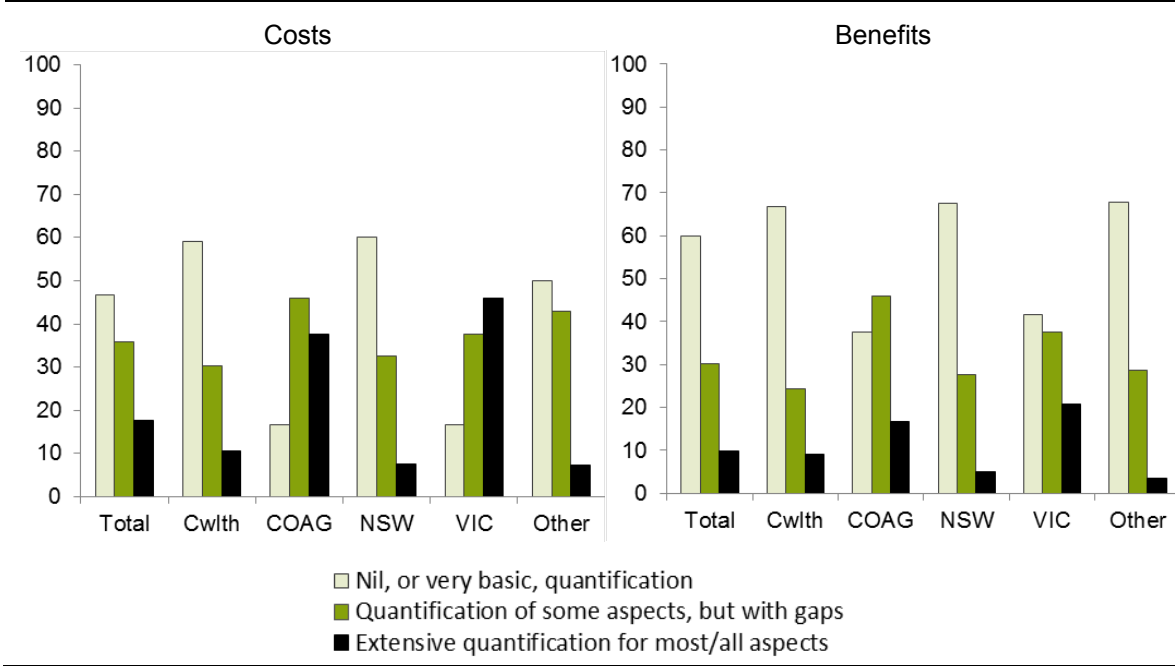
A major concern of stakeholders is that regulatory proposals with significant impacts are either bypassing RIS requirements (for example, because the extent of impacts were incorrectly gauged or the proposal was granted an exemption) or are inadequately scrutinised. There is some evidence at the Commonwealth level that substantiates this concern. In recent years, while around 75 to 85 per cent of *all* Australian Government proposals with significant impacts had a RIS, it appears that for proposals with *highly significant impacts*, considerably less than this — less than 40 per cent in some years — had a RIS.

Overall, in most jurisdictions only around 1 to 3 per cent of all regulation in the past two years has had a RIS completed for it. However, this low proportion of regulation analysed is not necessarily a problem since the vast majority of regulation is considered to be of relatively minor impact. Targeting effort and resources to those regulations where impacts are most significant and where the prospects are best for improving regulatory outcomes promotes RIA efficiency.

All Australian jurisdictions strongly endorse the principle that the depth of analysis undertaken on regulatory proposals be commensurate with the magnitude of the likely impacts. An assessment by the Commission of 182 recent RISs from all jurisdictions revealed that the scope and depth of analysis varied substantially between agencies and across jurisdictions. Overall, Victorian and COAG RISs tended to be more comprehensive than those of other jurisdictions. More generally, the Commission found a wide gap between leading practices on analysis required and analysis undertaken. This gap was evident in identifying the nature and magnitude of the problem, discussion of the rationale for government intervention, consideration of a range of options, the extent of impact analysis and consideration of implementation and enforcement of a regulatory proposal. In particular, there is little quantification and monetisation of impacts in many RISs — although the Commission recognises that quantification is not always feasible or cost effective,

and a strong qualitative analysis can still be a valuable input into decision making (figure 2).

**Figure 2      Quantification in impact analysis**  
Per cent of RISs that include quantification



Despite the comparatively greater depth of analysis and quantification in COAG RISs, the lack of detail on individual state and territory and/or industry sector impacts in some recent COAG RISs was one of the recurring complaints made to the Commission about the COAG RIA process by the states and territories.

Agencies, industry and consumer groups attribute the lack of quantification to data deficiency. For consumer and some smaller industry groups, a lack of resources and reliance on volunteers often constrains their capacity to provide information on regulatory impacts. More broadly however, the Commission found in this, and previous regulatory studies, little evidence of systematic attempts in any Australian jurisdiction or regulatory area to improve the body of data available for future analysis of regulatory proposals.

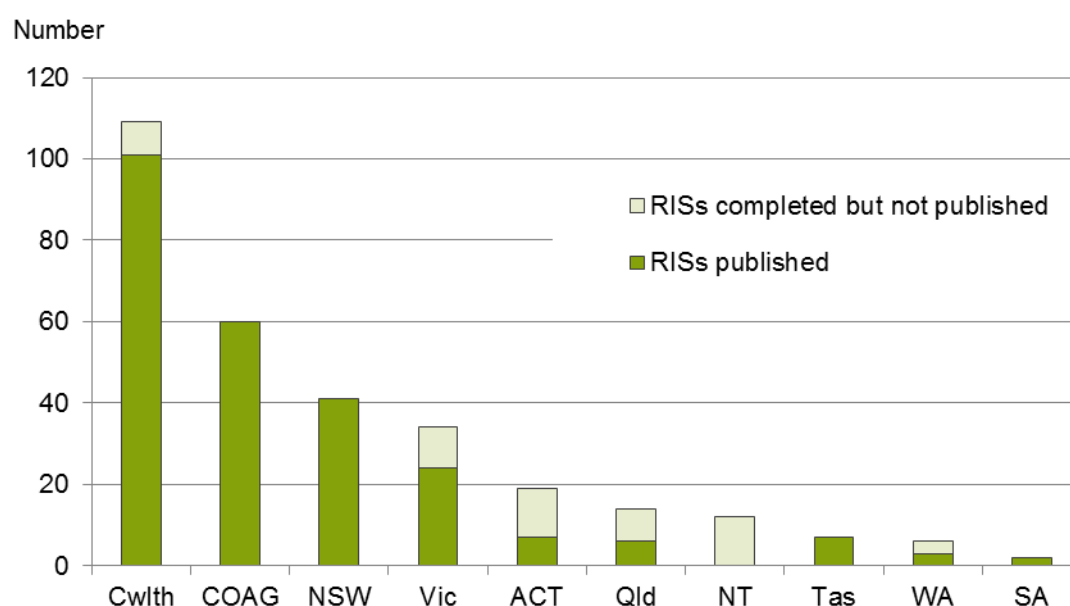
### Lack of transparency in the implementation of RIA

#### *Inadequate stakeholder engagement and infrequent publication of RISs*

The public consultation undertaken in RIA is important for ascertaining regulatory impacts, engendering public support for a proposal, and for enhancing the

transparency and accountability of the policy development process. Jurisdictions vary substantially on whether consultation is mandated, its timing, and the public release of RIA documentation to support the process. The Commission's discussions with stakeholders and submissions received revealed widespread dissatisfaction in all jurisdictions with the nature, scope and timing of consultation. Most stakeholders reported that they prefer to be advised early and often in the development of regulatory proposals but that they do not have the resources to engage with consultation processes on a regular basis. Not surprisingly, instances of poor consultation practice appear more common when agencies are under pressure to develop a quick regulatory response.

**Figure 3 RISs undertaken and published in the past two years**



There is discretion on publication of RISs in some jurisdictions: Northern Territory RISs are not public at any stage of their RIA process; the only RISs published in New South Wales, Victoria, Queensland and Tasmania are consultation RISs (rather than final RISs) since the document either does not get updated or is not publicly released to inform stakeholders of the outcomes from public consultation (figure 3).

Overall, in publication of RISs, the Commonwealth and COAG RIA processes are generally the most transparent, timely and accessible, with RISs added to a central online register at the time of regulatory announcement (Commonwealth) or as soon as possible after the compliance assessment (COAG).



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### *Exemptions and non-compliance are not routinely reported or explained*

Information on exceptions and other exclusions is rarely made public — Victoria's Scrutiny of Acts and Regulations Committee provides one of the few examples of transparency on this. The granting of exemptions is required to be made public in around half of Australia's jurisdictions but, in practice, the Commission was able to find public information on exemptions granted only in the Commonwealth and Victoria. Compliance with review requirements foreshadowed in RISs or required due to non-compliance with RIA requirements is similarly not systematically monitored or reported in most Australian jurisdictions.

Further, only the Commonwealth, COAG, Western Australia and Victoria publish their regulatory oversight body's adequacy assessments. The only jurisdiction that publicly provides more than just a flat statement of adequacy is Victoria (for subordinate legislation), although Queensland is planning to similarly provide more detailed adequacy advice once its recently revised RIA system is fully operational.

## **How can RIA be made more effective and efficient?**

Creating stronger incentives for governments to demand, and for officials to deliver, robust policy development processes requires a combination of refinements to the RIA process and to the implementation of requirements. Key practices which could promote such improvements are discussed below with leading practices that are adopted in some jurisdictions listed in table 2. If adopted more widely, these practices would address some of the shortcomings identified above and thereby improve RIA effectiveness and efficiency.

### **Agency and oversight body roles**

Giving agencies responsibility for implementation of the RIA process for their regulatory proposals is likely to improve their commitment to it and reduce administrative burdens. In practice, this would mean that responsibility for deciding the level of significance of a proposal's impacts (and therefore whether a RIS is required) would ultimately rest with the proponent agency. This currently happens to varying extent in five of the ten jurisdictions, with agencies taking advice from their regulatory oversight body. Such an approach is consistent with the risk management principles inherent in other regulatory areas such as taxation, and is likely to more efficiently enable the RIA process to draw on expertise and information presumed to reside in the proponent agency. However, it is an approach that necessitates clear guidelines on what is a 'significant impact' and additional transparency actions and accountability measures (discussed further below). In

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those jurisdictions with little RIA activity, it may prove to be more efficient for the oversight body to retain responsibility for determining the need for a RIS.

Where agencies are responsible for determining the need for further analysis of a regulatory proposal, regulatory oversight body responsibilities could largely include: provision of advice and training on RIA requirements; assessment of proposal compliance with the RIA process (including RIS adequacy and reasons for its assessment); publication of RISs, adequacy assessments, exemptions granted and reasons on a central register; annual compliance reporting; and monitoring and reporting on review requirements and implementation.

### **Targeting of RIA resources**

Better targeting of RIA efforts in some jurisdictions may reduce the administrative burden of RIA processes for agencies and/or help ensure a level of scrutiny for regulation that is commensurate with its likely impacts. Identified leading practices include:

- broad and clear specification of RIA criteria to better enable determination of whether RIA requirements apply (or exceptions are possible) and when impacts are likely to be sufficiently significant to trigger a RIS;
- where RIA requirements do apply, a presumption that a RIS is required, unless demonstrated that impacts are not significant (accompanied by a streamlined preliminary assessment process) — New South Wales and Victoria have a variant on this approach for their subordinate legislation;
- a streamlining of preliminary assessment processes — for proposals subject to RIA, the completion of a basic pro forma checklist, such as that used in Queensland, may be sufficient to determine the likely significance of impacts (and need for a RIS) and to provide a record of the basis for the decision taken;
- minimising inefficient duplication by using previous consultation and impact analysis such as that provided through discussion papers, ‘green papers’ or comprehensive and rigorous reviews conducted as a basis for a regulatory proposal — New South Wales and Victoria have guidelines on use of other studies and the approach taken in Western Australia of allowing alternative documents to substitute for a consultation RIS could reduce unnecessary duplication;
- in reviewing existing regulations, greater targeting of resources toward those with highly significant or uncertain impacts, thematic grouping of regulations for review, and the review of related subordinate and primary legislation as a

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package, would help ensure effort is commensurate with potential benefits and that there is proportionate scrutiny of regulations under review.

## **Two-stage RIS approach**

The Commission considers that consultation should occur throughout the policy development process, consistent with COAG-agreed best practice principles, and that this would be enabled by a two-stage RIS approach. At a minimum, the first stage would involve publication of a consultation RIS to inform stakeholders of the policy problem and proposal objectives, canvass a range of possible options and provide preliminary information on likely impacts, expected consultation processes, and implementation intentions. The second stage would draw on consultation to finalise impact analysis and inform stakeholders and decision makers.

The two-stage RIS approaches adopted under the COAG and Western Australian RIA processes are good models for consultation and transparency. Adoption of a similar approach (but with less information provided to stakeholders in the first stage) is under consideration by the Australian Government.

Despite some deficiencies in implementation for COAG and Western Australian regulatory proposals, the two-stage approach encourages: early integration of the RIA process into policy development; timely engagement with stakeholders; scope to demonstrate consideration of stakeholder views; and enhanced transparency through publication of both a consultation and final RIS. Successful implementation of such an approach requires commitment to transparency and sufficient time and opportunity for stakeholders to respond to both the options presented and estimates of likely impacts.

## **RIS content**

While regulatory proposals in all jurisdictions could benefit from greater attention to the implementation of RIS requirements as specified in jurisdiction guidelines, there are practices in some jurisdictions which may be particularly useful for engaging stakeholders on likely regulatory impacts.

- The inclusion of an explicit competition statement in RISs, as under the Victorian and Tasmanian RIA processes, regardless of whether a competition impact is evident, may facilitate implementation of the COAG *Competition Principles Agreement* in development of new regulation.
- Greater attention in RISs to implementation costs, and monitoring and compliance issues, would alleviate some stakeholder concerns (such as those of

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local governments implementing state regulation and states and territories implementing COAG regulatory proposals) that these issues are not adequately considered during the development of regulation. Victoria's RIA guidance material, which notes that full compliance should not be assumed, is a useful first step in this direction.

- COAG-agreed best practice of nominating the option which generates the greatest net benefit for the community, is an important element of sound analysis, increasing the usefulness of RISs to decision makers.

## **Enhanced RIA transparency**

Transparency in regulation making and review provided by RIA processes facilitates stakeholder engagement in the development of regulatory proposals, addresses the issue of non-compliance with RIA and policy development being largely hidden events, and improves commitment by providing additional incentive for rigorous analysis of regulatory proposals. The Commonwealth, COAG and Victorian (for subordinate legislation) RIA processes have a number of leading practices in transparency, but even in these jurisdictions there is room for improvement.

### *Publication of RISs*

Publication of all RISs (for both primary and subordinate regulatory proposals), in an accessible and timely manner, is a basic tenet of an effective RIA process and is essential for robust policy development.

To be timely, publication of final RISs should occur at the time of the announcement of the regulatory decision or as soon as practicable thereafter (as occurs in the Commonwealth and COAG processes). Transparency and accessibility are greatly enhanced where RISs are made available within each jurisdiction on an online central register that is maintained by the oversight body, as occurs in the Commonwealth, COAG, Victorian (subordinate legislation), South Australian and ACT processes.

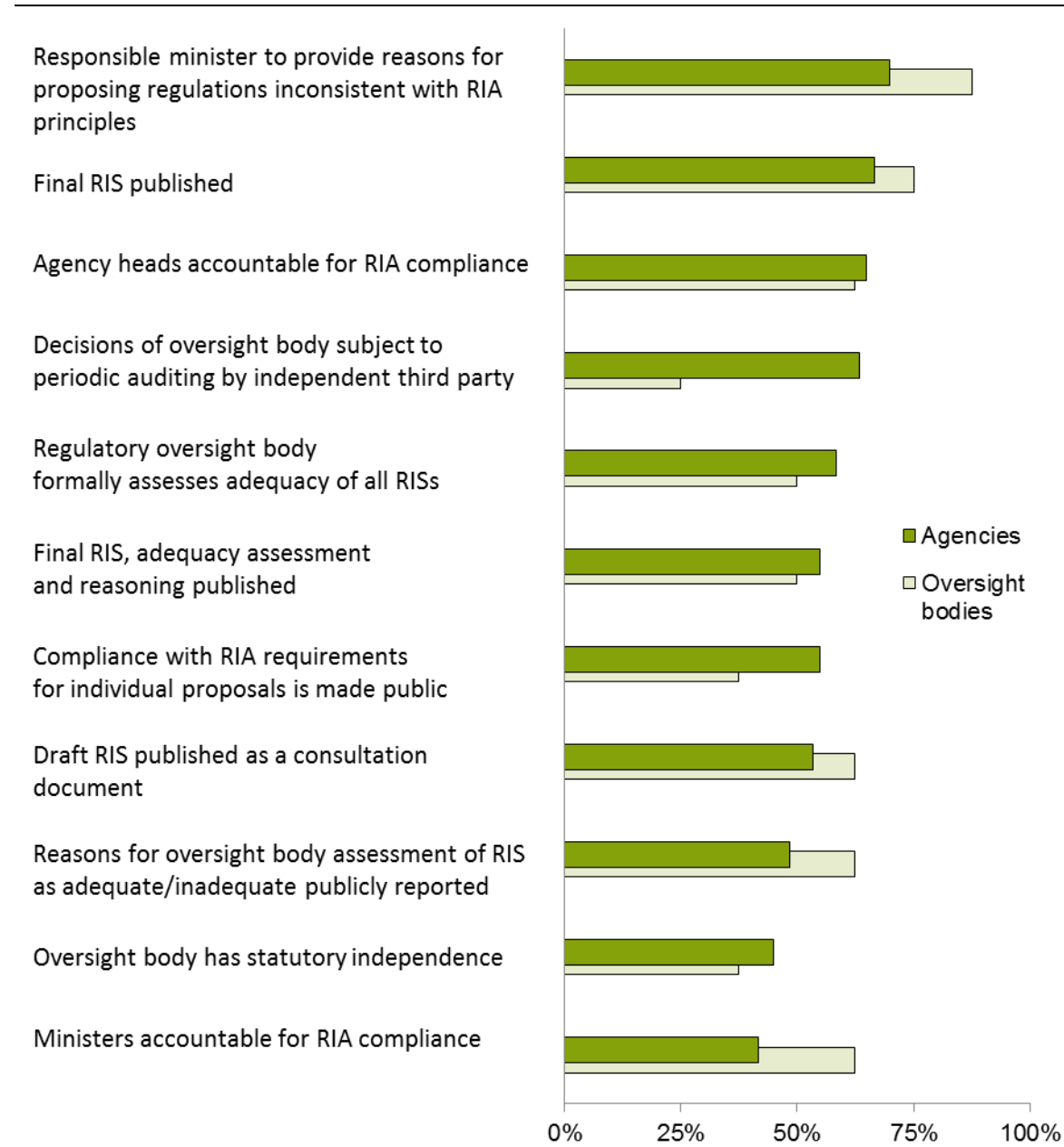
### *Ministerial explanations*

There are circumstances in which it is appropriate that ministers make quick decisions unencumbered by the administrative requirements of a RIA process. However, to maintain the integrity and commitment to the RIA process more broadly, it is necessary that there be transparency surrounding such decision making, including the provision of reasons why the RIA process was not followed

or an exemption was granted. Around 70 per cent of agencies and seven of the eight responding oversight bodies reported to the Commission that their RIA process would be improved if the minister were to provide reasons for proposals that are non-compliant but nevertheless proceed through to decision makers (figure 4).

Ministerial provision of reasons is currently required for some proposals in Victoria and is under consideration by the European Commission, the New Zealand Government, and in the case of exemptions granted, by the Australian Government.

**Figure 4 Perspectives on factors which would improve RIA**



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### *Transparency of adequacy assessments and compliance*

While two thirds of survey respondents reported to the Commission that RIA processes would be improved by having oversight bodies *formally* assess the adequacy of RISs, fewer were in favour of having these adequacy assessments made public, as currently occurs under the Commonwealth, COAG, Western Australian and Victorian (subordinate legislation) RIA processes. However, a number of submissions suggested that publication of the oversight body's adequacy assessment of each RIS would create a stronger incentive for agencies to undertake rigorous analysis of regulatory proposals.

In addition to these measures, transparency would be further improved if the adequacy assessment included an explanation of the reasons why the regulatory oversight body assessed the RIS as not adequate, or any qualifications where the RIS was assessed as adequate. Victoria is the only jurisdiction which currently does this (and only for subordinate legislation), although a similar approach is planned for inclusion in the Queensland RIA process.

More broadly, transparency and commitment to RIA processes would be enhanced by publicly reporting on compliance with RIA processes on at least an annual basis, as is currently done by oversight bodies under the Commonwealth, COAG and Victorian RIA processes. Most oversight bodies already monitor this information and some produce annual reports that are internal to their government. Hence, as noted recently by the NSW Better Regulation Office, the additional cost of publishing annual compliance information is likely to be low.

### **Accountability and consequences for non-compliance and exemptions**

In all jurisdictions, greater attention to accountability in RIA processes would go a long way toward addressing key stakeholder concerns with governments' policy development.

#### *Consequences for non-compliant and exempt proposals*

A vital aspect of accountability is the existence of effective consequences for non-compliance and exempted proposals. Jurisdictions currently range from having no consequences for an inadequate RIS, to specifying a need for a post implementation review (PIR) — but with no follow-up consequences for non-compliance with that requirement — to mandating the early expiry of certain exempt regulations.

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While the availability of PIRs has the potential to weaken motivation to prepare a RIS in some instances, if implemented rigorously PIRs would be an effective deterrent against non-compliance. PIRs also stand as a potential means (in the absence of the RIS) of providing information on new regulation to stakeholders and provide an opportunity to identify and deal with any regulatory implementation issues that have arisen. The extent to which PIRs are beneficial will be influenced substantially, however, by the level of analysis required in a PIR (compared to a RIS), the timeframe within which a PIR is required, and the consequences for non-compliance with PIR requirements.

Although not currently adopted in any Australian jurisdiction, the Commission considers that, as a stronger consequence for non-compliance, it should be a requirement that PIRs for all non-compliant proposals be conducted through an independent process (but funded by the agency originally responsible for compliance). Similar arrangements should also be applied for all PIRs prepared for exempt proposals with highly significant impacts.

In those jurisdictions where proponent agencies assess the significance of impacts and therefore the need for a RIS, there is merit in a regular audit of these agency decisions by the oversight body and, where there is repeated or blatant failure by an agency to appropriately assess the need for a RIS, removal of the agency's responsibility for such assessments for a period of time.

### *Adding accountability and autonomy to the oversight body role*

While a number of jurisdictions have the capacity to more closely monitor and report on the performance of various aspects of their RIA processes, the Commission was advised in some jurisdictions that there is little 'political appetite' for introducing or enforcing such measures. Nevertheless, basic monitoring, reporting and auditing have been accepted practice for many government administrative processes for some years and could be readily extended to RIA processes. In particular, as an added incentive for oversight bodies to be rigorous in their RIS adequacy assessments and compliance reporting, their performance could periodically be evaluated by an independent third party, such as the relevant jurisdictional audit office. Such practices have been recommended by the OECD and are implemented in the United Kingdom and the European Union.

A recurring point of debate is the impact that the location and governance structure of the regulatory oversight body has on the effectiveness and accountability of the RIA process. Locating the oversight body close to the centre of government is seen by some RIA stakeholders as affording the body (and the RIA process) greater authority and credibility, enhancing its ability to more easily bring concerns to the

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attention of government, and reducing the risk that it is ‘out of the loop’ on upcoming policy proposals. On the other hand, the Commission found (and submissions claimed) that the central location can make it difficult for the oversight body to resist government attempts to push through poorly considered regulatory proposals, to publish RIA compliance information, or to provide critical feedback on either proposed policy options or the RIA process more generally.

The Commission considers that locating the oversight function in a statutory body would provide the level of independence, objectivity and transparency necessary to implement RIA requirements most effectively. The success of such a body also requires government commitment to keeping the oversight body ‘in the loop’ on policy development. Where the oversight body function remains located within a central government department, there would be benefit in strengthening its autonomy as far as possible, such as through the establishment of a statutory office holder or other measures which allow direct ministerial reporting, strengthened governance arrangements and increased transparency.

## **Regulatory reviews**

Systematic requirements for reviews of regulation, including the use of a RIA framework for all such reviews, and greater monitoring of reviews foreshadowed in RISs would strengthen RIA’s contribution to regulatory outcomes. The foreknowledge that there would be rigorous scrutiny of whether claimed costs and benefits in RISs and underlying assumptions about the effectiveness of regulatory solutions are borne out in practice, would provide greater incentive for robust RIS analysis of regulatory proposals.

Reviews also provide an opportunity to revise and refine regulation based on information not available at the time the RIS was prepared, enable further examination of areas of regulatory uncertainty, and improve impact analysis for future regulatory proposals. Embedding review provisions in primary legislation would particularly strengthen analysis of those proposals which have significant impacts. For jurisdictions with sunset provisions, such scrutiny of subordinate regulation is already possible.



**Table 2 Mapping of leading practices to issues raised**

<i>Issue</i>	<i>Leading practice component</i>
Lack of commitment	<ul style="list-style-type: none"> <li>• Limit exemptions to genuine exceptional circumstances</li> <li>• Responsibility for granting exemptions to reside with head of government not with responsible minister</li> <li>• Election commitments subject to RIA requirements</li> <li>• Ministers to avoid closing off on options prior to RIS analysis being undertaken</li> <li>• Minister to provide reasons to Parliament for non-compliance and exemptions</li> <li>• Additional independence measures for oversight bodies</li> <li>• PIR for non-compliant proposals and exempt proposals with highly significant impacts to be undertaken through an independent process, paid for by proponent agency</li> <li>• Publication of evidence of RIA influence on regulatory outcomes</li> </ul>
Administrative burden of RIA process	<ul style="list-style-type: none"> <li>• Agencies responsible for assessing significance of proposal impacts and need for a RIS</li> <li>• Provide clear guidelines for exception and exemption criteria and determine eligibility as early as possible</li> <li>• Streamline preliminary assessment processes</li> <li>• Preliminary assessment processes should not be necessary for exceptions</li> <li>• Use of agency memorandum of understanding with oversight body on application of RIA requirements, expectations for RISs and dispute resolution</li> <li>• Group sunseting regulations thematically or with overarching Act for broad based review</li> </ul>
Proposals with significant impacts bypassing RIA	<ul style="list-style-type: none"> <li>• All forms of regulations where there is an expectation of compliance to be subject to RIA processes</li> <li>• Broad threshold significance test that considers positive and negative impacts on the community or a part of the community</li> <li>• Presumption that RIS is required unless impacts shown to be not significant</li> <li>• Oversight body to monitor and periodically audit agency assessments of need for a RIS</li> <li>• Target review resources to regulations likely to have highly significant or uncertain impacts</li> </ul>
Inadequate RIS analysis for some proposals	<ul style="list-style-type: none"> <li>• Greater consideration in RISs of costs of implementation, monitoring and enforcement</li> <li>• Include jurisdiction impacts in COAG RISs, particularly where these vary across jurisdictions</li> <li>• Include a competition statement in all RISs</li> <li>• Provide greater guidance on identifying national market implications</li> <li>• Use greatest net benefit to the community to identify preferred option</li> <li>• RIS adequacy criteria clear in guidance material</li> <li>• All oversight bodies to formally assess all RISs</li> <li>• Non-compliant and exempt proposals to require a PIR with terms of reference approved by oversight body</li> <li>• Provisions for mandatory review in all primary legislation where RIS requirements are triggered</li> </ul>

(continued next page)

**Table 2** (continued)

<i>Issue</i>	<i>Leading practice component</i>
Inadequate stakeholder engagement	<ul style="list-style-type: none"> <li>• Two-stage RIS process (initial consultation RIS and a final RIS) for all regulatory proposals</li> <li>• Agency to publish reasons where it assesses a proposal as requiring a RIS</li> </ul>
Infrequent publication of RISs	<ul style="list-style-type: none"> <li>• No discretionary power to not publish RISs</li> <li>• Oversight body to publish all final RISs in centralised location at time of regulatory announcement</li> <li>• Table final RISs in Parliament with legislation</li> </ul>
Exemptions and non-compliance not routinely reported or explained	<ul style="list-style-type: none"> <li>• Oversight body to               <ul style="list-style-type: none"> <li>– collect and publish agency compliance information</li> <li>– publish reasons for exemptions and RIS adequacy assessments</li> <li>– monitor and report on compliance with PIR requirements and reviews flagged in RISs</li> </ul> </li> <li>• Cabinet offices to provide RIA information and all adequacy assessments to Cabinet irrespective of compliance</li> <li>• Audit of oversight functions by body such as the audit office</li> </ul>

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## Leading practices in regulatory impact analysis

### Scope of regulatory impact analysis

#### LEADING PRACTICE 4.1

*Subject to appropriate exceptions, outcomes are enhanced where primary, subordinate and quasi regulation are included within the scope of the RIA process.*

#### LEADING PRACTICE 4.2

*To ensure regulations are subject to appropriate scrutiny, the threshold significance test for determining whether a RIS is required should be specified broadly and consider impacts — both positive and negative — on the community or part of the community. To implement this:*

- *jurisdictions should provide clear guidance to agencies, including a range of specific examples, to assist in determining whether impacts are likely to be significant*
- *where RIA applies, it should be presumed that a RIS is required (as is currently the case for subordinate legislation in Victoria and New South Wales), unless it can be demonstrated that impacts are likely to be not significant.*

#### LEADING PRACTICE 4.3

*The efficiency and effectiveness of processes for determining whether RIS requirements are triggered are likely to be enhanced where jurisdictions have adopted the following practices:*

- *agency self-assessment of the need for a RIS (in consultation with the oversight body when necessary)*
- *a preliminary assessment process that ensures only the minimum necessary analysis is undertaken — for proposals that will clearly impose significant impacts no preliminary assessment should be required*
- *where impacts are assessed as not significant (hence no RIS is required), reasons for the determination are made public*
- *in the case of agency self-assessment of the need for a RIS, the periodic independent auditing of these determinations by the oversight body and in the event of performance failure, the removal of the agency's responsibility for determinations for a period of time.*

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## Exceptions and exemptions

### LEADING PRACTICE 5.1

*Subjecting election commitments to RIA requirements enhances the integrity of the process. Where the requirement for a RIS is triggered, analysis would ideally reflect the full RIS requirements, but at a minimum include analysis of the implementation of the announced regulatory option.*

### LEADING PRACTICE 5.2

*Exceptions to RIA are a necessary part of a well-functioning RIA system. Determining as early as possible in the policy development process whether a regulation falls within an exception category, helps ensure that RIA resources are better targeted.*

- *All categories of exceptions should be set out in RIA guidance material, together with sufficient information and illustrative examples to assist agencies in determining the applicability of particular exceptions.*
- *Where exceptions clearly apply it should not be necessary to conduct any preliminary impact assessment.*

### LEADING PRACTICE 5.3

*For exemptions from the requirement to prepare a RIS:*

- *limiting the granting of exemptions to exceptional circumstances (such as emergency situations) where a clear public interest can be demonstrated, is necessary to maintain the integrity of RIA processes*
- *the exemption should not be granted after a RIS has commenced*
- *independence of the process and accountability requires that responsibility for the granting of exemptions resides with the Prime Minister or Premier/Chief Minister and not the Minister proposing the regulation*
- *publishing all exemptions granted and the reasons on a central register maintained by the oversight body, and requiring the responsible minister to provide a statement to parliament justifying the exemption, improves RIA transparency and accountability.*

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## Regulation impact statement analysis

### LEADING PRACTICE 6.1

*The benefits that a RIS provides are enhanced where all feasible options (including 'no action') are explicitly identified and assessed and the RIS is timed to inform decision making. Ministers and decision makers should not close off options for consideration prior to RIS analysis being undertaken.*

### LEADING PRACTICE 6.2

*Requiring a competition statement in all RISs, irrespective of whether the regulatory proposal is ultimately assessed as having competition impacts, should ensure such issues are identified and assessed by agencies.*

### LEADING PRACTICE 6.3

*Regulatory outcomes are enhanced where the option that yields the greatest net benefit to the community — encompassing economic, environmental and social impacts (where relevant) — is recommended in RISs.*

- *Impacts should be quantified wherever possible. Where quantification is not possible, a qualitative assessment should be undertaken and explicitly included in the overall assessment of net benefits.*
- *Stating the reasons an option is preferred, and why the alternatives were rejected, is regarded as an important element in strengthening RIA.*

### LEADING PRACTICE 6.4

*Greater consideration of implementation, monitoring and compliance issues in RISs is important for maximising the net benefits of regulation, and would involve:*

- *inclusion of implementation costs for government (including local governments), business and the community, as part of the impact analysis*
- *explicit acknowledgement of monitoring costs*
- *consideration of the impacts of different compliance strategies and rates of compliance (as required under Victoria's guidance material) in the estimation of a proposal's expected costs and benefits.*

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#### LEADING PRACTICE 6.5

*Greater guidance would assist agencies to identify and consider the national market implications of regulatory decisions. South Australia's requirements and guidance material represent leading practice in setting out the types of national market implications that should be considered in a RIS.*

#### LEADING PRACTICE 6.6

*National reform processes are more likely to work effectively when:*

- *detail on individual jurisdictional impacts is included in the RIS wherever possible, particularly where the costs and benefits vary across jurisdictions*
- *costs of implementation by jurisdictions are included in the RIS wherever possible*
- *announcements of COAG and Ministerial Councils on regulatory reforms do not close off options for consideration prior to RIA being undertaken, but rather, are informed by RIS analysis.*

### **Transparency**

#### LEADING PRACTICE 7.1

*Developing a two-stage RIS — an initial consultation RIS and a final RIS — greatly improves the transparency of RIA consultation processes and is regarded as an essential practice to follow.*

#### LEADING PRACTICE 7.2

*Measures that promote the transparency of RIA reporting processes include:*

- *absence of discretionary power as to the public release of a final RIS*
- *an electronic central RIS register that is easily accessible by the public, with publication of final RIS documents at the time of the announcement of the regulatory decision*
- *the tabling of final RIS documents in parliament with the enabling legislation.*

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#### LEADING PRACTICE 7.3

*Measures that promote the transparency of regulatory oversight body adequacy assessments and annual compliance reporting include:*

- *making RIS adequacy criteria explicit in jurisdictional guidance material*
- *publishing RIS adequacy assessments at the time of the announcement of the regulatory decision, including the reasons why the RIS was assessed as not adequate, or any qualifications where the RIS was assessed as adequate*
- *publicly reporting on RIS compliance annually, including overall compliance results for the jurisdiction, compliance by agency and by proposal.*

#### LEADING PRACTICE 7.4

*Where a government introduces regulation which has been assessed as non-compliant with RIA requirements, transparency entails that the minister responsible provide a statement to parliament outlining the reasons for the non-compliance and why the proposed regulation is still proceeding.*

### **Accountability**

#### LEADING PRACTICE 8.1

*The accountability of RIA processes is enhanced where, irrespective of whether RIA requirements have been met, Cabinet offices facilitate the provision of the following RIA information to Cabinets:*

- *the RIS for the regulatory proposal (where one was required and was submitted by the agency)*
- *the regulatory oversight body's adequacy assessment of the submitted RIS (or its advice that the RIS was not completed).*

#### LEADING PRACTICE 8.2

*Regulatory oversight bodies that have a greater degree of independence are likely to operate with more objectivity and transparency in implementing RIA requirements.*

- *Ideally, the oversight body should be located within an independent statutory agency.*
- *Where the oversight body remains located in a central department, its autonomy can be strengthened through the appointment of a statutory office holder with direct ministerial reporting and appropriate safeguards to ensure independence and objectivity.*

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#### LEADING PRACTICE 8.3

*Stakeholder confidence in regulatory oversight bodies is enhanced where their performance, including their adequacy assessments of RIA and PIR processes, is periodically evaluated by an independent body, such as the audit office.*

### **Regulatory reviews**

#### LEADING PRACTICE 9.1

*Overall RIA processes are strengthened where comprehensive and rigorous post implementation reviews (PIRs) are required for regulatory proposals which were either exempted or non-compliant, with:*

- *the terms of reference for all PIRs approved by the regulatory oversight body (as occurs at the Commonwealth level)*
- *for all non-compliant proposals, and for those exemptions which have highly significant impacts, the PIR being undertaken through an independent process, paid for by the proponent agency*
- *the regulatory oversight body publishing PIR adequacy assessments, including the reasons why the PIR was assessed as not adequate, or any qualifications where the PIR was assessed as adequate.*

#### LEADING PRACTICE 9.2

*In reviewing existing regulations, more efficient use of RIA resources is achieved by targeting resources at those regulations with highly significant or uncertain impacts.*

*All regulatory oversight bodies should monitor and report publicly on regulatory reviews flagged or required as part of RIA processes. Annual regulatory plans could be utilised for this, with oversight bodies checking them for adequacy.*

#### LEADING PRACTICE 9.3

*Provision for a mandatory review should be included in all future primary legislation where the associated proposal triggers RIS requirements.*

#### LEADING PRACTICE 9.4

*There are likely to be benefits for regulatory outcomes and efficient use of RIA resources from:*

- *prioritising sunseting regulations against agreed criteria, to identify the appropriate level of review effort and stakeholder consultation*



- 
- *grouping related sunseting regulations for thematic or package review*
  - *where appropriate, consideration of subordinate regulation in conjunction with its overarching primary legislation.*

## **Integration**

### LEADING PRACTICE 10.1

*For those agencies which undertake RISs regularly, oversight bodies should consider establishing a memorandum of understanding (which would be published) to:*

- *clarify interpretation of guidelines on what needs a RIS (specific to the instruments or activity of the particular agency)*
- *outline what sort of documentation generated by the agency would, in part, satisfy RIA requirements (such as consultation documents)*
- *lay out an approach for dealing with disputes between the agency and the oversight body.*

### LEADING PRACTICE 10.2

*Published evidence of the usefulness of RIA in improving the quality of regulatory outcomes — including which key aspects are instrumental in achieving this objective — would help inform refinements and improvements to RIA processes over time. Victoria has made substantial progress developing and publishing research in this field.*



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# 1 Introduction

## 1.1 What is regulatory impact analysis?

Regulatory impact analysis (RIA) is designed to improve the quality of regulatory decisions by providing relevant information to decision makers and stakeholders about the expected consequences of different policy options.<sup>1</sup> As such, RIA introduces a consistent, systematic and evidence-based framework to the policy development process. Throughout the report, the Commission will use the term RIA when referring to the *process* and regulation impact statement (RIS) when referring to the resulting *document* or *report*. The term ‘regulation’ will be used in the generic sense to include all common types of regulatory instruments, as defined in box 1.1.

### Box 1.1 Types of regulation

- *Primary legislation* refers to Acts of Parliament.
- *Subordinate legislation* comprises rules or instruments that have been made by an authority to which Parliament has delegated part of its legislative power. These include disallowable instruments such as statutory rules, ordinances, bylaws, and other subordinate legislation which is not subject to Parliamentary scrutiny.
- *Quasi regulation* encompasses those rules, instruments and standards by which government influences business to comply, but which do not form part of explicit government regulation. Examples can include government endorsed industry codes of practice or standards, government issued guidance notes, industry-government agreements and national accreditation schemes. Whether or not a particular measure is deemed to be quasi regulation depends on the nature of government involvement and whether there is a ‘reasonable’ expectation of compliance.
- *Co-regulation* is a hybrid in which industry develops and administers particular codes, standards or rules, but the government provides formal legislative backing to enable the arrangements to be enforced.

The RIS broadly sets out the policy problem, objective and the impacts of a range of regulatory and non-regulatory options. The RIS can provide a basis for community consultation during policy development. After government decisions are taken, the

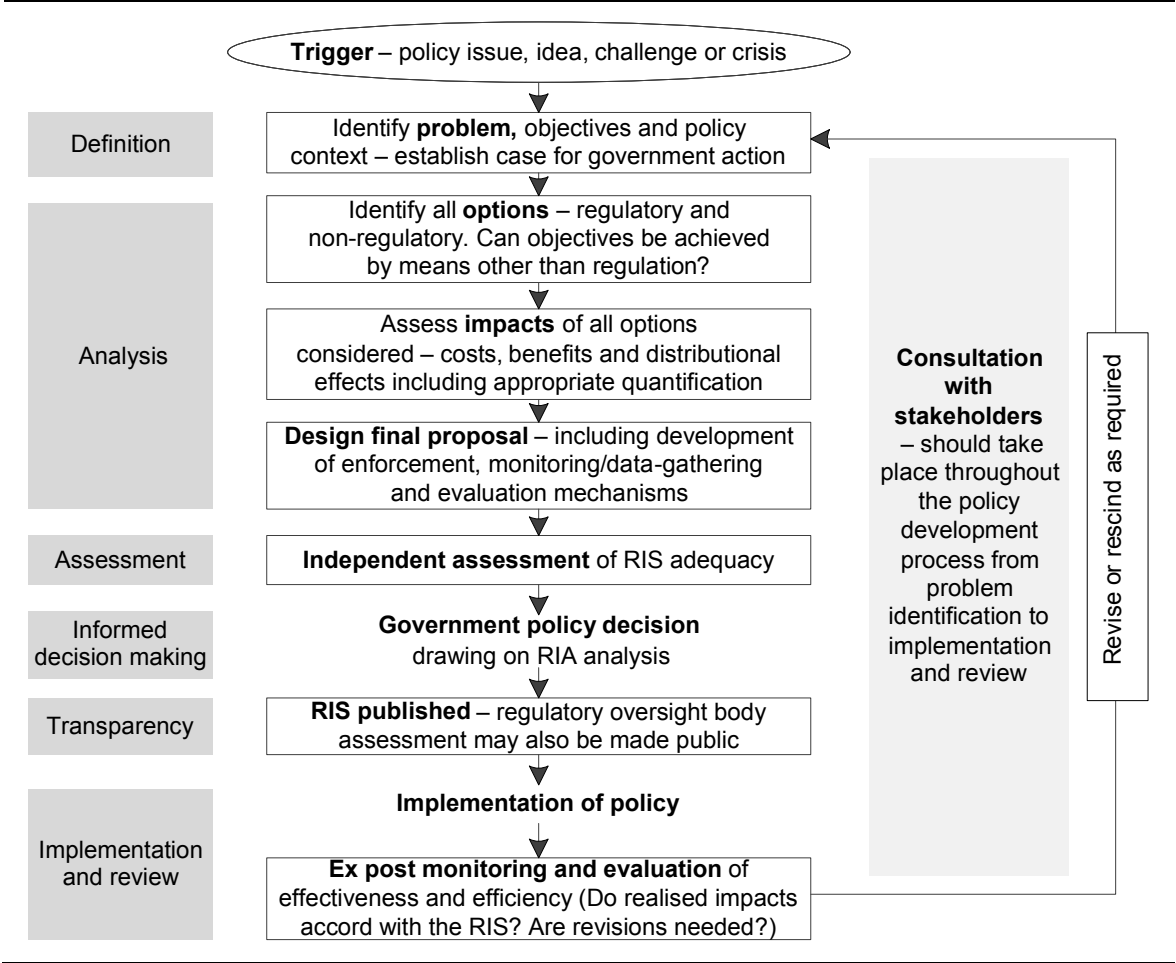
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<sup>1</sup> Regulatory impact analysis is also referred to in some jurisdictions as regulation impact analysis, regulatory/regulation impact assessment or impact analysis/assessment.

RIS can enhance accountability by making the reasons for decisions transparent to the community. Chapter 6 describes the elements of a RIS in more detail.

An illustrative schematic representation of the RIA process and its essential elements is provided in figure 1.1. In practice, the progression of RIA processes is rarely as linear as depicted, instead following a complex sequence of steps that intertwine with political and stakeholder negotiations, use of other policy development tools such as ‘green papers’ and other policy-specific reviews.

Figure 1.1     **Stylised schematic of the RIA process**



RIA seeks to ensure that regulations deliver the greatest benefit to the community relative to the overall costs they impose by providing a better informed, transparent and evidence-based framework for making regulations. However, RIA is just one of a range of strategies to improve regulatory decision making, and thus the effectiveness and efficiency of new and existing regulations. Important complementary and supporting strategies and tools include: managing and coordinating regulatory reform; public consultation policies and other measures to improve transparency and accountability; administrative simplification, red tape

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reduction programs and other mechanisms designed to reduce regulatory compliance burdens; and reviews of existing regulation.

In principle, better decision making processes should improve regulatory outcomes. However, in practice, improvements in regulatory outcomes attributable to RIA are difficult to identify. This is because RIA is just one element in an array of influences on the policy decision and, in turn, the policy decision is just one factor (combined with other policies, strategies and institutional arrangements) which influences regulatory outcomes. Also, there is typically no information on the decisions and resulting outcomes that would have prevailed in the absence of RIA.

## RIA in Australian jurisdictions

The Commonwealth, each state and territory and the Council of Australian Governments (COAG) (the ‘ten jurisdictions’) have all established RIA processes for new and amended regulation. The RIA process is typically an administrative requirement outlined in RIA guidelines and supported by other procedural documents such as Cabinet handbooks. Some jurisdictions have also set out RIA requirements in statute for subordinate legislation as listed in box 1.2.

Box 1.2 <b>Legal mandates for RIA</b>	
New South Wales	<i>Subordinate Legislation Act 1989</i>
Victoria	<i>Subordinate Legislation Act 1994</i>
Queensland	<i>Statutory Instruments Act 1992</i> <sup>2</sup> <i>Legislative Standards Act 1992</i>
Tasmania	<i>Subordinate Legislation Act 1992</i>
Australian Capital Territory	<i>Legislation Act 2001</i>

The interaction of the key elements of RIA with policy development and decision making processes are represented for each Australian jurisdiction in figures 1.2 to 1.11 at the end of this chapter. The schematics show how RIA processes were implemented in practice in each of the jurisdictions, as at January 2012. Despite all ten jurisdictions having similar objectives for their RIA arrangements, there are marked differences in the practical implementation of these arrangements. These are discussed in detail in the remainder of the report, but some principal points of difference follow.

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<sup>2</sup> As at 21 September 2012, Part 5 of the *Statutory Instruments Act 1992*, which prescribed specific requirements for the preparation of RISs for subordinate legislation, was repealed.

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- For some jurisdictions, whether the proposal involves primary or subordinate legislation, or is a matter to be considered by Cabinet, affects whether RIA requirements are applicable.
  - In several jurisdictions, significance thresholds, consultation and/or analytical requirements differ depending on whether the proposal involves primary or subordinate legislation.
  - The decision as to whether a regulatory proposal requires a RIS is made by the regulatory oversight body in some jurisdictions, but is left to the responsible minister or agency in others.
  - Some jurisdictions operate multi-stage RIA processes which can include a formal initial assessment of significance followed by a one or two stage RIS process.
  - Stakeholder engagement is a formal step in the process in some jurisdictions; in others, its extent and timing is not specified.
  - Not all jurisdictions publish RISs and, of those that do, the timing ranges from publication at the time of regulatory announcement to some time after legislation is developed, at the responsible agency's discretion.
  - While there are consequences for failure to implement RIA requirements in most jurisdictions, they differ substantially as to their nature and impacts.

Of particular note is that in five of the ten jurisdictions (those with RIA requirements for their subordinate legislation set out in statute), dual RIA processes are in operation, usually with slightly different requirements. For example, in New South Wales, a 'better regulation statement' (rather than a 'RIS') is required for primary legislation and amending regulations. In Victoria, a 'business impact assessment' (rather than a 'RIS') is required for primary legislation. These different RIA processes are referred to throughout the report where relevant — although for simplicity, the term 'RIS' is used generically to cover the documents produced under all RIA processes.

## **1.2 Recent reviews and changes to RIA processes**

A number of jurisdictions have undergone comprehensive reviews of their regulatory processes or made significant changes in recent years (box 1.3). In addition, several jurisdictions indicated to the Commission that they are awaiting results from this benchmarking study to inform the direction of their current and upcoming reviews.

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### Box 1.3      **Jurisdictional reviews and changes to RIA processes**

#### **Australian Government**

- In 2012, the Australian Government RIA process and its administration by the Office of Best Practice Regulation (OBPR) was reviewed by Robert Milliner and David Borthwick. The review found that, although the Australian Government RIA framework was entirely consistent with OECD principles, there was 'widespread lack of acceptance of and commitment to the RIA process by ministers and agencies' and 'substantial dissatisfaction by all major stakeholder groups' (Borthwick and Milliner 2012, p. 9). The review made a number of recommendations intended to increase agency responsibility for the RIA process and clearly define the role of the OBPR. The final report from the review was released by Government in October 2012, with the Government's final response to the report recommendations to be released after a period of consultation.
- In its review of regulatory reform, the OECD (2010a) found the Australian Government RIA process to be generally strong. The review made recommendations to enhance the process, such as increasing accountability of ministers and other authorities.
- The Australian Government RIA process was also revised in late 2006, following the Regulation Taskforce Report (2006), and subsequently modified further in 2010.

#### **Victoria**

- In 2011, the Victorian Competition and Efficiency Commission (VCEC) reported on priorities for reforms to the Victorian regulatory system (VCEC 2011b). With regard to RIA, VCEC recommended a move to a single impact assessment process for primary and subordinate legislation, a broadening in the scope of instruments and sectors covered, publication of all VCEC RIS assessment letters and a broadening in the range of options considered in preliminary consultation processes.
- As input into the VCEC inquiry, Access Economics (2010) reviewed the effectiveness of the Victorian RIS process. Access Economics found the Victorian system performed well in relation to OECD guiding principles, but identified areas for improvement including greater emphasis on policy development throughout the RIS process, more consideration of non-regulatory options and earlier engagement with stakeholders.

#### **New South Wales**

- The Better Regulation Office (BRO) released an issues paper in September 2011 which highlighted scope to improve consistency in the New South Wales regulatory process across different types of regulation, to centralise notice for RIA consultation, to introduce a post implementation review process and to publish RIA compliance information.
- The New South Wales system had previously been reviewed by the Independent Pricing and Regulatory Tribunal (IPART 2006). Recommendations of this review led to the creation of the BRO and informed the development of the *Guide to Better Regulation* (NSW DPC 2009).

(Continued next page)

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### Box 1.3 (continued)

#### Queensland

- The Auditor-General (2011), in following up on a 2009 audit of the Queensland RIA process, reported the RIA process had been improved to incorporate better regulatory principles and to apply to a broader range of regulations. Amendments to legislation to provide appropriate support for the RIA process were recommended.
- In July 2012, the Queensland Office of Best Practice Regulation was established in the Queensland Competition Authority (an independent statutory authority) to assess the adequacy of RISs and report on compliance with RIA (QCA 2012). Previously regulatory oversight was undertaken by the Department of Treasury. Key features of the revised process are noted throughout the report where relevant.

#### South Australia

- The *Better Regulation Handbook* (SA DPC and DTF 2011), introduced a new and more formalised process for RIA, in line with the 2007 COAG–agreed best practice principles, and for the first time, outlined RIA requirements in a public document (rather than a Cabinet Circular) (pers. comm., SA DPC, August 2012).

As detailed in the terms of reference to the Commission’s study, the implementation plan for the ‘regulation making and review’ reform stream in the *National Partnership Agreement to Deliver a Seamless National Economy* (SNE) also required all jurisdictions to review their RIA processes during 2010 and 2011. In particular, jurisdictions considered opportunities for enhancing existing arrangements in areas such as consideration of national market implications, publication of RISs and fostering cultural change in regulation making.

## 1.3 The Commission’s study

The Commission was asked to undertake a study to benchmark the efficiency and quality of RIA processes in the ten jurisdictions, as at January 2012. The full terms of reference for the study are set out on page iv. The study was added to the SNE reform stream to move reform focus from ‘principles and the implementation of better regulatory decision-making processes’ to assessing whether these changes are delivering improved regulation and identifying the need for further reforms (CRC 2009).

The purpose of the benchmarking study is not to develop a harmonised approach to RIA processes, but to compare processes and identify leading practice examples (within Australia or overseas) that might usefully inform consideration for reform by individual jurisdictions. The leading practices are based, where possible, on the OECD recommendation on RIA (OECD 2012a) and COAG–agreed best practice principles (COAG 2007a). These are set out in appendix C.



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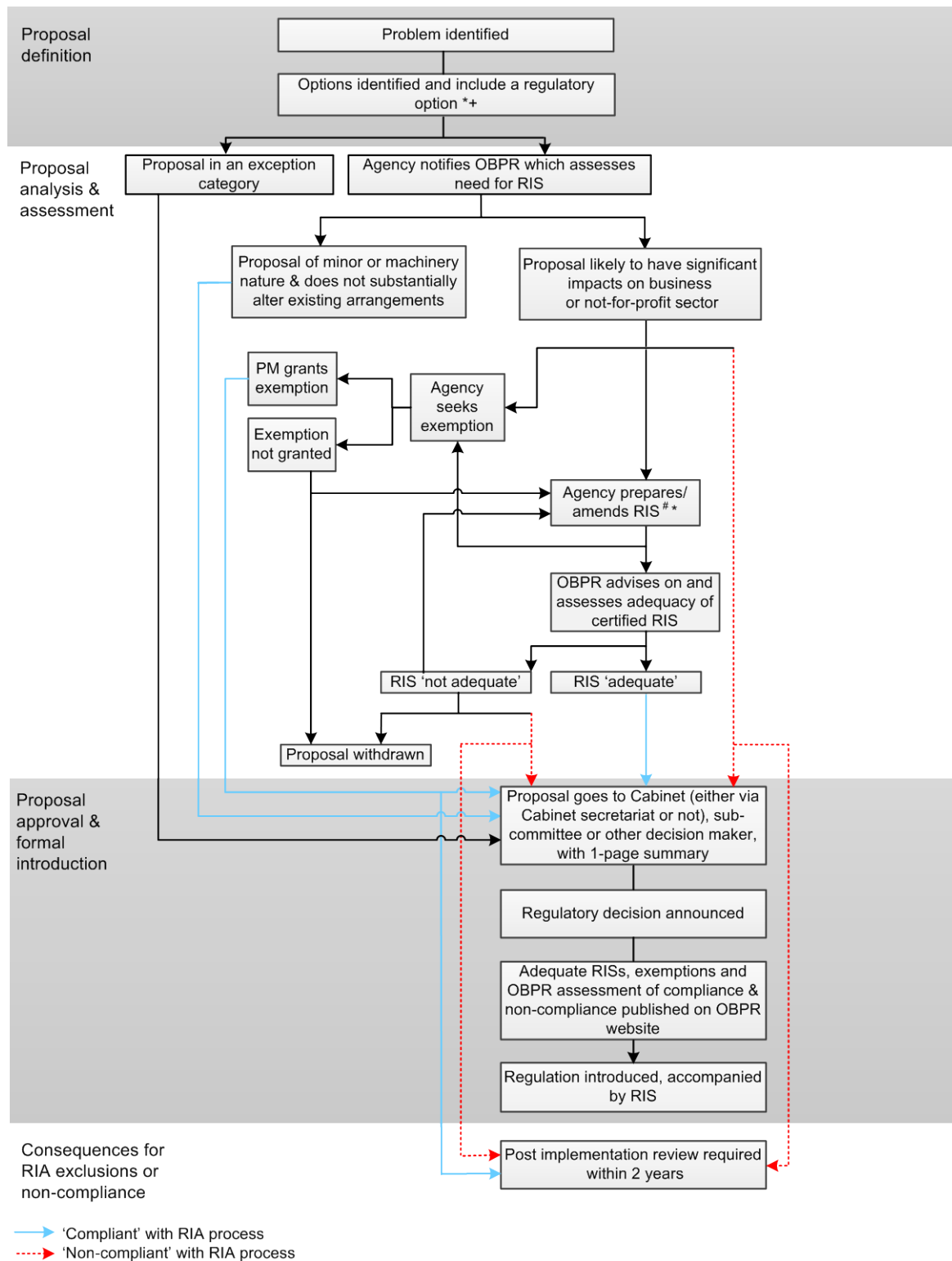
The Commission was also asked to assess the practical influence of RIA on the policy making process by evaluating mechanisms for transparency, accountability and compliance, identifying evidence where RIA processes have led to improved regulation and reporting on the extent and timing of ministerial engagement with the RIA process.

A number of other concerns provided additional impetus for this study. The OECD (2010a) identified the need to strengthen the contribution of RIA to policy development, including by improving the quantitative evidence underpinning decisions and the need for greater accountability arrangements. From its 2010 scorecard benchmarking Commonwealth, state and territory regulation making processes, the Business Council of Australia (BCA) found that, while there had been some improvement since the previous 2007 scorecard, recommendations for improving transparency and accountability that had been made in 2007 had not been adopted by jurisdictions (BCA 2010). The BCA considered there was scope to improve Australia's regulatory model to 'prevent bad regulation from being made in the first place'.

Specific concerns raised by the BCA or other business groups — for example, the Australian Chamber of Commerce and Industry (ACCI 2011) and the Property Council of Australia (PCA 2011) — include the lack of rigour in impact analysis (in particular, in relation to regulatory proposals of greater significance), the RIS not reflecting the resulting regulation, the need for more independent scrutiny of RISs, inadequate consultation processes and the number of exemptions granted under RIA processes. Concerns have also been raised about reviews of existing regulation, including scheduled post implementation reviews and the large volume of regulation subject to mandatory reviews or sunseting. These reviews may create competing demands for skilled RIA resources and impose burdens on business and community groups (PC 2011).

In preparing its report, the Commission drew on its extensive consultations and on written submissions (appendix A). The Commission also surveyed regulatory oversight bodies and agencies subject to RIA requirements, receiving responses from 69 government officials involved in the RIA process in one or more of the ten jurisdictions (appendix D). The study further drew on a broad level comparison of 182 RISs completed during 2010 and 2011 from all ten jurisdictions. Finally, the Commission considered other research and information sources, including analysis and findings in previous reviews and studies. In particular, this study benefited from recent research undertaken by the Commission on overseas approaches to managing regulation (PC 2011, Appendix K). Consistent with the *Productivity Commission Act 1998*, the Commission based its assessments on arrangements that are likely to give the best outcomes for the Australian community as a whole.

Figure 1.2 Commonwealth RIA and regulatory development



**OBPR** Office of Best Practice Regulation **PM** Prime Minister + Agency may be directed by Minister on which options to analyse in a RIS for Cabinet or a committee of Cabinet, at any stage up until final assessment of the RIS by OBPR \* Consultation is required at some point and is sometimes undertaken at this stage # Agency may consult the Small Business Advisory Council.

Figure 1.3 COAG RIA and regulatory development

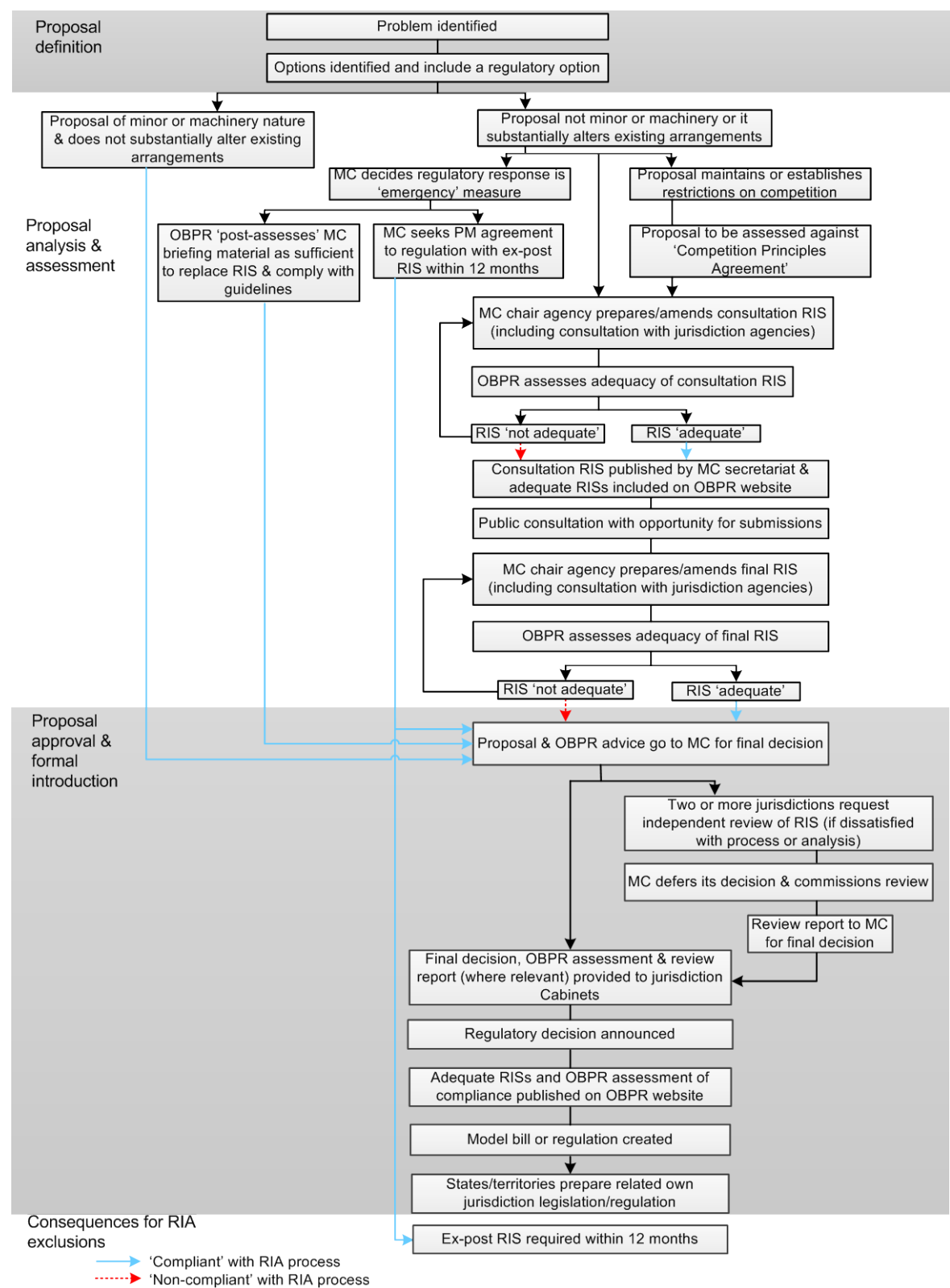
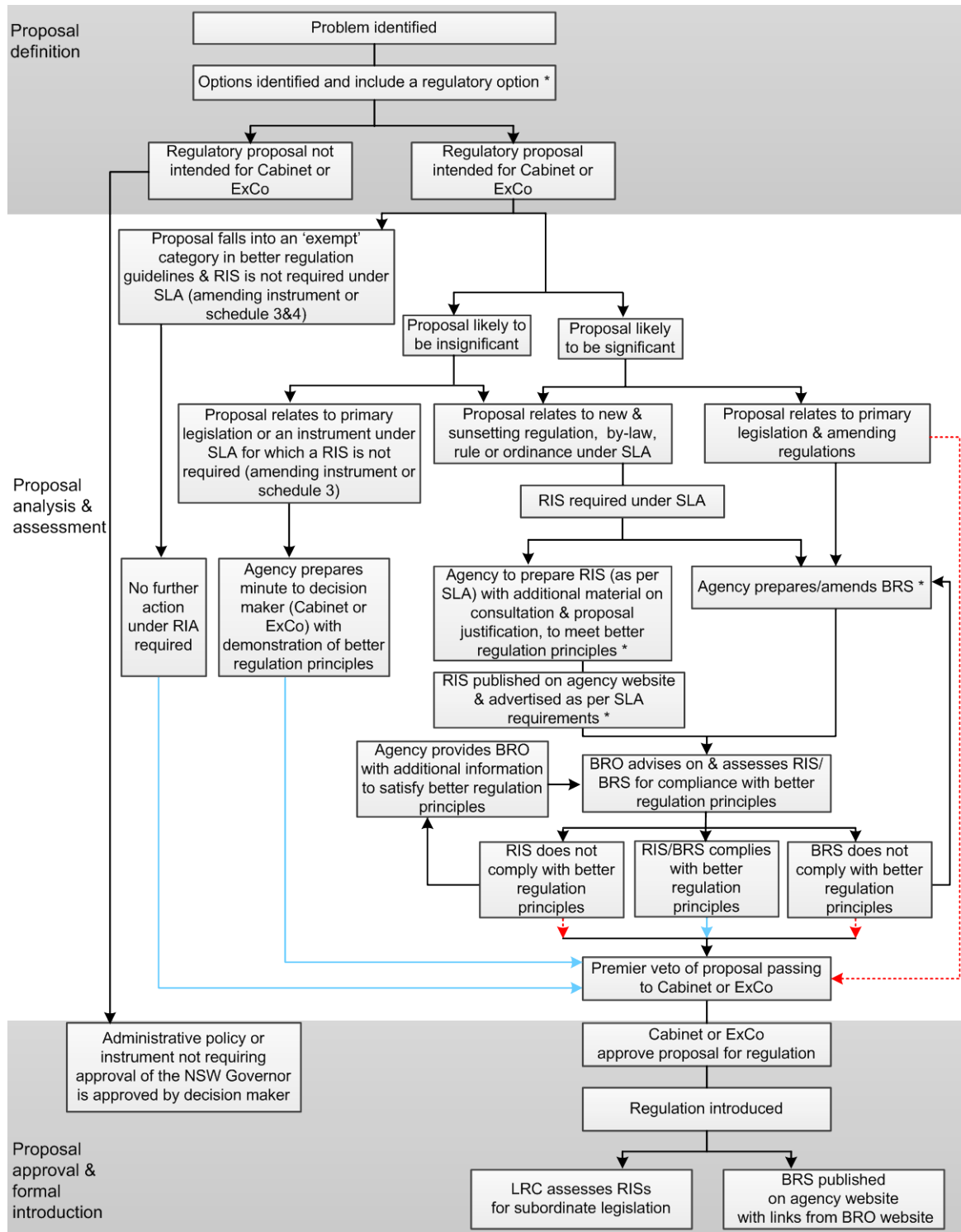
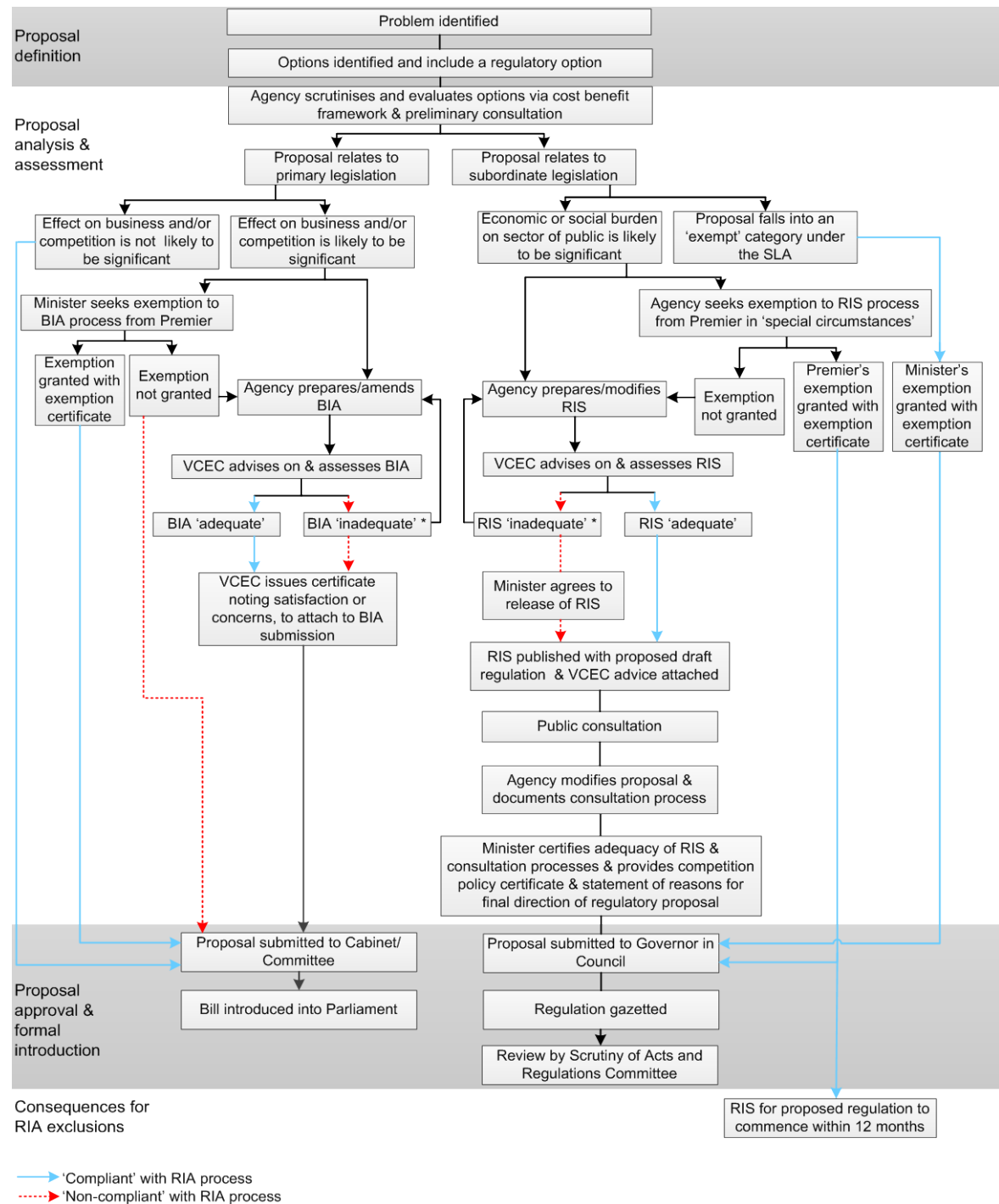


Figure 1.4 New South Wales RIA and regulatory development



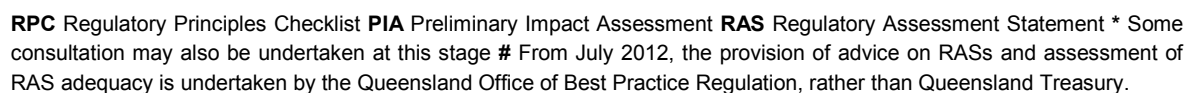
**BRS** better regulation statement **BRO** Better Regulation Office **ExCo** Executive Council **LRC** Legislative Review Committee **SLA** Subordinate Legislation Act 1989 \* Consultation is required to be undertaken on a draft RIS and during development of a BRS. It is sometimes undertaken at one or more of these stages.

Figure 1.5 Victoria RIA and regulatory development



**VCEC** Victorian Competition and Efficiency Commission **BIA** business impact assessment **SLA** Subordinate Legislation Act 1994 \* An 'inadequate' assessment is not made until a final draft is presented to VCEC. The Victorian Guide to Regulation and the SLA allow for BIAs and RISs to proceed without an adequate assessment to demonstrate compliance with RIA requirements.

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The flowchart illustrates the Regulatory Impact Assessment (RIA) process in New Zealand, organized into four horizontal phases: Proposal definition, Proposal analysis & assessment, Proposal approval & formal introduction, and Consequences for RIA exclusions.

**Proposal definition:** The process begins with "Problem identified" and "Options identified and include a regulatory option".

**Proposal analysis & assessment:**

- The "Minister applies for Treasurer's exemption from RIA process". If "Exemption granted", the process moves to "No further action under RIA required". If "Exemption not granted", the process moves to "Agency undertakes Preliminary Impact Assessment (PIA) #".
- "Agency undertakes Preliminary Impact Assessment (PIA) #": The "PIA submitted to RGU for assessment of significance".
  - If "Proposal is in an exception category to full PIA requirement #", it moves to "Impacts likely to be insignificant", then to "No further action under RIA required".
  - If "Proposal not excepted from full PIA requirement", it moves to "Impacts on business, consumers or economy likely to be significant", then to "RIS required".
- "RIS required": The "Minister applies for Treasurer's exemption from RIS".
  - If "Exemption granted", it moves to "No further action under RIA required".
  - If "Exemption not granted", it moves to "Agency prepares/amends consultation RIS".
- "Agency prepares/amends consultation RIS": "RGU assesses consultation RIS".
  - If "RIS 'inadequate'" (marked with a red arrow), it moves to "Agency prepares/amends decision RIS".
  - If "RIS 'adequate'" (marked with a blue arrow), it moves to "Consultation RIS published with RGU Compliance Assessment Notice on agency & RGU website".
- "Consultation RIS published...": "Consultation".
- "Consultation": "Agency prepares/amends decision RIS".
- "Agency prepares/amends decision RIS": "RGU assesses decision RIS".
  - If "RIS 'inadequate'" (marked with a red arrow), it moves to "Agency prepares/amends decision RIS" (loop).
  - If "RIS 'adequate'" (marked with a blue arrow), it moves to "RGU issue Compliance Assessment Notice".
- "RGU issue Compliance Assessment Notice": "Proposal & RGU Compliance Assessment Notice go to decision maker".

**Proposal approval & formal introduction:** The process moves to "Decision announced".

**Consequences for RIA exclusions:**

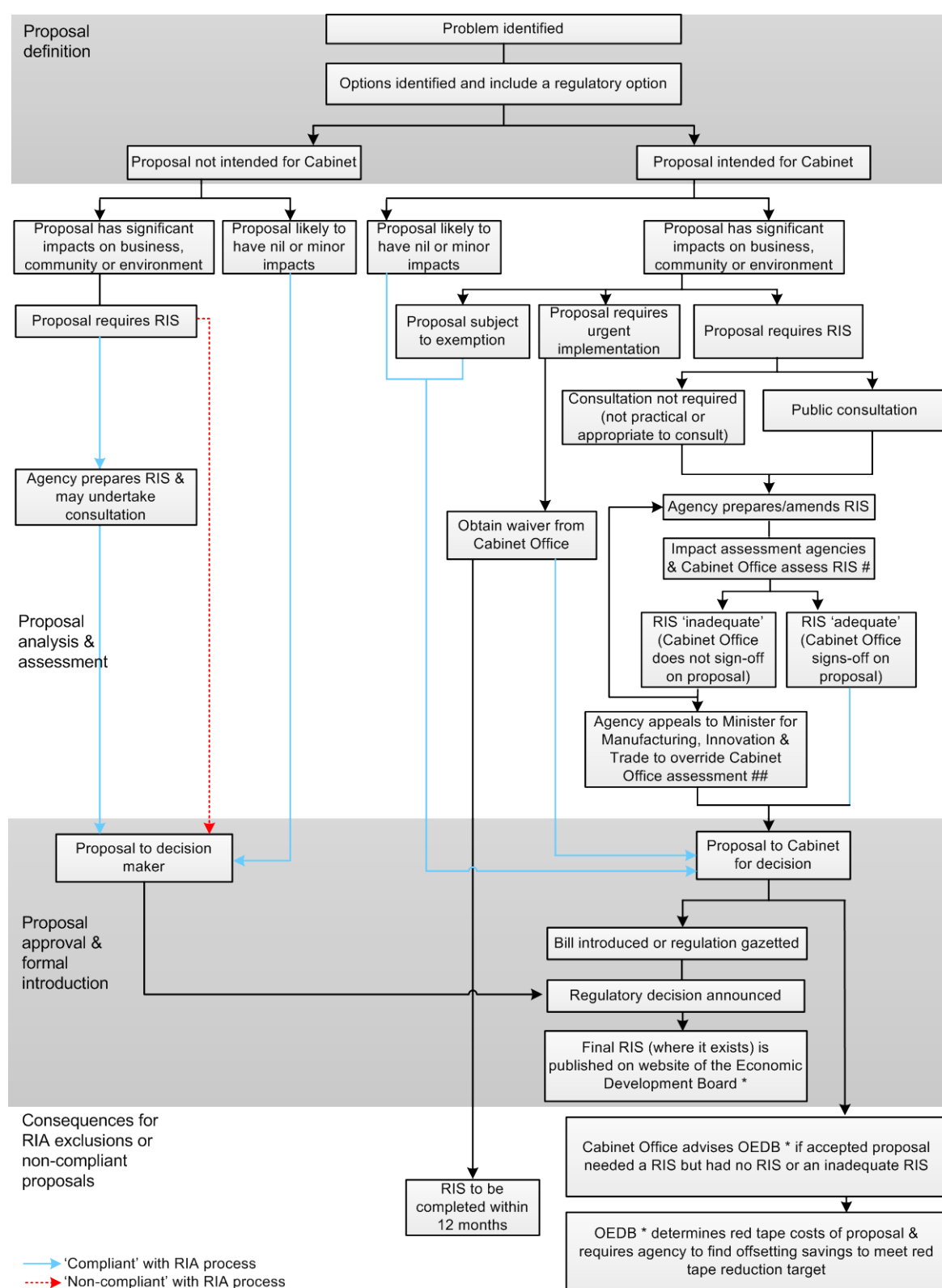
- "No further action under RIA required" (from exemption) leads to "Post-implementation review within 2 years".
- "Exemption granted" (from RIS exemption) leads to "Post-implementation review within 2 years".
- "RIS 'adequate'" (from consultation) leads to "Post-implementation review within 2 years".
- "Decision announced" leads to "Bill introduced or regulation gazetted; related decision RIS published with RGU Compliance Assessment Notice on agency & RGU website".

**Legend:**

- Blue arrow: 'Compliant' with RIA process
- Red arrow: 'Non-compliant' with RIA process

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Figure 1.8 South Australia RIA and regulatory development



**OEDB** Office of the Economic Development Board # Four impact assessment agencies, see table 3.2. ## Appeals go to the Chair of the Competitiveness Council (this function does not apply since 1 July 2012) \* Since January 2012, responsibility for red tape reduction and offsets has been moved from the OEDB to the Cabinet Office.



The flowchart illustrates the Regulatory Impact Assessment (RIA) process in New Zealand, organized into three main stages: Proposal definition, Proposal analysis & assessment, and Proposal approval & formal introduction.

**Proposal definition:**

- Problem identified
- Options identified and include a regulatory option
- Agency prepares Statement of Intent & submits to Economic Reform Unit (ERU)

**Proposal analysis & assessment:**

- Primary Legislation Path:**
  - Proposal relates to primary legislation
  - ERU gives agency 'in-principle' assessment of proposal & significance of impacts
  - Minister submits proposal to Cabinet with ERU 'in-principle' assessment
  - Cabinet gives approval for draft legislation
- Subordinate Legislation Path:**
  - Proposal relates to subordinate legislation
  - Branches based on impact:
    - Proposal not expected to impose significant burden: ERU gives agency 'in-principle' advice that a RIS is not required.
    - Proposal likely to be in an exempt category: ERU gives agency 'in-principle' advice that a RIS is not required.
    - Proposal likely to impose significant burden, cost or disadvantage: ERU gives agency 'in-principle' advice that a RIS is required.
  - Draft regulation prepared
  - Draft legislation to ERU for final assessment of significance

**Proposal approval & formal introduction:**

- Primary Legislation Path:**
  - Impacts assessed to be not significant: ERU does not endorse MAS (Non-compliant).
  - Proposal assessed as likely to have minor negative impacts on business: Agency prepares/amends Minor Assessment Statement (MAS); ERU endorses MAS (Compliant).
  - Proposal assessed as likely to restrict competition or have major negative impacts on business: Agency prepares/amends consultation RIS; ERU endorses consultation RIS & consultation plans (Compliant) or ERU does not endorse consultation RIS &/or consultation plans (Non-compliant).
  - ERU does not endorse MAS or ERU does not endorse consultation RIS &/or consultation plans: RIS published; public consultation (Non-compliant).
  - ERU endorses MAS or ERU endorses consultation RIS & consultation plans: RIS published; public consultation (Compliant).
  - Agency prepares Minute to Minister seeking approval to submit Bill to Cabinet & submits draft legislation with MAS or RIS (where applicable) to ERU for final assessment
  - Bill submitted to Cabinet for approval, with MAS or RIS (where applicable) & ERU compliance statement
  - Bill introduced into parliament
- Subordinate Legislation Path:**
  - Proposal assessed as not imposing a significant burden: ERU endorsement of consultation RIS & consultation plans (ERU certificate issued) (Compliant).
  - Proposal assessed as exempt: ERU does not endorse consultation RIS &/or consultation plans (Non-compliant).
  - Proposal assessed as imposing a significant burden, cost or disadvantage: Agency prepares/amends consultation RIS; ERU endorses consultation RIS & consultation plans (ERU certificate issued) (Compliant) or ERU does not endorse consultation RIS &/or consultation plans (Non-compliant).
  - RIS published; Public consultation
  - Agency advises ERU of any changes to regulation
  - Agency prepares Minute to Minister seeking approval to submit Bill to Cabinet
  - Draft regulation, RIS (where applicable) & ERU certificates submitted to Executive Council
  - Regulation gazetted
  - Regulation, ERU certificates, fact sheet, RIS and post consultation documents (where relevant) submitted to Subordinate Legislation Committee
  - Regulation tabled in Parliament

**Legend:**

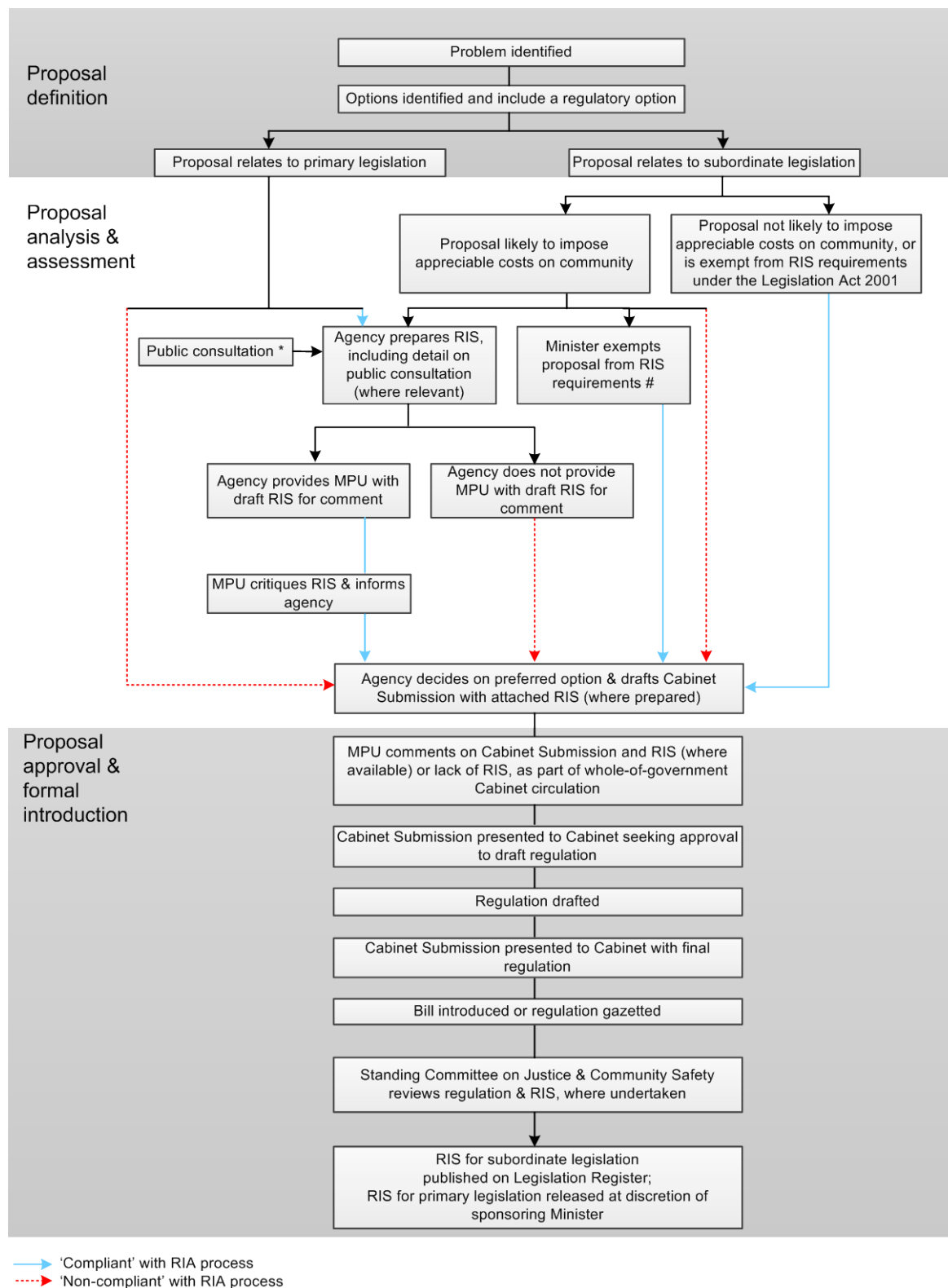
- Blue arrow: 'Compliant' with RIA process
- Red dotted arrow: 'Non-compliant' with RIA process

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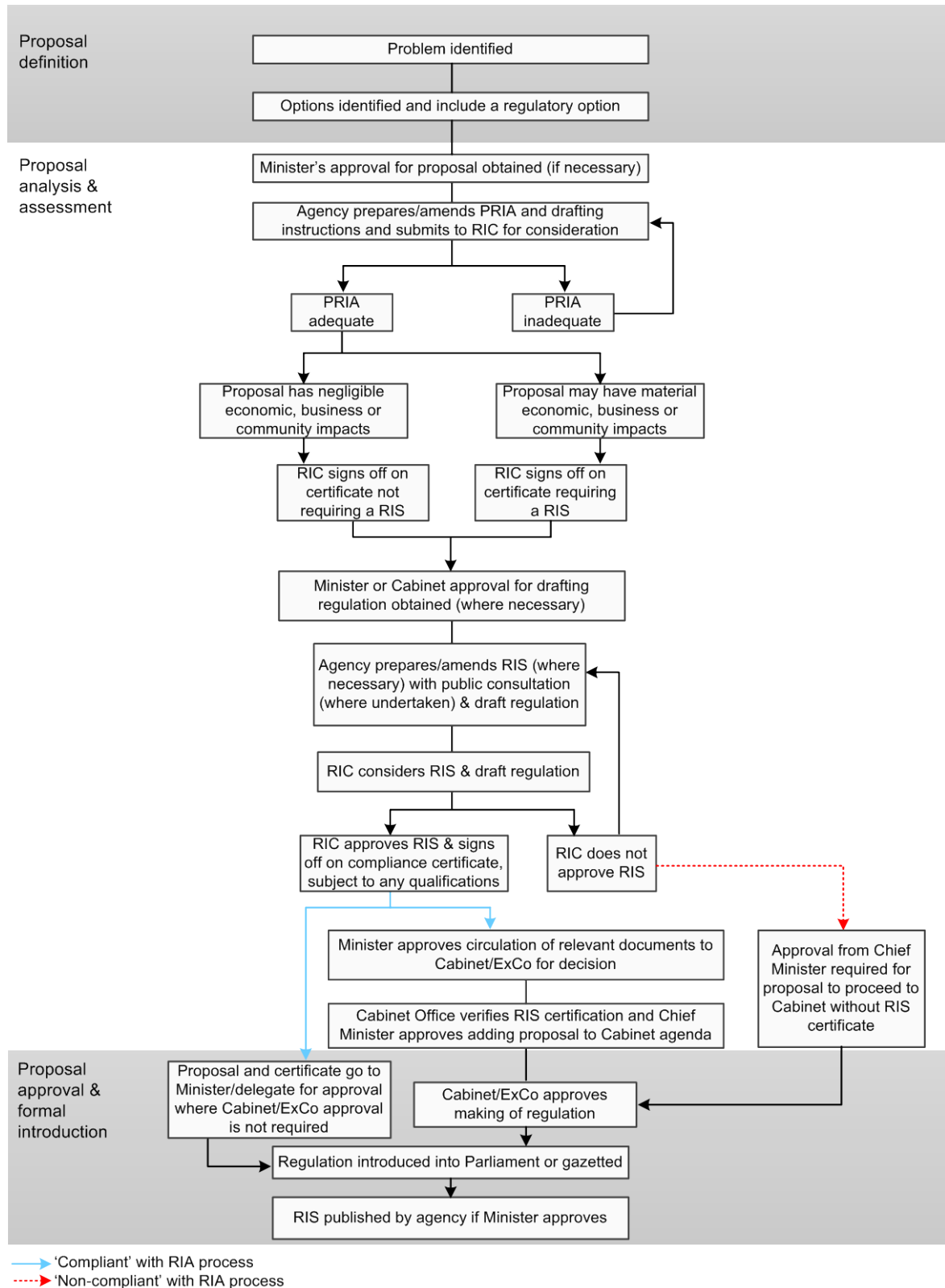
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Figure 1.10 Australian Capital Territory RIA and regulatory development



**MPU** Microeconomic Policy Unit, ACT Treasury Directorate \* Public consultation requirements are contained in *Engaging Canberrans – a guide to community engagement* # For proposals relating to subordinate legislation, agencies must prepare a 'late RIS' if the exemption is disallowed.

Figure 1.11 Northern Territory RIA and regulatory development



**ExCo** Executive Council **RIU** Regulation Impact Unit **RIC** Regulation Impact Committee consists of Department of Treasury and Finance, Department of the Chief Minister, Department of the Attorney-General and Justice and Department of Business **PRIA** Preliminary regulatory impact assessment



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## 2 Efficiency and effectiveness of regulatory impact analysis

### Key points

- Regulatory impact analysis (RIA) requirements across Australia all have a reasonably high degree of consistency with OECD and COAG guiding principles.
- There is, however, little concrete evidence of the effectiveness of RIA in Australia in improving regulatory decision making or the quality of regulation. This reflects
  - the difficulty of attributing outcomes to RIA when other factors are also likely to have had an influence
  - in some jurisdictions, the relative newness of the RIA systems
  - more generally, a lack of any systematic effort in most jurisdictions to gather the required evidence.
- Nevertheless, evidence from Victoria suggests that benefits attributed to its system may have substantially exceeded costs and anecdotal evidence from other jurisdictions provides examples of the positive contribution of RIA.
- But there is also evidence that RIA is failing to deliver on its potential. Some lack of integration of RIA early in policy-development processes, poor consultation, and bypassing of requirements for some high impact regulations, are key concerns.
- There is scope for all jurisdictions to improve on the design of their systems through adoption of leading practices from Australia and overseas. Transparency of RIA is a particular weakness in most jurisdictions, with the publication of the regulation impact statement (RIS) and compliance information common areas for improvement.
- However, the contribution of RIA to better regulatory outcomes has been inhibited as much by poor implementation and enforcement of existing processes as by specific aspects of design.
- Participants raised concerns about the quality of RISs. Common areas for improvement are the consideration of regulatory and non-regulatory alternatives; the assessment and comparison of costs and benefits; and the discussion of how proposed regulations are to be implemented and reviewed.
- Although costs of RIA are substantial, they are likely to be small relative to the benefits of improved regulation that RIA can *potentially* deliver. That said, there is scope to improve the efficiency of RIA with better targeting of resources according to the likely impacts of proposals.

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## 2.1 Introduction

The Commission was asked to benchmark the efficiency and quality of RIA processes in Australia and to assess the effectiveness and efficiency of key features of these processes. The Commission's definition of the key concepts of efficiency, quality and effectiveness is provided in box 2.1.

Given the rationale for, and objectives of, RIA outlined in chapter 1, RIA systems can be considered effective if there is evidence that they have contributed to improvements in regulatory decision making and, ultimately, the quality of regulatory outcomes. In order to make judgments about efficiency, the costs of preparing RISs and other costs associated with RIA systems need to be taken into account as well as the benefits.

This chapter uses a variety of indicators to assess RIA effectiveness and efficiency. These indicators are based on case study and anecdotal evidence and stakeholder perceptions drawn from submissions and meetings, a survey of agencies engaged in RIA activities, and the Commission's own assessment of the documentary output of RIA processes.

### Box 2.1 Efficiency, quality and effectiveness

Efficiency, quality and effectiveness are interrelated concepts. For the purposes of this study the Commission defines *efficiency* in terms of achieving given objectives at least cost or getting the best outcomes with given inputs. A *quality* RIA system is a system that is well designed and implemented, generating 'good' outcomes. Thus, a quality system is also an *effective* system in that it is successful in achieving its objectives. A broad definition of quality also encompasses an efficiency element in that an effective, but unnecessarily costly, RIA system would not be considered a quality system. On the other hand, an efficient system will not necessarily be the highest quality system because trade-offs usually need to be made between quality and cost.

For convenience, generally in this report the Commission has used the terms quality and effectiveness somewhat interchangeably and, importantly, considers that an effective and efficient RIA system is also a quality system.

In addition to assessing the *overall* contribution of RIA to improving policy development processes and regulatory outcomes across jurisdictions, the Commission endeavoured to identify key aspects of RIA processes which may explain differences between jurisdictions in the effectiveness and efficiency of RIA processes. In particular, the terms of reference direct the Commission to identify leading practices — that is, the measures and design characteristics that are most likely to assist in achieving the objective of more efficient and effective regulations.

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Strengths and weaknesses of the various aspects of RIA and possible leading practices that jurisdictions might consider adopting are discussed more fully in the following chapters. However, by way of comparison, examples of key positive features and areas for improvement in each jurisdiction are listed in the annex to this chapter. This is not intended to be comprehensive, but rather illustrates differing aspects of the RIA processes across jurisdictions.

There are at least some features of the RIA processes in each jurisdiction which the Commission regards as a leading practice. But in all jurisdictions, there is also considerable scope for improvements that are likely to enhance the efficiency of the processes for both oversight bodies and agencies and the effectiveness in delivering improved regulatory outcomes. In addition to the positive practices adopted in one or more of the jurisdictions (as noted throughout the remainder of the report), consideration could be given to adopting some of the leading practices that are not currently a feature of any of the RIA systems in Australia (these relate, in particular, to transparency and accountability of RIA processes).

## **2.2 How effective are RIA processes?**

The contribution of RIA processes to better decision making, regulatory outcomes and ultimately community welfare can be assessed by considering whether these processes have made a significant difference beyond what would have happened anyway.

A fundamental problem is the difficulty of establishing the nexus between a RIA process (or even more so, individual aspects of RIA, such as particular accountability arrangements) and improvements in the quality of regulation. Typically, a range of regulatory policies, strategies and institutional arrangements are likely to play a part. It is also generally difficult to determine what would have occurred if the particular regulation were not implemented or if a different institutional framework existed — would a process without formal RIA have mostly resulted in selection of the same options or very different outcomes?

### **The Commission's framework for assessing RIA performance**

A starting point for benchmarking RIA processes is the identification of what might be considered to be best practices for RIA. COAG has agreed on a number of best-practice principles for regulation making and the OECD has provided substantial guidance over many years (appendix C). For example, the OECD Council recently approved the *Recommendation of the OECD Council on*

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*Regulatory Policy and Governance* (OECD 2012a), advocating particular practices for RIA. Neither COAG nor the OECD, however, suggest a single best practice model for RIA.

Overall, the Commission found that the RIA requirements across Australia all have a reasonably high degree of consistency with the OECD and COAG guiding principles. While a detailed assessment against these principles is provided in the remainder of the report, this chapter highlights key areas where improvements may be necessary in jurisdictional system design.

The Commission also looked beyond system design to consider how well RIA processes have been implemented in practice. A range of performance indicators are used to evaluate the contribution of RIA processes. These are discussed under the following headings:

- Influence on policy development and regulatory outcomes
- Is RIA being undertaken when appropriate?
- Quality of analysis
- Capacities to undertake RIA
- Transparency and community understanding of regulatory issues
- Effectiveness of RIA process oversight

### **Influence on policy development and regulatory outcomes**

The best measure of the contribution and effectiveness of RIA is the extent to which it has actually influenced policy development, regulatory decision making and ultimately the quality of regulatory outcomes. In principle, RIA may make a positive contribution in a number of ways (box 2.2).

Any change to the policy (or recommended option) during the course of the development of the RIS, or the RIA process more broadly, is only *prima facie* evidence of the influence of RIA. Further information is required to verify the extent to which RIA was the actual cause of a change. The clearest evidence of RIA influence would be any direct public reference by decision makers to the role played by RIA, for example, the persuasive analysis of a RIS influencing the policy option chosen, or more generally evidence that decision makers are demanding good quality analysis before making decisions.



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**Box 2.2      How can RIA influence policy development and regulatory outcomes?**

**Changing the regulatory culture within departments and agencies** — by, for example, improving awareness amongst regulatory officials of key regulatory quality issues and ensuring greater emphasis in policy development processes on consultation and consideration of the costs and benefits of regulatory and non-regulatory alternatives.

**Stopping poor regulatory proposals or facilitating the removal of regulations** — by providing the evidence and analysis during the policy development process that leads to the withdrawal of a proposal for new regulation or the removal of an existing regulation, for example by:

- providing a better understanding of the nature and magnitude of the problem
- causing a reconsideration of the appropriateness of the policy objective to be achieved
- identifying a non-regulatory solution to a problem that generates greater net benefits for the community
- demonstrating that the status quo is a better solution to the problem.

Where regulation is found to be justified, **influencing the design of the regulation** so as to increase net benefits — either by improving effectiveness, narrowing coverage, reducing stringency or otherwise reducing unnecessary compliance costs.

**Discouraging agencies from putting forward poor proposals** in the first instance — RIA can also create a disincentive for government agencies to put forward regulatory proposals that would be unlikely to withstand rigorous scrutiny:

... the mere presence of an evaluation, along with an evaluation process, may prevent agencies and others from adopting economically unsound regulations in the first place. This deterrent effect will not appear in most statistical analyses, but is nonetheless real, and indeed, could be the most important function of economic analyses. (Hahn and Tetlock 2008, p. 79)

In practice, such evidence is rarely publicly available and few studies have attempted to systematically estimate the impact of RIA on actual regulatory decision making in Australia. However, case study examples and anecdotal evidence from oversight bodies, agencies making regulation and decision makers can provide insights into specific revisions to regulatory proposals or other changes to outcomes that may have resulted from the RIA process.

Even where RIA has been effective in improving the quality of information available to decision makers on the consequences of different policy options, this is not sufficient to ensure that better regulatory decisions are actually made. Decision makers may, for political or other reasons, not adopt the option recommended in a RIS.

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### *Views from the Commission's surveys*

The majority of agencies surveyed by the Commission reported that RIA has not merely replaced policy development processes that would otherwise be undertaken, but that it has led to a more systematic consideration of costs and benefits and has improved decision makers' understanding of impacts. Amongst oversight bodies, there was also widespread agreement that RIA has led to a more thorough analysis of the nature of the problem, and consideration of a broader range of options, than would otherwise have occurred.<sup>1</sup> Less than half the oversight bodies and a smaller proportion of agencies also agreed that RIA had influenced regulatory decisions not to proceed with a regulatory action, by demonstrating that either the status quo or a non-regulatory option was preferable or had influenced the design of a regulation by demonstrating that a particular option was more effective or efficient.

The Commission's survey also provided some insight into perceptions about the effectiveness of RIA in improving the quality of regulation. Overall, regulatory oversight bodies in Victoria and in the Northern Territory estimate that between 10 and 30 per cent of regulatory proposals were modified in a significant way or withdrawn because of RIA processes, while oversight bodies in all other jurisdictions, and nearly all agency respondents, estimated the proportion to be less than 10 per cent. COAG proposals were more likely (than those of individual jurisdictions) to be reported by agencies as having been altered because of the RIA process.

The oversight bodies in New South Wales, Victoria, Western Australia, the Northern Territory and the ACT considered that overall the RIA process in their jurisdiction had been effective in improving the quality of regulation. The oversight bodies in these five jurisdictions and in Tasmania considered that RIA has also been effective in reducing unnecessary impacts. The perceptions of agencies about the influence of RIA were less positive with around 40 per cent agreeing that RIA had been effective in improving the quality of regulation and a similar proportion agreeing that RIA had been effective in reducing unnecessary impacts of regulation.

### *Examples of RIA influence in Australia*

With the exception of Victoria, there appears currently to be no systematic reporting of instances of proposals significantly changed as a result of RIA. The Australian Government has reported this information in the past. The Office of Regulation

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<sup>1</sup> The Office of Best Practice Regulation (OBPR), as the regulatory oversight body for both the Commonwealth and COAG, did not complete the perception based survey questions as they considered that such matters represent policy questions for government.

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Review (ORR — the predecessor to the OBPR) reported that in 2004-05, the preferred option within a RIS changed in 14 per cent (10 out of the 71) of RISs which were prepared and considered by decision makers (PC 2005).

In the context of the number of regulations that have been subjected to RIA processes, the Commission identified relatively few concrete examples of RIA influence (box 2.3). Although, in addition to public examples, oversight bodies in every jurisdiction and a few individual agencies that the Commission met with had confidential examples of proposals pulled from Cabinet agendas or changed substantially because of RISs.

Conversely, it is also easy for stakeholders to identify numerous examples of poor regulatory outcomes, notwithstanding the existence of RIA systems (see, for example, Australian Food and Grocery Council, sub. 5, Plastics and Chemicals Industries Association, sub. 8 and Institute of Public Administration Australia (IPAA) 2012).

While some of these examples may have bypassed the RIA process (including some granted a formal exemption), in other instances ineffective application of the RIA process or decision makers' lack of regard for the RIS content has failed to stop poor regulation being made. In the view of a number of participants, this includes some recent examples of major national reform processes, including in relation to the development of uniform occupational health and safety laws (chapter 6).

Some participants submitted that the RIA process focuses more on some types of regulatory impacts than on others and that this can adversely influence the regulatory outcome. For example, the Consumer Action Law Centre (sub. 16, p. 2) point out that in their experience, 'the RIA process tends to focus more heavily on the costs regulation will create for business than on the less tangible benefits that regulation will provide or on the cost to affected groups of retaining the status quo.' Similarly, the Western Australian Local Government Association (sub. 6) considered that RISs do not adequately assess social and environmental impacts.

However, the claims made in submissions about the quality of regulatory outcomes need to be interpreted with a degree of caution. In some instances, such as where no RIS was undertaken for significant reforms, participants' claims of poor regulatory outcomes may be legitimate. In other circumstances, claims of poor regulatory outcomes may simply reflect the poor implementation of an otherwise well-considered option, or alternatively, that the chosen approach does not accord with participants' preferred approach.

## Box 2.3 Examples of the influence of RIA in Australia

### Proposal stopped, withdrawn or removed

The Regulatory Gatekeeping Unit in Western Australia (RGU WA) reported, in its response to the Commission's survey, that preliminary impact assessment or RIA had been effective in stopping some regulatory proposals, some at a very early stage:

For a number of proposals, the case for regulatory change fails at this early [preliminary impact] assessment stage, without resort to the more rigorous assessment required through a Regulatory Impact Statement ...

In ... [the 2010-11] reporting year, RIA resulted in savings to business of \$43.1m with two proposals not proceeding to the decision maker ...

In 2011-12, early RIA examination of two proposals revealed costs that could be avoided if amendments were made to the original policy. Assessment of one proposal showed that there would be regulatory duplication resulting in costs to Government of approximately \$150,000. This proposal was changed to address regulatory costs. A second proposal was subsequently amended following a preliminary examination under RIA, resulting in savings to consumers of almost \$4 million. (Western Australian response to PC RIA Survey 2012, regulatory oversight body survey)

*Do Not Call Register (Cwlth)* — following release of the RIS and consultation, 'the Government did not proceed with the policy to extend the register to business numbers as the regulatory cost far outweighed the benefits of the proposed regulation' (Australian Chamber of Commerce and Industry (ACCI), sub. 2, p. 3).

*Bookmaking related registration fees (Vic)* — the Government decided not to proceed with a proposal to introduce a registration fee for 'key employees' of bookmakers. (Victorian Competition and Efficiency Commission (VCEC) 2011a, p. 54)

*Public Health and Wellbeing Regulations 2009 (Vic)* — after discussions with the VCEC, and the development of estimated costs as part of the RIS process, the Department of Health decided not to proceed with a proposal to extend existing daily water testing requirements (amongst other regulatory controls) for public swimming pools to private pools in multi-dwelling buildings. This was because the expected benefits were not anticipated to exceed the expected costs. The RIS estimated the incremental cost saving associated with removing this part of the proposal to be \$3.1 million per annum or \$25.8 million over 10 years. (Abusah and Pingiaro 2011, p. 8)

### Design of regulation improved

*Graduated Licensing System for new drivers (Vic)* — VicRoads began considering the RIS ... early in the process of developing the proposal. After initial discussions with the VCEC and further analysis of different options, VicRoads decided to change the proposal from requiring a Statutory Declaration with the submission of all learner log books to simply requiring the completion of a form in the log book. This decision reduced the expected costs imposed on learner drivers by \$4.84 million over 10 years. (Abusah and Pingiaro 2011, p. 8)

(continued next page)

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### Box 2.3 (continued)

*Petroleum Regulations (Vic)* — remade (sunsetting) regulations provide ‘greater flexibility to firms to meet their obligations by moving from a prescriptive to an outcome based regulatory framework ...’ and ‘reduce the number of “consents” firms are required to obtain ...’ (VCEC 2011a, p. 54)

*Second-hand Dealers and Pawnbrokers Regulations (Vic)* — while preparing to remake the sunsetting regulations, the Department of Justice considered the impacts of various elements of the existing framework. The sunsetting regulations contained a requirement for second-hand dealers and pawnbrokers with computerised record-keeping systems to produce a daily printed and sequentially pre-numbered hard copy of all transactions. The costs of this requirement were estimated in the RIS to be around \$2.1 million per annum and \$17.5 million over 10 years. After discussions with Victoria Police on the costs and benefits of the existing approach, the Department decided not to require a daily print-out of transactions. (Abusah and Pingiaro 2011, p. 8)

*Taxi driver standards (WA)* — proposed legislative changes were significantly amended during the RIA process, following feedback from SBDC [Small Business Development Corporation], to reduce the cost impacts for small business (SBDC, sub. 25, p. 4)

*Proposed changes to mineral royalties (Tas)* — input from industry resulted in ‘a more equitable apportioning ... of the components of the royalty payment points ...’ (Tasmanian Parliamentary Standing Committee on Subordinate Legislation (SCSL), sub. 3, p. 4)

#### **Other examples of impact on policy development**

The RGU WA indicated that preliminary impact assessment is effective in flagging those proposals that have insufficient information on the problem or issue to be addressed, unaligned objectives (and therefore regulatory options) and inadequate consultation or outcomes that are unsupportive of the recommended regulatory proposal. (PC RIA Survey 2012)

The officers undertaking RIA in the Victorian transport portfolio (sub. 17, p. 3) provided two examples (development of the Owners Corporation Act and Graduated Licensing for Motorcyclists) where early integration of the RIA framework, including consultation at various stages of the process, had influenced policy development, for example by identifying and clarifying issues, and contributing to a better understanding of problems and the impact of solutions.

### *Lessons from other studies*

There is a significant body of official reports and academic literature that has attempted to evaluate aspects of the performance of RIA systems (mainly in the United States, United Kingdom and European Union), although the main focus has been on the quality of RIA documents (appendix E).

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Where studies have sought to assess the actual contribution to policy making and regulatory outcomes, the findings have been mixed, ranging from a marginal effect or no effect to a significant positive impact, in particular cases. However, even where positive impacts have been found, evidence of any significant general impact on policy outcomes is weak.<sup>2</sup>

As with the evidence presented in this report, the studies have mostly been based on case study or anecdotal information, including the perceptions of officials and decision makers drawn from interviews and surveys. Some studies have taken a more systematic quantitative or statistical approach (see, for example, Sobel and Dove 2012; Farrow and Copeland 2003), to try to determine how much any overall observable change in outcomes corresponds with a particular process or feature.

Overall, a review of these studies reinforces the difficulty of finding any conclusive evidence that would enable better outcomes to be attributed in any systematic way to RIA. However, the limited evidence of the influence of RIA does not necessarily demonstrate a lack of impact. Rather, it may largely reflect methodological difficulties and an inability to collect the necessary information (for example, due to confidentiality of that information). However, to some extent it also reflects a failure to draw on information, that is potentially available, that would shed light on the effectiveness of RIA.

Nevertheless, the OECD has for many years (see for example, OECD 2002) reported widespread agreement amongst regulatory management officials that RIA ‘when it is done well’ reduces the number of low-quality and unnecessary regulations, improves the cost-effectiveness of regulatory decisions, increases the transparency of decisions, and enhances consultation and the participation of affected groups. However, it also acknowledges non-compliance and quality problems associated with the implementation of RIA and that ‘the results of many reviews of the effectiveness of RIA suggest mixed success with influencing the quality of individual regulations’ (OECD 2009b, p. 3).

International experiences show that there can be divergence between what is accepted as sound regulatory policy in principle and what happens in practice:

It is thus paramount to ‘mind the gap’ between principles and practice. Regulatory policies are often well defined on paper but putting them into effective practice is proving more elusive. Tools and processes may be defined at a strategic level, but considerable work is then needed to give them concrete substance at the practical level

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<sup>2</sup> See for example — Australia (Carroll 2010, Carroll et al. 2008, Deighton-Smith 2007); United Kingdom (NAO 2010a, Russel and Turnpenny 2009); United States (Shapiro and Morrall 2012, Morgenstern 2011, Hahn 2010, Farrow 2000); Europe (European Parliament 2011, European Court of Auditors 2010, Renda 2010).

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of policy and law making. This appears to be especially true of ex ante impact assessment. (OECD 2011, p. 19)

This gap between policy and practice can lead to a number of potential problems, including: wasting scarce review resources; breeding cynicism within business and government about the value of RIA processes and reviews; and, by giving the appearance of a rigorous review, giving unwarranted legitimacy to poor or unnecessarily burdensome regulation. Radaelli (2009, p. 13) refers to one possible view of RIA as an example of ‘symbolic politics’ — governments send signals to the business community that ‘something is being done’ and invest in symbols of evidence-based policy. In a study of the United Kingdom’s RIA process, Boyfield (2007, pp. 9, 11) noted RIA was viewed by some stakeholders as a ‘bureaucratic sham’, treated ‘as a bolt on extra designed to justify a regulation’ rather than being used to shape and inform policy formulation. More generally, Renda (2006) concluded:

Evidence from other international experiences as well as from the past EU experience reveal that it is preferable to not have RIA, than to have a bad one. (p. 135)

Other studies report a general trend toward deregulation or less restrictive and prescriptive regulation, but according to Hahn (2010, p. 267) ‘it is not clear that regulatory evaluation has had much of an impact on these trends’. Moreover, Baldwin (2005, p. 14) finds that RIA ‘has a more limited capacity to deliver smarter regulation than is often appreciated’. The OECD (2011, p. 25) notes that RIA has mostly been designed for command and control regulations and the ‘increasing use of performance-oriented regulations and regulatory alternative[s] provide substantial challenges to the effectiveness of RIA’. Deighton-Smith (2008) considers that RIA can discourage consideration of more imaginative and innovative (and therefore more difficult to analyse) regulatory alternatives. Some critics of RIA suggest that it can actually have detrimental impacts on the quality of regulations because it ‘devalues the benefits of regulation and hence leads to insufficiently protective regulations’ (Shapiro and Morrall 2012, pp. 1-2).

### **Is RIA being undertaken when appropriate?**

The RIA process should ideally commence as soon as an agency identifies a problem that it considers might require regulation that could potentially have significant impacts on the community or a part of the community.

Regulation should be defined broadly to include all new or amended regulatory instruments or other instruments where there is an expectation of compliance (chapter 4). The broad application of RIA removes the incentive for agencies to favour one instrument over another on the basis of it being subject to RIA or not.

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### *Targeting of RIA resources*

Given the significant costs of undertaking RIA (see below), the targeting and prioritising of effort and resources to those regulations where impacts are most significant and where the prospects are greatest for improving regulatory outcomes, is particularly important to ensure RIA efficiency.

All jurisdictions have broad categories of regulation that fall outside the scope of RIA. These vary between jurisdictions and the Commission has not sought to make an assessment of the appropriateness of individual exception categories. Generally, there appears to be a clear rationale for these exceptions, but in some instances there could be greater clarity provided regarding their scope and applicability. For example, in determining whether the common exception for ‘regulatory proposals previously assessed’ applies to a specific proposal, agencies might be unclear as to how recent the previous assessment needs to be and what criteria the previous assessment needs to meet. There are some more ad hoc exclusions (‘carve outs’) at the Australian Government level, negotiated with individual agencies, which until recently, lacked transparency (see chapter 5 and OBPR sub. DR35).

Tests of significance are used in nearly all jurisdictions to identify and exclude those regulations that are likely to fall below a threshold at which RIA is likely to be cost effective. The nature and extent of the initial screening that is required to determine whether threshold significance tests are met differs across jurisdictions. Queensland, Western Australia and the Northern Territory have formal processes of preliminary impact assessment (PIA). Some stakeholders identified scope for the efficiency of these processes to be improved, for example by not requiring PIA where a proposal very clearly triggers the need for a full RIS (chapter 4).

In those jurisdictions where oversight bodies are consulted in relation to all regulatory proposals, it is important that the costs imposed on the proponent agency and the oversight body are the minimum necessary. Reducing the administrative burden for agencies and the oversight body can increase the cost effectiveness of RIA systems.

Clearer guidance on regulation subject to RIA, the scope of exceptions and how significance tests should be interpreted, can potentially reduce the extent to which oversight bodies are required to be consulted on proposals that are either not subject to RIA or do not trigger the requirement for a RIS.

For the majority of proposals, the completion of a basic pro forma checklist may be sufficient to make a judgment on the need for a RIS and to provide a record of the basis for the decision taken. Further information or impact analysis may only be



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necessary in a small proportion of cases where further evidence is required to clarify the significance of the impacts.

Some RIA systems (for example South Australia) reduce the burden further by allowing agencies, in the first instance, to self-assess whether a RIS is required. This approach can facilitate more effective integration of RIA and the necessary cultural change within agencies. It recognises that it is the agency's responsibility to undertake RIA and it should generally have the best understanding of a regulatory proposal's impacts and the necessary technical expertise or knowledge to assess whether a RIS is required. Greater use of self-assessment is consistent with the risk management approach adopted in other regulatory areas, such as taxation. As in those areas, additional accountability measures need to be implemented to ensure agencies have sufficient incentive to comply (chapter 8).

It is also important that once the requirement for a RIS is triggered, that the resources devoted to undertaking the analysis are commensurate with the likely impacts of the proposal. This is one aspect of the quality of analysis discussed below.

### *Proposals with significant impacts are bypassing RIA*

A number of stakeholders have identified regulatory proposals with significant impacts that are bypassing RIA requirements (see for example, Master Builders Australia (MBA), sub. 19 and ACCI, sub. 2). There are a number of explanations for proposals with significant impacts not having a RIS or escaping RIA altogether, including:

- the agency and/or oversight body do not adequately consult with stakeholders to correctly gauge the importance of a regulatory proposal
- the responsible Minister chooses to take the proposal to Cabinet notwithstanding its non-compliance with RIA requirements
- in the case of quasi regulation, it simply 'slips through the cracks', for example because:
  - it is not submitted to Cabinet (WA State Government, sub. 24)
  - of the difficulty (and cost) of tracking such regulation
  - in some instances, of the uncertainty surrounding what is deemed quasi regulation
- an exemption is granted.

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Of greatest concern, however, is the perception that in some jurisdictions proposals (often politically contentious) with highly significant impacts are more likely not to be subjected to adequate RIA than other less significant proposals, either because:

- they are more likely to be granted an exemption from the process by the Prime Minister, Premier, Treasurer or relevant delegated officer, or
- where no exemption is granted, it is more likely that a RIS will nevertheless not be prepared at all for proposals with highly significant impacts or that the analysis in the RIS will be assessed as inadequate.

There is very little RIA compliance data available that allows a comparison to be made of compliance rates for highly significant proposals relative to other proposals. However, the Australian Government OBPR (and previously the ORR) did publish such detailed information over several years, up to 2009-10. For the three years 2007-08 to 2009-10, the proportion of proposals for which adequate impact analysis was undertaken for proposals with highly significant impacts (25, 0 and 60 per cent, respectively) was substantially lower than the equivalent proportions for all other proposals (89, 85 and 81 per cent).<sup>3</sup> In more recent years (based on Commission estimates), it appears that less than 40 per cent of proposals with highly significant impacts had a RIS.

It is appropriate that the circumstances that would justify an exemption or waiver are limited (such as to emergency situations where a clear public interest can be demonstrated) so as to constrain the degree of discretion in granting such exemptions. Further, where an exemption is granted, best practice would suggest that there be transparency in the reasons for granting the exemption and ultimately, transparency on the likely impacts of the proposal.

### *Lack of integration of RIA into policy development processes*

There is also concern amongst stakeholders that RIA processes are often not effectively integrated, or integrated early enough, in the policy development process. The Commission was provided with numerous case study examples of regulations where RIA was conducted, but it commenced too late to integrate proper consultation processes or to have any real influence on policy development. Since RIA provides an assessment of regulatory and non-regulatory alternatives, it is

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<sup>3</sup> Proportions were calculated by the Commission based on OBPR published data (OBPR 2008a, 2009, 2010) on compliance and exemptions granted, for the more significant proposals, in each of the three years. The OBPR changed its terminology for more significant proposals, using the term ‘highly significant’ in 2007-08 and the term ‘major regulatory initiatives’ in 2008-09 and 2009-10, but the Commission understands that the methodology for classifying such proposals did not change.

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important to integrate it at an early stage of the process — ideally as soon as it is considered that regulation may be necessary (chapter 10).

It is apparent that the RIS is often written after a decision has been made and effectively becomes an ex post justification for that decision. Over 60 per cent of respondents to the Commission's survey of government agencies identified this as one of the main barriers to using RIA to better inform policy development. RISs were described by some stakeholders as being 'retrofitted' or as an 'add-on extra'.

While there was evidence of some COAG RISs also being written after a decision had been taken (for example, MBA's concern about the National Occupational Licensing System (sub. 19)), the Commission gained the strong impression that the essential elements of RIA are firmly embedded in the regulation development processes of at least some COAG ministerial councils (Standing Council on Energy and Resources), as well as in some of the national standard setting bodies (such as the Australian Building Codes Board; Australian Transport Commission; Food Standards Australia New Zealand), and independent Commonwealth agencies (for example, Australian Securities and Investments Commission).

Strong political commitment, effective training and guidance, and appropriate incentives/sanctions and accountability mechanisms can play a part in ensuring successful integration of RIA more generally (chapter 10).

### *Application of RIA to reviews of regulation*

Australian jurisdictions employ a range of approaches to periodically reviewing the stock of regulation to ensure that it remains necessary, effective and efficient. Consistent with OECD guidance (OECD 2012a), the RIA framework should generally be applied when conducting such reviews. In practice, the extent to which RIA is required when conducting such reviews varies across jurisdictions and also depends on the nature of the review or the regulation's impacts (chapter 9).

The large volume of sunseting instruments that require review is placing an increasing burden on review resources in some jurisdictions. The Commission recently noted, for example, that the very large number of sunseting Commonwealth legislative instruments due for renewal 'could place an overwhelming burden on departments and agencies and the OBPR' (PC 2011, p. LI).

In such circumstances there is an increased risk that instruments will be remade without adequate impact analysis or proper consultation with stakeholders. At the same time, some agencies noted there are many examples of regulations that are

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integral to the operation of a particular sector of the economy, but which must nevertheless be subjected to rigorous stakeholder consultation and agency review before being remade. There are also concerns that reviews of subordinate legislation are being conducted in an uncoordinated and inefficient manner — for example, related regulations are reviewed separately and subordinate regulation is reviewed in isolation of the relevant primary legislation, thereby constraining the improvements that can be considered.

The Commission notes only around one quarter of the respondents to the survey of agencies consider that sunseting has made a substantial contribution to improving regulatory quality and more than 40 per cent consider that sunseting requires too great an investment of resources for the benefits achieved.

Given the potentially large investment of RIA resources associated with sunseting reviews, it is essential that the processes for determining the timing and scope of reviews consider ways to improve review efficiency (chapter 9).

## **Quality of analysis**

While good quality impact analysis does not guarantee better regulatory decision making and more effective and efficient regulatory outcomes, it is generally accepted that higher standard RIA and associated consultation is more likely to have an influence on decision making than poor standard RIA. Renda (2010, p. 23) considers that ‘the precondition for making RIA a success is to “first make it good” ...’ Indeed, a poor RIS could have a detrimental impact on the quality of outcomes (for example, by presenting inaccurate analysis that wrongly suggests one alternative is preferable to another). On the other hand, it may be hard for decision makers to ignore the recommendations of very rigorous RISs.

When determining the depth of analysis or the resources that should appropriately be devoted to data collection, agencies must take into account the likely impacts of the regulatory proposal and also the extent to which the analysis has the potential to add value to or influence the policy development process. As noted in the COAG guidebook:

The likely benefits of obtaining and analysing additional information should always exceed the costs of so doing. Better information often reduces the uncertainty surrounding estimates, however, if a proposal is already known to be clearly viable or unviable, the pay-off from obtaining extra information may be negligible. (COAG 2007, p. 25)

And, importantly, detailed analysis in a RIS with, for example, the use of extensive quantification, does not necessarily imply quality or rigour.

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An elaborate and detailed analysis of a problem that has been wrongly conceptualised may well be worthless.

But a ‘back of the envelope’ analysis of a problem that has been thought through correctly will, at the very least, be a helpful first step. (COAG 2007, pp. 25-26)

**Box 2.4      Alternative approaches to assessing the quality of RISs**

**Compliance rates** — what proportion of RISs are assessed by oversight bodies or ministers (where responsible for certification) as adequate/inadequate? The value of this approach to assessing RIS quality relies on the quality of the adequacy assessments that are made (Harrison 2009). Moreover, its use is often limited by the lack of publicly available information on compliance. The level of monitoring and public reporting of compliance with RIA requirements in Australia varies substantially across jurisdictions (chapter 3), with the Commonwealth, COAG and Victoria having by far the most systematic reporting.

**Scorecard/content analysis** — this approach is based on an objective ‘yes/no’ checklist of RIS features and analytical content. The key advantage of this approach is that it does not require a detailed knowledge of, or assessment of the appropriateness of, assumptions, methodologies, calculations, or about the accuracy of results. The main disadvantage of this approach is that a RIS can score well but still be of poor quality. Nonetheless, since the questions generally used in scorecards are quite basic, a RIS with a low score is unlikely to be of high quality.

**In-depth qualitative assessments of RISs** — usually based on individual case studies, this approach can allow judgments to be made about the actual quality and rigour of the analysis. It is, however, more subjective and requires much more time to conduct. Hence, this approach is generally only feasible for examining a small sample of RISs and is therefore not particularly well suited to studies involving multiple jurisdictions.

**Ex post review of RISs** — actual regulatory impacts and outcomes are compared with those predicted in the RIS as the basis for assessing the accuracy of the estimates and the appropriateness of assumptions and methodologies. However, a limitation with such comparisons is that there will very often be other explanations for discrepancies between ex ante and ex post measures of costs and benefits. This would include, for example, the extent to which the implemented policy has deviated from the design, as specified at the time the RIS or other policy changes adopted after the RIS was completed. Hahn (2010) also points out that as long as the reviewer is not the same as the original author of the RIS, some of the difference could be explained by different assumptions being made or the same data being interpreted differently. Even where the original analyst conducts the ex post review their views and judgments regarding the same evidence may evolve over time.

The quality of the RIS document can be assessed using a variety of indicators and analytical approaches (box 2.4). A small number of Australian studies and a more significant number of overseas studies have assessed RIA quality using mainly

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scorecard analysis, to a lesser extent qualitative assessments and in a few cases ex post reviews. Overall, the findings have been disappointing, with most studies revealing significant deficiencies in the quality of analysis in RIA documents and, in many, little evidence of improvement over time. A summary of the key findings of a selection of these studies is provided in appendix E.

For this study, the Commission undertook its own content analysis of 182 RISs from all jurisdictions. While some RISs stood out as being very comprehensive, participants raised significant concerns with the quality of some other RISs, providing a number of examples of analysis they considered to be deficient. Based on its own analysis and the views of stakeholders, the Commission identified common areas for improvement in RISs, including: a clearer identification and assessment of the nature and magnitude of the problem and the rationale for government intervention; more comprehensive consideration of wider range of alternative options; more systematic assessment of costs and benefits and greater consideration of implementation and enforcement of regulatory proposals (chapter 6).

### *Is RIS analysis proportionate?*

The Commission found, based on its assessment of RISs, that generally the level of analysis appears to be broadly correlated with the significance of a proposal's impacts. However, this was not always the case. The Commission saw examples of RISs for relatively minor proposals that seemed to contain a disproportionately high level of analysis (many of these were for sunset regulation) — this is consistent with the observation of the Centre for International Economics that 'full RISs are often required for proposed regulatory changes which do not target significant economic problems' (sub. 14, p. 7). There were also examples of proposals with more major impacts where the impact analysis did not appear to be significantly more detailed or rigorous than some lesser proposals and, as discussed, some important regulatory changes are escaping the RIA process altogether.

It is also important that inefficient duplication of previous consultation and impact analysis is avoided. In certain cases, elements of the RIA process will have effectively been satisfied through earlier policy development processes. This could include, for example, extensive consultation in relation to discussion papers, 'green papers' and the like, or in some cases comprehensive and rigorous reviews may have been conducted and form the basis of a regulatory proposal. The RIS should appropriately be able to draw on the review findings and supporting evidence — this could include, for example, evidence on the nature and magnitude of the problem and the justification for a regulatory response.

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In certain cases where reviews have been conducted it may be appropriate to waive altogether the requirement to prepare a RIS — this could be limited to those instances where the review met certain criteria for independence and rigour of analysis and only to those cases where the government’s proposal is substantively consistent with the recommendation of the review (chapter 5). Even where a RIS is still required, the evidence and analysis contained in an earlier review report would generally make the preparation of the RIS document more straightforward.

## **Capacities to undertake RIA**

In around half of the jurisdictions, responsibility for assessing whether the RIS requirements are triggered rests with the agency sponsoring the regulation. Furthermore, in all jurisdictions, as is generally the case overseas, responsibility for preparing the RIS rests with the agency. This improves ‘ownership’, contributes to cultural change and integration of RIA into decision making, and enables the process to draw on expertise and information presumed to reside in the sponsoring agency.

Some agencies, particularly in smaller jurisdictions, consider that there is a shortage of personnel with the skills required to undertake RIA (chapter 10). In many agencies where very few RISs are prepared, it is typically the case that an officer having completed a RIS will not be involved in the preparation of another for several years, if at all. Therefore it can be difficult for agencies to maintain the skills acquired.

More generally, systematic and ongoing efforts are required to educate those responsible for RIS preparation. This includes not only developing the necessary skills and knowledge of essential methodological and data collection issues, but also an understanding of the purpose of RIA and the need for it to be integrated into policy development processes. While agencies are utilising consultants where there are deficiencies in in-house expertise, effectiveness and efficiency of RIA will be enhanced where the involvement of consultants provides an opportunity for skills transfer. Good practices in RIA training, guidance and capacity building are discussed in chapter 10.

Developing the necessary competencies within agencies to undertake RIA is potentially a very important contributor to its effective integration into policy making and the preparation of better quality RISs. However, the Commission notes that in some cases it is the larger central agencies (that could be expected to have the resources and skills required), which have poor records of compliance with RIA requirements — emphasising that commitment to the process is also essential.

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## Transparency and community understanding of regulatory issues

The transparency in regulation making and review provided by RIA processes can improve accountability and reduce the risk of regulatory capture by particular interest groups. It can also facilitate the development of better options and better designed regulation by providing information to decision makers and an opportunity for stakeholder input. Moreover, by providing a framework for involving stakeholders in the policy development process and communicating relevant information to decision makers and the community, RIA can go some way to alleviating the risk of communities not accepting policy decisions and their regulatory outcomes. There are many examples of policies that have been well developed and involved considerable thought and analysis but, for want of good consultation and communication, have led to a public backlash and come to be seen as regulatory failures (IPAA 2012).

In responding to the Commission's survey, half of the oversight bodies and just over 40 per cent of agencies considered that the RIA process in their jurisdiction had, by building stakeholder awareness and support for the decision made, influenced regulatory decisions or the quality of regulation.

Consultation is a particularly important aspect of transparency and it is vital that it is conducted effectively. Like all elements of RIA, it should also be proportionate to the likely impact of a regulatory proposal. All Australian jurisdictions have a requirement that those affected by significant regulatory proposals be consulted during the policy development process.

Examples of good practice consultation were highlighted in submissions and meetings with stakeholders, and the two stage approach to RIA consultation used in COAG, Queensland and Western Australian processes was identified as facilitating improved stakeholder input. However, a number of concerns about consultation were also raised (chapter 7). Participants commented, for example, that sometimes consultation either does not occur or occurs too late when the opportunity to influence the regulatory outcome is limited. In some jurisdictions, the relatively late stage that consultation on the RIS usually occurs may explain the typically small number of submissions received.

Some consultation was also considered inadequate in terms of the range of stakeholders consulted, the time allowed for feedback or the extent to which views were taken into account in developing the final proposal. Instances of poor consultation practice, not surprisingly, appear to be more common when agencies are under pressure to develop a regulatory response to a problem very quickly.



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One indicator of the effective contribution of RIA to transparency is the increasing number of references in several jurisdictions to RISs in public debates on regulatory issues, for example by politicians, industry stakeholders, review bodies and the media. In particular, there has been a significant increase in such references to Australian Government RISs since these became available on a central RIS register. In those jurisdictions that either do not publish RISs or have not facilitated easy access to RISs, transparency has been seriously hindered.

The way RIA is communicated to decision makers is also very important. Clear communication of the analysis, options and impacts, and the use of executive summaries, can facilitate its contribution to informing decision making.

### **Effectiveness of RIA process oversight**

Each jurisdiction has a government body tasked with overseeing the operation of its RIA process (chapter 3). Although, ultimately, responsibility for the quality of RISs must rest with sponsoring agencies, clearly it is also vital that oversight bodies are adequately resourced and the staff have the necessary skills and expertise to provide sound and consistent advice to agencies and to assess RIS quality.

In South Australia and the Northern Territory several agencies contribute to the performance of the oversight function. This allows specialist expertise residing in those agencies to be drawn on to assess the adequacy of RISs and broadens the involvement of agencies in working toward quality policy development processes. The Commission does not, however, have sufficient evidence to determine whether the ‘committee-style’ oversight model is more effective than a single body with sole responsibility.

Oversight body involvement in the RIA process can be influential, as noted in some of the examples of RIA-attributed policy changes outlined above. Generally, however, it is difficult to disentangle the relative contribution of different factors in influencing changes to policy outcomes. Responses to the Commission’s survey of agencies were fairly positive about the contribution of oversight bodies in their jurisdictions with respect to two key aspects of their roles:

- Around 60 per cent of respondents considered that the oversight body had been helpful in improving the quality of draft RISs.
- 70 per cent of respondents considered that provision of oversight body advice and assessments had been timely.

In addition, performance information provided in VCEC and OBPR annual reporting (see, for example, VCEC 2011a and OBPR 2011a) suggests a high level

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of satisfaction with the training and advice provided by these oversight bodies. Both these bodies regularly survey agencies undertaking training or preparing RISs to obtain feedback on perceptions on the quality of the service the oversight body provides, a practice others might consider adopting.

The perceptions of agencies about oversight body performance need to be interpreted with a degree of caution. There can be an inverse relationship between objectively better performance by the oversight body and the extent to which the agency perceives that performance as being of high quality. This is because an agency will often be motivated to get a RIS prepared and cleared with the minimum resource commitment and in the shortest time. Thus, the performance of an ‘easy to please’ oversight body, whose expectations with respect to the standard of analysis in the RIS are relatively low, might be rated more highly than an oversight body whose standards are perhaps more appropriately set higher and are perceived to be less easy to deal with and to create more work for the agency.

On timeliness of advice, allowing the oversight body too little time to assess and make comments on RISs makes meaningful review, especially of complex RISs, difficult, but too long a time period may impose unwarranted delay. There needs to be some flexibility and utilisation of triage mechanisms to ensure proportionality and cost effectiveness, but also appropriate incentives for oversight bodies to work efficiently. Periodic review of their performance by an independent body (chapter 8) could provide such incentives.

While, overall, the evidence presented to the Commission does not suggest widespread dissatisfaction about the effectiveness of RIA process oversight, some concerns were raised, which suggests possible areas for improvement.

- Agencies in several jurisdictions suggested that on occasions oversight bodies had been inconsistent in their advice or that the advice and expectations with respect to the level of analysis appeared to vary depending on the particular officer an agency dealt with.
- On occasions it was felt that the costs of additional analysis (sometimes necessitating the engagement of a consultant) demanded by oversight bodies outweighed the benefits (Officers undertaking RIA in the Victorian transport portfolio, sub. 17; PC RIA Survey 2012).
- A concern raised both by agencies and business groups relates to the subjectivity involved in decisions about whether or not the RIS requirements are triggered. Agency questioning of the judgment of the oversight body typically related to being asked to prepare a RIS where they considered the impacts were not significant enough to warrant one (WA Department of Transport, sub. 12). On the other hand, industry groups raised instances of agencies not being asked to

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prepare RISs when the impacts of the proposal were considered to be significant (Accord Australasia, sub. 26; ACCI, sub. 2).

- The need in some instances for greater efficiency and discipline in the provision of comments on RISs, to ensure expectations are made clear earlier in the process of engaging with the agency and unnecessary iterations are avoided (Department of Climate Change and Energy Efficiency (DCCEE) 2012).
- Some stakeholders suggested that the analysis in particular RISs was deficient and should not have been cleared as adequate by the oversight body. Others went further, saying the oversight body acts as a ‘rubber stamp’ or is ‘not able to identify or challenge many of the key assumptions contained within the analysis’ (CropLife Australia, sub. 7, p. 3).

However, any suggestions that oversight bodies may be passing RISs too easily need to be reconciled with the contrary view expressed by several agencies that oversight bodies are often too demanding with respect to the standard of analysis (and in particular the level of quantification) they require. It should also be recognised that even with a significantly increased investment of time and resources for checking the adequacy of RISs, there will always be some shortcomings in the analysis that will be difficult for oversight body staff to detect, and ultimately the quality of the analysis is the responsibility of the proposing agency.

## **2.3 Costs of RIA**

To evaluate the overall efficiency of RIA processes, it is necessary to focus on the costs of those processes as well as the benefits that they generate. An efficient RIA process is one that is effective in achieving the objectives of better informed decision making and more open and transparent government processes, while avoiding unnecessary costs. In order for a RIA process to be ‘efficient’, it must also be a cost effective process — that is, be the lowest cost way of achieving RIA objectives.<sup>4</sup>

The major sources of costs include those associated with the preparation of RISs and costs incurred by regulatory oversight bodies in the performance of RIA-related functions (chapter 3). Other costs of RIA include industry and other stakeholder participation in RIA-related consultation and the costs of any delays in policy implementation that can be attributed to requirements to conduct RIA.

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<sup>4</sup> The converse, however, does not apply — a cost effective RIA process is not necessarily an economically efficient process — as there may be other approaches that achieve the same objective but provide higher net benefits.

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Some costs, such as those associated with stakeholder consultation, would generally be incurred as part of the policy development process irrespective of there being a RIA process, so the Commission has sought where possible to identify the incremental or ‘additional’ costs that can be attributed to RIA. Indeed, to the extent that RIA simply represents good policy development practice that agencies should be following anyway, it could be argued that none of the costs should really be considered additional.

### **Agency costs associated with preparing RISs**

The cost of preparing RISs varies greatly depending on many factors, including for example: the significance and complexity of the issues; the difficulty of obtaining the necessary data; the extent of consultation (and whether consultation needs to be conducted in multiple jurisdictions, as in the case of national RISs); and the nature of any involvement by consultants. The Australian Government Attorney-General’s Department notes that:

For a complex RIA, the requirements on an agency can extend to requiring a team of experts across a range of fields e.g. experts in policy development, risk assessment, risk management, economic modelling and analysis, and technical expertise in a particular subject matter. (sub. 4, p. 4)

As a result, it is not very meaningful to talk in terms of the cost of a ‘typical’ RIS. However, based on agency responses to the Commission’s survey, it seems that costs of an individual RIS can range from as little as \$2500 up to around \$450 000 (chapter 3).

A shortage of in-house personnel with the skills required to undertake RIA, particularly in smaller jurisdictions, may increase agency costs. This may, for example, be a consequence of the longer times taken by agency staff to achieve the required standard of analysis or the need to make greater use of consultants (although use of consultants does not necessarily add to cost).

Consultants may be engaged to undertake particular elements of impact analysis or may prepare a full RIS. Their involvement can include managing stakeholder consultation through the policy-development process and, for example, organising meetings and focus groups. However, even where consultants are engaged to prepare or have input into RISs, the agency responsible for the RIA process will incur some costs related to the engagement and management of the consultancy. For example, the Australian Government Attorney-General’s Department submitted that it incurred approximately \$50 000 in staff costs just to undertake the procurement process to engage consultants for a COAG RIA process (sub. 4).

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Another substantial cost for some agencies is the cost of providing input into COAG RISs (and conducting associated consultations). For smaller jurisdictions, such as Tasmania, this can represent the largest RIA-related resource cost.

### **Costs associated with oversight of RIA processes**

Another major source of RIA costs is expenditure associated with independent oversight of the processes. These costs are covered more extensively in chapter 3 and can include, depending on the jurisdiction, the costs of:

- deciding whether proposals require RISs
- providing training and advice on the RIA process
- examining and advising on adequacy of RISs
- reporting annually on agency compliance with the RIA process.

These costs vary substantially across jurisdictions — ranging from less than \$200 000 per annum in the smaller jurisdictions (Tasmania and Northern Territory), to \$3.8 million for the Australian Government Office of Best Practice Regulation (although its oversight role also extends to COAG RIA).

Differences in costs are largely a function of staffing levels, which in turn reflect the scope of the body's activities and aspects of RIA system design, such as whether or not agencies are required routinely to consult the body on the need to undertake RIA. A high proportion of the costs are fixed and therefore do not vary directly with, for example, the level of RIS activity. Thus, calculations of oversight costs per RIS can vary substantially from period to period depending on the number of RISs actually completed in that period.

Because of the significant differences across jurisdictions in system design, the allocation of oversight body costs between functions also varies — for example in those jurisdictions with a formal preliminary assessment stage a larger proportion of costs relates to this stage of the RIA process.

### **Other costs**

Other costs of RIA can include the costs to business and other stakeholder groups that are consulted — for example, costs associated with participation in meetings, focus groups or public hearings, or devotion of resources to reviewing RISs or preparing submissions on draft RISs. To the extent that these costs are greater than consultation-related costs that would be incurred in the absence of a RIA process, they can be considered to be part of the overall costs of RIA. A number of consumer

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groups indicated to the Commission that the cost of consultation and data gathering can place considerable pressure on their limited resources — to the point that they cannot participate in some consultation processes (see for example, Queensland Consumers Association sub. DR28 and Consumers Federation of Australia, sub. DR34). In practice, there is very little information on costs of participating in RIA consultation, let alone estimates for incremental costs of such activity.

In principle, another potentially significant cost of RIA arises from uncertainty or delays in policy implementation that can be attributed to the requirement to conduct RIA. Indeed, some stakeholders view the RIA process as yet another study that is delaying beneficial regulation. The cost of any delay attributed to RIA depends on the period of the delay and the magnitude of the net benefits associated with regulatory reform that are deferred. However, the impact of delay could also be positive, where the selected policy has been improved by the RIA process. The net benefits of any delay could be substantial if the extended RIA process results in a particularly poor regulatory decision being avoided. Some stakeholders have called for minimum consultation periods to allow time to contribute effectively (see for example Western Australian Local Government Association (sub. 6)).

Overall, there appears to be little evidence of any systemic issues with undue delays associated with RIA. That said, the Commission was provided, in confidence, with a few examples of RIA processes for specific proposals that were considered to be unnecessarily protracted. In some of these cases it was claimed that the oversight body took too long to provide comments on draft RISs (in one case nearly two months). It is difficult to form a judgment in individual cases about the reasons for delays or whether the time taken is justified. The oversight body may, for instance, claim it was waiting for further information from the agency.

Some agencies advised the Commission that the costs of conducting RIA can, in some circumstances, discourage agencies from proceeding at all with a regulatory proposal that they consider would have had net benefits. Alternatively, it was suggested that rather than not proceeding with a regulation because of the cost of RIA, some agencies may find ways to avoid the process (chapter 5). Officers undertaking RIA in the Victorian transport portfolio (sub. 17) are of the view that:

... the requirements of the Victorian Guide to Regulation may be too onerous and costly which results in the avoidance of the RIA process and diminishes the use of the RIA process as a policy development tool. (sub. 17)

## **Are RIA processes cost effective?**

The limited information available on the actual costs and benefits of RIA means the Commission is unable, in this study, to draw a definitive conclusion on the overall

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efficiency or net benefits of Australian RIA systems. Moreover, the Commission is not aware of any other study that has been able to ‘prove’ that the benefits of RIA outweigh the costs. This is because of the difficulty, discussed earlier, of attributing positive outcomes to RIA and therefore of measuring its effectiveness. The OECD (2009b, p. 18) has commented that ‘[s]omewhat ironically, it is methodologically difficult to assess the costs and benefits of a RIA system’.

In one of the only detailed Australian studies of the costs and benefits of RIA, Abusah and Pingiaro (2011) suggested that the Victorian RIA process may have been a cost-effective mechanism for improving the quality of regulation (box 2.5). The Department of Treasury (Western Australia) noted that in the first year of operation, RIA ‘resulted in savings of more than \$40 million to the Western Australian economy’ (sub. DR37, p. 1).

**Box 2.5 Study of RIA cost effectiveness in Victoria**

Abusah and Pingiaro (2011) estimated that between 2005-06 and 2009-10, the RIA process achieved gross savings, from reduced regulatory costs, of \$902 million (in current dollar terms) over the 10 year life of the regulations and that for every dollar incurred by the key parties involved in the RIA process, gross savings of between \$28 and \$56 were identified. The Commission notes, however, that the study makes the assumption that changes that occurred during the policy development process could be attributed to the RIA process. To the extent that any such changes might also have been made in the absence of RIA, net benefits will have been overstated. The study acknowledges a number of other important limitations of the methodology, including:

- the analysis did not consider offsetting reductions in benefits that may have resulted from the changes (for example, removing or reducing regulatory requirements) that generated the savings in the costs of regulations — although costs savings were only included where it was considered that the changes to regulatory proposals led to cost reductions that exceeded the regulatory benefits forgone
- estimated cost reductions are gross savings as they did not include any offsetting increases in the costs imposed by regulations over the period — it was assumed that any increases in the regulatory burden would have also occurred in the absence of the RIA process
- additional benefits likely to flow from RIA, for example, preventing low quality proposals being put forward in the first instance, are not included in the estimates.

The authors therefore appropriately caution that the overall cost effectiveness measure is only partial and the results should be taken as indicative only.

*Source:* Abusah and Pingiaro (2011).

In most jurisdictions, the magnitude of aggregate costs imposed by regulations, or indeed the costs associated with many major regulations on their own, are typically

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such that RIA costs are small compared to the possible benefits if RIA is effective in influencing decision making and the quality of regulation. Given the size of the impacts typically associated with major national reforms, the potential net benefits of COAG RIA processes are likely to be even higher. In an OECD Working Paper, Cordova-Novion and Jacobzone (2011) make a similar point:

The cost of a single RIA, even if it can be significant, is often small compared with the economic magnitude of the issues at stake. The return rate can be remarkable if all the direct and indirect external effects and savings are taken into account ... (p. 41)

A few studies in the United States, where more comprehensive information on the costs and benefits of regulations are available, have drawn similar conclusions about the likely cost effectiveness of RIA (or cost-benefit analysis of regulation):

If the cost of cost-benefit analysis is \$25 million ... and if rules cost \$2.5 billion annually ... then even a 0.1% savings resulting from cost-benefit analysis will outweigh the direct costs of the cost-benefit analysis requirement. (Shapiro 2007, p. 4, drawing on earlier work by Portney 1984)

If regulatory review could have eliminated just the major regulations with negative monetised net benefits from 1995 to 2005, the expected incremental net benefits of improved review would have exceeded \$250 million per year. (Hahn and Tetlock 2008, p. 80)

Notwithstanding the mixed evidence internationally of the actual success of RIA in influencing outcomes, Deighton-Smith (2007) states:

Certainly there is a clear view that RIA itself passes a notional benefit/cost test: that the gains in social welfare that it brings forth significantly exceed the costs of the resources devoted to the RIA process. (p. 153)

It is the Commission's view that RIA systems, if implemented well and supported by a high level of political commitment, are very likely to be cost effective. The various shortcomings with existing RIA processes identified in this chapter are explored more fully in the rest of this report, together with suggestions for how the effectiveness and efficiency of RIA processes might be improved.

## **2.4 Conclusion**

RIA requirements across Australia all have a reasonably high degree of consistency with OECD and COAG guiding principles. The Commission considers that COAG and Victorian RIA systems represent leading practice with respect to many key features. The Commonwealth system is also a particularly good model in relation to a number of design aspects related to transparency.



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There is, however, little concrete evidence on the effectiveness of RIA in Australia in improving regulatory decision making or the quality of regulation. This reflects a number of factors, including: the difficulty of attributing outcomes to RIA when other factors are also likely to have had an influence; in some jurisdictions, the relative newness of the RIA systems; and more generally a lack of any systematic effort in most jurisdictions to gather the required evidence. (Improving the monitoring and reporting of the benefits and costs of RIA is discussed in chapter 10.)

Nevertheless, some evidence from Victoria suggests that benefits attributed to their system may have substantially exceeded costs and case study and anecdotal evidence from some other jurisdictions provides examples of the positive contribution of RIA.

But there is also evidence that RIA is failing to deliver on its potential. The disappointing quality of RISs, the lack of integration of RIA early in policy-development processes and the bypassing of requirements for some high impact regulations, are key concerns. Often, RIA commences only once a preferred option is chosen, is prepared simply to justify a decision, or to be seen to have complied with requirements. Some participants are particularly concerned about the number of major or politically significant proposals that are being granted exemptions from RIA in some jurisdictions.

There is clearly scope for all jurisdictions to improve the design of their systems through adoption of leading practices from Australia and overseas, particularly measures that improve transparency and accountability, which are discussed in the following chapters. However, the contribution of RIA to better regulatory outcomes has also been inhibited by poor implementation and enforcement of existing processes. The lack of effective integration of RIA into policy development processes suggest that there is a need for a stronger commitment by politicians (including heads of governments) to ensuring the gap between RIA principles/requirements and actual practice is narrowed.

Although costs of RIA are substantial, they are likely to be small relative to the benefits of improved regulation that RIA can potentially deliver. That said, there is scope for better targeting of resources, according to the likely impacts of proposals, which would further improve the cost effectiveness of RIA.

## Annex RIA practices by jurisdiction

Table 2.1 Features of RIA practices by jurisdiction<sup>a</sup>

	<i>Examples of positive features</i>	<i>Examples of possible areas for improvement</i>
Cwllth	<ul style="list-style-type: none"> <li>• RIA applies to all regulation types</li> <li>• Publication of RISs at time of regulatory announcement</li> <li>• Central RIS register with published RISs</li> <li>• RIS tabled with legislation</li> <li>• 'Real time' and annual compliance monitoring and reporting</li> <li>• Updates to guidelines reported on website</li> <li>• Post Implementation Reviews (PIRs) for all exempt and non-compliant proposals</li> </ul>	<ul style="list-style-type: none"> <li>• Inadequate justification for exemptions</li> <li>• No consultation RIS</li> <li>• RIS not required to recommend option with greatest net benefit to community</li> <li>• Published adequacy assessments do not include reasons or qualifications</li> <li>• No public ministerial statement of reasons for non-compliance or exemptions</li> <li>• No consequences for failure to do a PIR</li> </ul>
COAG	<ul style="list-style-type: none"> <li>• RIA applies to all regulation types</li> <li>• Threshold test requires consideration of positive and negative impacts on any group in the community</li> <li>• Publication of RISs at time of regulatory announcement</li> <li>• Central RIS register with published RISs</li> <li>• 'Real time' and annual compliance monitoring and reporting</li> <li>• Two stage RIS approach (consultation and final RIS)</li> </ul>	<ul style="list-style-type: none"> <li>• Policy announcements close off options before RIA is undertaken</li> <li>• Limited analysis in RISs of jurisdiction-specific impacts and implementation costs</li> <li>• No public ministerial statement of reasons for non-compliance or exemptions</li> <li>• Published adequacy assessments do not include reasons or qualifications</li> <li>• No PIR required for non-compliant proposals</li> </ul>
NSW	<ul style="list-style-type: none"> <li>• Publication of all RISs</li> <li>• RIS presumed to be required for all proposals, unless demonstrated that impacts are not significant (subordinate only)</li> <li>• Agencies determine need for RIS with oversight body monitoring</li> <li>• No discretion over publication of RISs (subordinate only)</li> </ul>	<ul style="list-style-type: none"> <li>• RIA does not apply to all regulation types</li> <li>• No consultation RIS (primary)</li> <li>• No final RIS (subordinate)</li> <li>• No compliance reporting</li> <li>• No public ministerial statement of reasons for non-compliance or exemptions</li> <li>• Oversight body adequacy assessments not published</li> <li>• No PIR required for non-compliant proposals</li> </ul>
Vic	<ul style="list-style-type: none"> <li>• RIS presumed to be required for all proposals, unless demonstrated that impacts are not significant (subordinate only)</li> <li>• 'Real time' and annual compliance monitoring and reporting</li> <li>• Central RIS register with published RISs</li> <li>• Published evidence of RIA impacts and influence</li> <li>• Ministerial explanations for some exemptions and for proceeding with a proposal assessed as inadequate</li> </ul>	<ul style="list-style-type: none"> <li>• RIA does not apply to all regulation types</li> <li>• No consultation RIS (primary)</li> <li>• No final RIS (subordinate)</li> <li>• RISs (primary legislation) not published</li> <li>• No PIR required for non-compliant proposals</li> </ul>

(continued next page)

**Table 2.1** (continued)

	<i>Examples of positive features</i>	<i>Examples of possible areas for improvement</i>
Vic (c'td)	<ul style="list-style-type: none"> <li>• Ministerial explanations for changes to proposal post consultation</li> <li>• Adequacy assessments of RISs published including reasons and any qualifications</li> <li>• No discretion over publication of RISs (subordinate only)</li> <li>• Competition impact assessment explicitly required, and routinely included, in RISs</li> <li>• Oversight body has operational independence</li> </ul>	
Qld <sup>b</sup>	<ul style="list-style-type: none"> <li>• RIA applies to all regulation types</li> <li>• Streamlined preliminary assessment process</li> <li>• No preliminary assessment necessary for exceptions</li> <li>• Two stage RIS approach (consultation and final RIS for primary legislation)</li> </ul>	<ul style="list-style-type: none"> <li>• No consequences for submitting inadequate RIS to decision maker</li> <li>• No compliance reporting</li> <li>• No central access point for all RISs</li> <li>• No final RIS (subordinate)</li> <li>• Final RIS (primary) not published</li> <li>• No public ministerial statement of reasons for non-compliance or exemptions</li> <li>• Oversight body adequacy assessments not published</li> <li>• No PIR required for proposals with an inadequate RIS</li> </ul>
WA	<ul style="list-style-type: none"> <li>• Scope to use other suitable reviews in place of consultation RIS</li> <li>• Most adequacy assessments published</li> <li>• Two stage RIS approach (consultation &amp; final RIS)</li> </ul>	<ul style="list-style-type: none"> <li>• RIA does not apply to all regulation types</li> <li>• Preliminary assessment process overly burdensome for both agencies and oversight body</li> <li>• No compliance reporting</li> <li>• Published adequacy assessments do not systematically include reasons or qualifications</li> <li>• No public ministerial statement of reasons for non-compliance or exemptions</li> <li>• No PIR required for non-compliant proposal</li> </ul>
SA	<ul style="list-style-type: none"> <li>• RIA applies to all regulation types</li> <li>• Explicit guidelines on considering national market implications in RISs</li> <li>• Agencies determine need for RIS with oversight body monitoring</li> <li>• Adequacy assessment process draws on expertise of multiple agencies</li> <li>• Publication of RISs at time of regulatory announcement</li> <li>• Central RIS register with published RISs</li> <li>• No discretion over publication of RISs</li> </ul>	<ul style="list-style-type: none"> <li>• Guidelines do not appear to relate to non-Cabinet proposals</li> <li>• No compliance reporting</li> <li>• No consultation RIS</li> <li>• No public ministerial statement of reasons for non-compliance or exemptions</li> <li>• Oversight body adequacy assessments not published</li> <li>• PIR not required for most exempt or non-compliant proposals</li> </ul>

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**Table 2.1** (continued)

	<i>Examples of positive features</i>	<i>Examples of possible areas for improvement</i>
Tas	<ul style="list-style-type: none"> <li>• Competition impact assessment explicitly required, and routinely included, in RISs</li> <li>• No discretion over publication of RISs</li> </ul>	<ul style="list-style-type: none"> <li>• RIA does not apply to all regulation types</li> <li>• Consultation RIS prepared comparatively late in policy development process and focuses on justifying regulation to Parliament</li> <li>• No final RIS</li> <li>• Excessive documentation required for proposals with insignificant impacts</li> <li>• No central access point for all RISs</li> <li>• No compliance reporting</li> <li>• No public ministerial statement of reasons for non-compliance or exemptions</li> <li>• Oversight body adequacy assessments not published</li> <li>• No PIR required for exempt and non-compliant proposals</li> </ul>
ACT	<ul style="list-style-type: none"> <li>• RIA applies to all regulation types</li> <li>• RIS tabled with legislation</li> <li>• No discretion over publication of RISs (subordinate)</li> <li>• Central RIS register with published RISs</li> </ul>	<ul style="list-style-type: none"> <li>• Implementation of RIA processes is comparatively unstructured and guidance material is dated</li> <li>• For primary legislation, no significance threshold to exclude proposals with insignificant impacts from RIS process</li> <li>• No consultation RIS (primary)</li> <li>• No final RIS (subordinate)</li> <li>• No compliance reporting</li> <li>• No public ministerial statement of reasons for non-compliance or exemptions</li> <li>• Oversight body adequacy assessments not published</li> <li>• No PIR required for exempt and non-compliant proposals</li> </ul>
NT	<ul style="list-style-type: none"> <li>• RIA and preliminary assessment apply to all regulation types</li> <li>• Threshold test requires consideration of positive and negative impacts on any group in the community</li> <li>• Adequacy assessment process draws on expertise of multiple agencies</li> </ul>	<ul style="list-style-type: none"> <li>• Guidance material does not accord with current practice and does not include information on exceptions/exemptions</li> <li>• No consultation RIS</li> <li>• No RISs are published</li> <li>• No compliance reporting</li> <li>• No public ministerial statement of reasons for non-compliance or exemptions</li> <li>• Oversight body adequacy assessments not published</li> <li>• No PIR required for exempt and non-compliant proposals</li> </ul>

<sup>a</sup> The table does not attempt to be comprehensive. Rather, key positive features and shortcomings in each jurisdiction are highlighted. <sup>b</sup> Some examples may no longer apply as substantial changes have been made to the Queensland RIA process since January 2012.

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## 3 Institutions involved in regulatory impact analysis

### Key points

- All government agencies, ministerial councils and national standard setting bodies which make or amend regulation are subject to regulatory impact analysis (RIA) requirements.
- The principal role of ministers in the RIA process is to decide how to address the relevant policy issue, given the information generated by RIA on potential options and their likely impacts. In some jurisdictions, ministers also certify completed regulation impact statement (RIS) documents to indicate that RIA requirements have been satisfied and they may also approve RIS exemptions.
- Agencies assess the need for a RIS in five of the ten jurisdictions, often with the advice of the jurisdictional regulatory oversight body. Agencies in Tasmania also make such an assessment, but only for proposals related to subordinate legislation.
- Consistent with best practice, all Australian jurisdictions have a body tasked with overseeing the RIA process.
  - Most jurisdictional oversight bodies reside within departments at the centre of government. The only exceptions are the Victorian Competition and Efficiency Commission and the newly established Queensland Office of Best Practice Regulation.
  - In South Australia and the Northern Territory, several departments contribute to the regulatory oversight function.
- Oversight body functions vary between jurisdictions, but can include: deciding whether regulatory proposals require a RIS; providing advice and training on the RIA process; examining and advising on the adequacy of RIS documents; and reporting annually on agency compliance with the RIA process.
- Information on compliance with RIA requirements is reported annually only in three jurisdictions — the Commonwealth, COAG and Victoria.
- In five jurisdictions, Cabinet offices have a role verifying that proposals have satisfied RIA requirements before they proceed to Cabinet or its sub-committees.
- All jurisdictions have parliamentary scrutiny committees which examine legislation that has proceeded to parliament to determine whether legislative principles and procedures have been followed. In five jurisdictions these committees have an explicit mandate to consider whether RIA requirements have been met.

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This chapter describes the roles and activities of institutions which are involved in RIA processes, as at January 2012, with changes made after this point noted where relevant. Discussion of the appropriateness of these roles and the performance of these institutions is left to other chapters.

RIA requirements apply to institutions that create, amend or review regulations. These include government departments and agencies, ministerial councils and national standard setting bodies (NSSBs) — hereafter, when these are referred to collectively, they will be termed ‘agencies’. In addition to these agencies, there are a number of other bodies with jurisdiction-wide responsibility for ensuring RIA requirements are satisfied, including:

- regulatory oversight bodies with a role of ensuring that adequate analysis has been undertaken prior to consideration of proposals by decision makers
- Cabinet offices, which may have a role verifying that appropriate RIA information is attached to Cabinet submissions or, in some cases, preventing proposals that have not met RIA requirements proceeding to decision makers
- parliamentary scrutiny committees which examine regulation that has proceeded to parliament and, in some cases, have an explicit mandate to consider RIA requirements.

## **3.1 Institutions subject to RIA requirements**

### **Government departments and agencies**

All government departments and agencies which create or amend regulation are subject to their jurisdictional RIA requirements, regardless of whether these agencies are established administratively or by statute. When agencies engage with RIA, this can involve:

- contacting the jurisdictional oversight body to seek advice early in the policy development process
- either deciding if a RIS is required for a proposal or, in some jurisdictions, providing relevant information to the jurisdictional oversight body which makes this decision (see section 3.2)
- undertaking the steps to prepare a RIS (including engaging with stakeholders)
- ensuring that relevant internal staff are sufficiently trained in RIA processes
- publishing RISs or approving their publication on a central RIS register.

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In practice, the majority of agencies undertake no more than one or two RISs in a given year, with many producing none. A small number of agencies undertake around five to ten RISs each year — although often several of these RISs stem from a single reform pursued by the agency. In recent years, agencies with the most RIS activity have been in areas such as finance, primary industry, environment and transport. The number of RISs produced by individual agencies varies over time depending on policy and regulatory priorities.

### *Coordination of RIA within and between agencies*

Some agencies have established centralised RIA units to coordinate implementation of RIA requirements. In these agencies, the relevant policy branch is generally responsible for completing the RIA process but is provided with guidance and technical assistance by the centralised unit. Around half of agency survey respondents indicated that their agency had a centralised unit which assisted in undertaking the RIA process (PC RIA Survey 2012). A centralised unit was more common in agencies that undertook a comparatively large number of RISs or had significant regulatory responsibilities. Such a unit may not be cost effective for smaller agencies and those that engage with the RIA process infrequently.

Some jurisdictions have also established regulatory coordinators in agencies, have had them in the past or intend to introduce them (box 3.1). Such coordinators can be a mechanism for sharing experiences and transferring knowledge between agencies.

### **Ministerial councils and national standard setting bodies**

Ministerial councils — consisting of standing councils, select councils and legislative and governance fora — are an integral part of the Council of Australian Governments (COAG) structure. They are comprised of representative ministers from the Commonwealth and all of the states and territories from the particular policy or reform area. The role of ministerial councils is to develop reform proposals to be considered by COAG and to oversee the implementation of reforms agreed by COAG. Often these reform proposals relate to implementation of broad goals set out in intergovernmental agreements, such as those made as a part of the *Seamless National Economy Partnership* (Victorian Department of Premier and Cabinet, sub. DR32). All ministerial councils are subject to the COAG RIA requirements when they make decisions of a regulatory nature.

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### **Box 3.1 Regulatory coordinators**

#### **Commonwealth/COAG**

The Best Practice Regulation Coordinators were established in Australian Government agencies in 2007 and in agencies subject to COAG RIA requirements in 2009-10 (Office of Best Practice Regulation (OBPR) 2010). Their role varies across agencies, with many acting as a first point of contact for policy officers undertaking RIA. The Commission understands that the role of these coordinators has now been supplemented by OBPR outpost officers (section 3.2).

#### **Victoria**

In its recent review of the Victorian regulatory system, the Victorian Competition and Efficiency Commission (VCEC) proposed regulator networks as an avenue to improve understanding of the available tools and share lessons from experience (VCEC 2011b). This recommendation was supported by the Victorian Government (Victorian Government 2012).

#### **Queensland**

In 2010, the Queensland Government established and funded 'Regulatory Reform Champions' for 18 months to assist in establishing the RIA system within their agencies. These were instrumental in setting up the RIA process and providing advice, assistance and guidance on RIA and the application of best practice principles (Queensland Treasury, pers. comm., August 2012).

#### **Western Australia**

The RIA working group was established in 2010, comprising representatives from various agencies. This enabled agencies to provide feedback, to work with the oversight body on RIA implementation and to make recommendations on changes to RIA (Western Australian Government, sub. 24).

During consultations, the Commission found that responsibility for implementing COAG RIA requirements varied between ministerial councils and across different proposals. In some cases, the regulatory proposal was presented by one jurisdiction and the agency supporting the proponent minister was responsible for preparing the RIS. In other cases, the agency which was supporting the minister chairing the ministerial council had responsibility for preparing the RIS.

NSSBs can be either Commonwealth bodies subject to Australian government RIA requirements or intergovernmental bodies subject to COAG RIA requirements. Commonly, NSSBs reach broad level agreement on standards which are then to be given force through regulation. It is this resulting regulation which triggers the need for early consideration of RIA requirements.

Similar to government agencies, individual ministerial councils and NSSBs have limited engagement with the RIA process, with many producing no RISs in a given year. The ministerial councils and some examples of NSSBs are listed in table 3.1.



**Table 3.1 Ministerial councils and national standard setting bodies**

***Ministerial councils<sup>a</sup>***

<i>Standing councils</i>	<i>Select councils</i>	<i>Legislative and governance fora</i>
Community, Housing and Disability Services	Climate Change	Consumer Affairs
Energy and Resources	Disability Reform	Corporations
Environment and Water	Gambling Reform	Food Regulation
Federal Financial Relations	Homelessness	Gene Technology
Health	Immigration and Settlement	Murray-Darling Basin
Law and Justice	Women's Issues	
Police and Emergency Management	Workplace Relations	
Primary Industries		
Regional Australia		
Schools, Education and Early Childhood		
Tertiary Education, Skills and Employment		
Transport and Infrastructure		

***National standard setting bodies<sup>b</sup>***

<i>Commonwealth</i>	<i>Intergovernmental (COAG)</i>
Auditing and Assurance Standards Board	Australian Building Codes Board
Australian Accounting Standards Board	Australian Commission on Safety and Quality in Health Care
Australian Communication and Media Authority	Environment Protection and Heritage Council
Australian Competition and Consumer Commission	Financial Reporting Council
Australian Fisheries Management Authority	Food Standards Australia New Zealand
Australian Maritime Safety Authority	Fuel Standards Consultative Committee
Australian Pesticides and Veterinary Medicines Authority	National Health and Medical Research Council
Australian Prudential Regulation Authority	National Industrial Chemicals Notification and Assessment Scheme
Australian Radiation Protection and Nuclear Safety Agency	National Marine Safety Committee
Australian Safeguards and Non-Proliferation Office	National Pathology Accreditation Advisory Council
Australian Securities and Investments Commission	National Plumbing Regulators Forum
Civil Aviation Safety Authority	Nuclear Safety Committee
Department of Families, Housing, Community Services and Indigenous Affairs (Child Care Standards)	National Transport Commission
Department of Health and Ageing (Aged Care Standards)	Security Sensitive Biological Agents Regulatory Scheme
Office of the Gene Technology Regulator	
Office of Chemical Safety	
Private Health Insurance Administration Council	
Therapeutic Goods Administration	

<sup>a</sup> This new COAG Council System was established in February 2011 subsequent to the Hawke review (COAG 2011). *Standing Councils* pursue and monitor priority issues of national significance which require sustained, collaborative effort and address key areas of shared Commonwealth and state responsibility and funding. *Select Councils* undertake time-limited work in areas of shared Commonwealth and state responsibility. *Legislative and Governance Fora* oversee significant collective responsibilities which are set out in governing instruments but are outside the scope of Standing Councils. <sup>b</sup> This list was compiled by the Commission and is not complete as there is no systematic record of these bodies (pers. comm., Department of Prime Minister and Cabinet, August 2012 and OBPR, May 2012).

Sources: COAG (2011); Department of Health and Ageing, pers. comm., November 2011; PC assessment.

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The Commission was unable to find a full listing of NSSBs. Neither the Office of Best Practice Regulation (the oversight body that monitors NSSB compliance with RIA requirements), nor the Department of Prime Minister and Cabinet (which had an important role in developing the COAG RIA guidelines), keep a complete record of these bodies (pers. comm., Department of Prime Minister and Cabinet, August 2012 and OBPR, May 2012). The compilation of a comprehensive list of NSSBs would ensure clarity about which bodies are subject to RIA requirements.

## **Role of ministers in the RIA process**

The principal role for ministers in the RIA process is to decide how to address the relevant policy issue, given the information generated by RIA on potential options and their likely impacts.

In several jurisdictions, RIA guidelines outline other roles for ministers in the RIA process. In some jurisdictions this includes deciding whether proposals require a RIS (chapter 4) and applying for exemptions (chapter 5). The Australian Government RIA guidelines also (uniquely) allow ministers to constrain the options considered in a RIS:

... agencies may be given direction regarding which options to analyse in a RIS for the Cabinet or a committee of the Cabinet. This would require the sponsoring minister to write to the Prime Minister or the Cabinet Secretary, copied to the Treasurer and the Minister for Finance and Deregulation. (Australian Government 2010a, p. 15)

At the end of the RIA process, ministers in a number of jurisdictions must certify completed RIS documents to indicate that they have satisfied RIA requirements. Requiring the responsible minister to endorse the RIS is intended to provide accountability and quality assurance. In Victoria and Queensland this requirement is outlined in RIA guidelines, with responsible ministers required to sign certificates before the proposal proceeds to the decision making stage in order to indicate compliance with RIA requirements. In New South Wales, Victoria and Tasmania, this requirement is outlined in the jurisdictional subordinate legislation Act (see box 1.2). In the Commonwealth, the RIA guidelines require the departmental secretary or deputy secretary (or the relevant agency head or deputy head) to certify the RIS prior to final assessment by the OBPR (Australian Government 2010a).

In other states and territories, although there is no separate requirement to certify RIS documents, ministers are still required, by Cabinet or ministerial handbooks, to certify their Cabinet submissions. A Cabinet submission will generally include the RIS as an attachment for regulatory proposals with significant impacts.

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The COAG guidelines (COAG 2007a) do not outline any requirement for ministers to certify completed RIS documents. The guidelines do, however, make a unique provision for ministerial council members to trigger an appeal of the RIA process if they consider it unsatisfactory:

Where a Minister is dissatisfied with the outcome of the impact assessment process, the Minister may seek the agreement of his/her Head of Government to request an independent review of the assessment process. (COAG 2007a, p. 16)

### **Cost of RIA: institutions subject to RIA requirements**

There is limited information available on agency costs associated with RIA; the Commission surveyed agencies in all jurisdictions with a view to building knowledge in this area (PC RIA Survey 2012).

In the survey, respondents were asked to estimate the cost of the RIA process to their agency above ‘business as usual costs’ for the financial year 2010-11. Many respondents were unable to provide an estimate — perhaps due to low RIA activity, lack of record-keeping or the difficulty of separately identifying costs associated with RIA from other agency costs. For those agencies that did provide an estimate, the values varied substantially, ranging from \$1200 to \$3 million for the year. At the lower end, the state agency reporting costs of \$1200 had no RIS activity and undertook only preliminary assessments in 2010-11. At the higher end, one state agency reported a total cost of \$1.5 million, having completed eight RISs. The agency attributed this figure to engaging new in-house staff with the required analytical skills to complete RISs. The difference in reported costs was not entirely attributable to differing levels of RIS activity because individual RIS costs vary greatly. Box 3.2 provides a summary of information gathered by the Commission about the cost of completing a single RIS.

From box 3.2, it is evident that consultant input can be a significant contributor to RIS costs. In the survey, 38 per cent of respondents reported that they had used consultants for some aspect of the RIA process. Approximately 80 per cent of these had outsourced cost-benefit analysis to consultants while 50 per cent had outsourced completion of the entire RIS (figure 3.1). Where consultants had been engaged to complete the entire RIS, a significant percentage of agency RIA costs, for 2010-11, was still attributed to internal staff costs.<sup>1</sup>

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<sup>1</sup> Note that responses relating to the use of consultants are not directly comparable to reported costs because the question about consultants was not time-specific, while the cost question related only to 2010-11.

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### Box 3.2 Information on the cost of completing a RIS

#### *PC RIA Survey 2012 responses*

- Estimates for the cost of a single RIS ranged between \$2500 and \$450 000.
  - The agency that reported completing a RIS for \$2500 stated this was at the lower end of typical RIS costs in recent years.
  - Two agencies each reported a recent RIS with a cost of around \$450 000 — one agency prepared a COAG RIS, paying \$240 000 to a consultant for cost–benefit analysis and \$200 000 for internal staff time. The other agency prepared a state RIS paying \$150 000 for consultant input, with the remainder comprising internal costs.
- Other respondents reported consultant costs of \$30 000 to \$35 000 for a RIS, but did not provide the total cost for these RISs.
- Two respondents from Commonwealth agencies described the cost of a RIS in terms of staff time:
  - One agency reported an average RIS required 6 weeks work by a middle-level manager. Proposals which require more complex cost–benefit analysis and more extensive consultation were reported by that agency to take 15 to 20 weeks, while more straightforward proposals could take 2 to 4 weeks.
  - Another agency reported that, depending on its size and complexity, a RIS could take between 50 and 145 hours, involving a range of staff levels.

#### *Study submission*

The Australian Government Attorney General's Department provided the following cost estimates associated with a COAG RIA process currently being undertaken:

- approximately \$300 000 for external consultants to conduct focus groups and prepare the consultation and final RISs
- approximately \$50 000 in staff costs to undertake the procurement process to engage external consultants, and
- approximately \$90 000 in advertising costs associated with the release of the consultation RIS to ensure adequate coverage of stakeholders, particularly small to medium enterprises (sub. 4).

#### *Office of Regulation Review estimate*

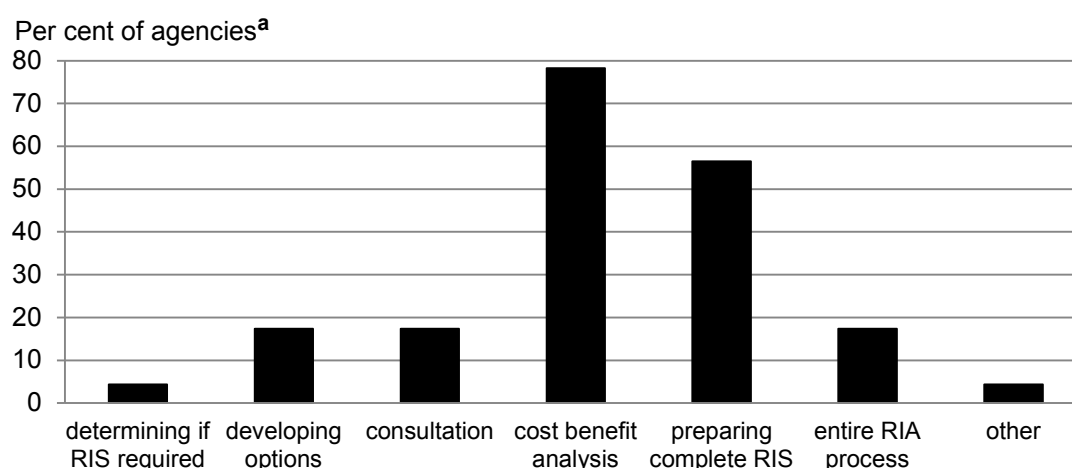
In 2005-06, the Office of Regulation Review (ORR), predecessor to the OBPR as regulatory oversight body for Commonwealth and COAG, asked Australian Government agencies to estimate the number of person days taken to prepare a RIS. It found, on average, that it took nearly 15 person days to prepare a RIS. The ORR estimated that this translated to an average cost of around \$5200 (approximately \$6000 in current prices). This estimate was based on labour costs alone, other costs such as overheads, capital costs and consultant fees were not included (PC 2006).

The median cost of RIA for 2010-11 was approximately \$37 000 higher for agencies that indicated they had used consultants relative to those that had not. For one survey respondent, this difference was explained by high consultant fees relative to internal costs:

From the tender process, a typical RIS on a major topic would cost around \$100 000 with some tenders at \$120 000 and \$150 000. In-house cost of a similar RIS would be \$75 000. (PC RIA Survey 2012)

Alternatively, the cost difference may be due to agencies seeking assistance from consultants on more complex proposals. It may also relate to an underestimate of the internal cost of RISs relative to consultant costs, if overhead costs of RISs prepared internally are difficult to measure.

**Figure 3.1 For what part of the RIA process were consultants used?**



<sup>a</sup> Based on 23 agencies which indicated they had used consultants for RIA. This question related to use of consultants in general, rather than for a particular RIS. As such, agencies were able to select multiple options.

Data source: PC RIA Survey (2012).

## 3.2 Regulatory oversight bodies

Consistent with best practice, all Australian jurisdictions have a regulatory oversight body which administers and promotes the RIA process. The key functions of oversight bodies can include:

- deciding whether proposals require RISs
- providing training and advice on the RIA process
- examining and advising on adequacy of RISs
- reporting annually on agency compliance with the RIA process.

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These functions may be performed by a single office or several agencies. Oversight bodies may also have other functions related to RIA, such as maintaining RIA guidance material and publishing RIS documents and adequacy assessments. They can also have roles which are not directly related to RIA, such as reviewing existing regulation, reducing red tape and conducting inquiries on behalf of government.

## **Who are the regulatory oversight bodies in Australia?**

The regulatory oversight function in each jurisdiction was generally established with the introduction of RIA requirements (table 3.2). The Australian Government introduced RIA requirements and an oversight body in 1985 (OECD 2010b). That body, now called the Office of Best Practice Regulation (OBPR), was also made responsible for oversight of the COAG RIA process in 1995. Victoria and New South Wales were the first states to establish regulatory oversight in the mid to late 1980s. Other jurisdictions introduced regulatory oversight more recently, with Western Australia establishing a RIA process for the first time in 2009.

Australia's regulatory oversight bodies tend to reside at the centre of executive governments, typically in the jurisdiction's Department of Treasury or Department of Premier and Cabinet. The exceptions to this are:

- the Victorian Competition and Efficiency Commission (VCEC) which is an independent advisory body established under the *State Owned Enterprises Act 1992* (Vic)
- the Queensland Office of Best Practice Regulation (QOBPR) which was established in July 2012 within the Queensland Competition Authority — an independent statutory authority.

The relative merits of different locations for the regulatory oversight function are discussed in chapter 8 in the context of accountability and quality control of RIA processes.

In the majority of jurisdictions, oversight functions are performed by a single office, with the exception of the Northern Territory and South Australia. In the Northern Territory, the Regulation Impact Unit in the Department of Treasury and Finance advises agencies and provides administrative support to the Regulation Impact Committee, which assesses and certifies the adequacy of RISs. In South Australia, the Cabinet Office signs off RISs for submission to Cabinet under the advisement of four 'impact assessment agencies' which need to indicate they are satisfied that the RIS meets an appropriate standard in their area in order for a proposal to be signed off by Cabinet Office (SA DPC and DTF 2011).

**Table 3.2 Regulatory oversight bodies**

As at January 2012

	<i>Regulatory oversight body</i>	<i>Location in government</i>	<i>Introduced</i>
Cwth	Office of Best Practice Regulation (OBPR)	Department of Finance and Deregulation (DFD)	1985 <sup>a</sup>
COAG	OBPR	DFD	1995
NSW	Better Regulation Office (BRO)	Department of Premier and Cabinet	1989
Vic	Victorian Competition and Efficiency Commission (VCEC)	Independent state body — Department of Treasury and Finance Portfolio	1985 <sup>b</sup>
Qld	Regulatory Review Branch (RRB)	Department of Treasury	1990 <sup>c</sup>
WA	Regulatory Gatekeeping Unit (RGU)	Department of Treasury	2009
SA	Cabinet Office (RIS sign off) Impact assessment agencies Department of Treasury and Finance (cost–benefit analysis) Department for Manufacturing, Innovation, Trade, Resources & Energy (business & regional impacts) Department for Communities & Social Inclusion (family and societal impacts) Department of Environment, Water & Natural Resources (environmental impacts)	Department of the Premier and Cabinet	2003 <sup>d</sup>
Tas	Economic Reform Unit (ERU)	Department of Treasury and Finance	1995
NT	Regulation Impact Unit (RIU) Regulation Impact Committee (RIC) Department of Treasury and Finance (chair) Department of the Chief Minister Department of the Attorney-General and Justice Department of Business	Department of Treasury and Finance	2003
ACT	Microeconomic Policy Unit	Department of Treasury	2000

<sup>a</sup> The Business Regulation Review Unit (BRRU) was established in the Department of Industry, Science and Technology in 1985. In 1989 the BRRU was renamed the Office of Regulation Review (ORR) and moved into the statutorily independent Industry Commission. In 2006 the ORR was renamed the OBPR and subsequently moved to DFD in 2007. <sup>b</sup> Prior to the establishment of the VCEC in 2004, oversight functions were undertaken by the Victorian Office of Regulation Reform which was located within the Department of State and Regional Development. <sup>c</sup> The RRB was preceded by the Queensland Office of Regulatory Efficiency which also resided in the Department of Treasury. In July 2012, some oversight functions were relocated to the Queensland Office of Best Practice Regulation which was established in the Queensland Competition Authority. <sup>d</sup> Cabinet Office and three assessment agencies have performed an oversight role since 2003. The new *Better Regulation Handbook* (SA DPC and DTF 2011) introduced the Department of Treasury and Finance as a fourth impact assessment agency.

Three jurisdictions have an additional unit (residing in a separate agency to the oversight body) tasked with ensuring small business impacts are addressed

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appropriately during the RIA process. The functions and activities of these small business units are summarised in box 3.3.

### **Box 3.2      Separate units that focus on small business impacts**

#### **Commonwealth**

The Small Business Advisory Committee (SBAC) is a panel of small business experts established in June 2010. Its role in RIA is to advise on proposals that are likely to have a significant impact on small businesses. For these proposals, the agency contacts the SBAC Secretariat, located within the Department of Innovation, Industry, Science, Research and Tertiary Education. The Secretariat assists the agency in determining whether the RIS would benefit from referral to the SBAC, taking into account the availability of committee members and timing issues (Australian Government 2010a). Since its establishment, SBAC has provided advice on only two RISs. Agencies have sought to make use of SBAC on multiple occasions; however, due to timing or other constraints SBAC has not been in a position to provide advice (SBAC Secretariat, pers. comm., July 2012).<sup>2</sup>

#### **Victoria**

Small Business Victoria (SBV), in the Department of Business and Innovation, published a *Small Business: Regulatory Impact Assessment Manual* (Victorian Government 2007) which provides practical assistance for agencies undertaking RIA. The Victorian RIA guidelines (Victorian DTF 2011a) recommend consultation with SBV early in the RIA process for assistance with proposals that may have a significant impact on small businesses but this has rarely occurred in practice (SBV, pers. comm., August 2012).

#### **Western Australia**

The independent Small Business Development Corporation (SBDC) has two key roles:

- reviewing preliminary impact assessments (PIAs) and RISs in order to provide comments to the oversight body, from a small business perspective, on the regulatory proposals
- providing direct assistance to agencies in assessing the significance of negative impacts on small businesses.

Since 2009, when the Western Australian RIA system was introduced, the SBDC has reviewed 129 PIAs and provided assistance to numerous agencies to complete RIA documents. The SBDC has also prepared submissions to consultation RISs (sub. 25).

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<sup>2</sup> The role of SBAC has recently been expanded to include providing broader advice to the Government and an internal evaluation of the future role of SBAC is planned.



## Comparing roles of regulatory oversight bodies

In all jurisdictions, oversight bodies examine and advise on the adequacy of RISs and provide some form of advice and/or training to agencies. Oversight bodies report annually on compliance in three jurisdictions (table 3.3). The manner in which oversight functions are performed can vary significantly between jurisdictions — this is discussed below for each oversight function.

**Table 3.3 Summary of oversight body functions**

As at January 2012

<i>Jurisdiction</i>	<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
Decide whether proposals require RISs	✓	✓	✗	✗	✗	✓	✗	✓ <sup>a</sup>	✗	✓
Provide advice and/or training on the RIA process	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Examine and advise on adequacy of RISs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Report annually on compliance with the RIA process	✓	✓	✗	✓	✗ <sup>b</sup>	✗ <sup>c</sup>	✗	✗	✗	✗

<sup>a</sup> In Tasmania the oversight body determines if a RIS is required for proposed primary legislation based on a 'statement of intent' provided by the agency, while agencies self-assess the need for a RIS for proposed subordinate legislation. <sup>b</sup> The newly established Queensland Office of Best Practice Regulation will be required to report annually on compliance with the RIA process (Queensland Competition Authority (QCA 2012). <sup>c</sup> The Western Australian Regulatory Gatekeeping Unit (RGU) has not yet published an annual compliance report, despite its guidelines. The RGU Compliance Assessment Notice is published, along with the relevant RIS, on agency websites (and RGU provides a central link to these sites). However, this does not appear to occur systematically for all RISs.

Source: Jurisdictional guidance material (appendix B).

### *Deciding whether proposals require RISs*

Thresholds for triggering RIS requirements are somewhat subjective, which means proposals need to be interpreted on a case-by-case basis (discussed further in chapter 4). In four jurisdictions, the oversight body is responsible, based on information provided by the agency, for deciding whether a RIS is required for a proposal. Additionally, the oversight body in Tasmania assesses the need for a RIS, but only in relation to proposals for primary legislation.

In the remaining jurisdictions, it is the role of the agency or responsible minister to decide whether a RIS is required. This is often termed agency 'self-assessment'. In practice in these jurisdictions, the oversight body is still involved to some extent in advising agencies early in the process. Survey respondents in jurisdictions with self-assessment were equally likely to contact the oversight body early in the policy

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development process as those in jurisdictions with formal oversight body assessment. In both cases, agencies most commonly reported (in approximately 40 per cent of responses) that they first engaged with the oversight body at the start of policy development (PC RIA Survey 2012).

In some jurisdictions with self-assessment, an agency assessment may be challenged by the oversight body prior to a proposal reaching the decision making stage (chapter 4).

### *Providing guidance, advice and training on the RIA process*

#### *Guidance material*

All jurisdictions have published RIA guidance material, which, in most cases has been written and is maintained by the regulatory oversight body. The guidance material covers the steps in the RIA process as well as, to varying extent, detailed information on how to complete a RIS. All guidance material has been updated in recent years with the exception of that of the Australian Capital Territory, which has not updated its guidelines since 2003.

In addition to RIA-specific guidance material, most jurisdictional Cabinet handbooks or drafting guides for Cabinet submissions include information on RIA requirements. For COAG, RIA requirements are reinforced in the *Handbook for COAG Councils* (COAG 2011).

#### *Advice and training*

All Australian oversight bodies provide some form of advice and/or training to agencies in their jurisdictions. In particular, the oversight body in each jurisdiction offers technical assistance and ad hoc advice to agencies, whether they are making general enquiries about the applicability of RIA or seeking assistance in drafting a particular RIS (including guidance on cost–benefit analysis).

Most oversight bodies also offer formal training programs (table 3.4). These programs generally take the form of workshops or seminars providing participants with a general overview of the RIA process, information on the main steps in a RIS and on the resources available to assist with undertaking the process. The OBPR also provides workshop training slides on its website for the Commonwealth and COAG RIA processes. In Queensland, ongoing training is provided via web-based training modules. At the time these modules were introduced in 2010, all existing government officers involved in the development or review of regulation were required to complete them (PC RIA Survey 2012).

**Table 3.4 Oversight body training**  
2010-11

<i>Jurisdiction</i>	<i>Cwlth/COAG<sup>a</sup></i>	<i>NSW<sup>b</sup></i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
Formal general training	✓	✓	✓	✓ <sup>c</sup>	✓	✓	x	x	x <sup>d</sup>
Web-based modules	x	x	x	✓	x	x	x	x	x
Formal CBA training	✓	x	✓	x	x	✓ <sup>e</sup>	x	x	x
Formal training tailored to agency needs	✓	x	✓	✓	✓	✓	..	..	..
Course length for formal training (in hours)	2-4	1.5	full day	1-3	1-3	1-4	..	..	..
Total number of courses 2010-11	28	11	9	33	9	15	..	..	..
Approximate total number of staff trained 2010-11	404	140	171	460 <sup>f</sup>	425	180	..	..	..

<sup>a</sup> Training for agencies which undertake RIA under either the Commonwealth or COAG process is provided by the OBPR. <sup>b</sup> NSW data relate to 2011-12. No training was undertaken in 2010-11 because a change of government resulted in revisions to policies and training material. <sup>c</sup> Mainly associated with the introduction of the new RAS system in 2010, rather than on-going training. <sup>d</sup> Has been provided prior to 2010-11. Recently the RIU has favoured providing assistance on specific proposals, rather than general training. <sup>e</sup> Initial workshops associated with the introduction of the new system, no further workshops are planned at this stage.

<sup>f</sup> Including 160 staff trained in using the Compliance Cost Calculator .. not applicable

Sources: PC RIA Survey (2012) and PC information requests to jurisdictions.

In a number of jurisdictions, there is an increasing focus on training tailored to address agency-specific issues. Tailored training can involve examining RISs previously completed by the agency or workshopping current and upcoming proposals. Some jurisdictions also offer more in-depth training in cost-benefit analysis (CBA).

No formal on-going training is offered by oversight bodies in Tasmania, the Australian Capital Territory and the Northern Territory. For Tasmania and the Northern Territory, the comparatively small number of RISs (chapter 4) may mean that provision of oversight body advice, on request, is more cost effective than formal training.

In addition to advice and training, the OBPR introduced an ‘outpost officer’ program in late 2011 (OBPR 2011b). Under this program, an OBPR officer is assigned to an agency preparing a Commonwealth or COAG RIS, for a period of several weeks to months, to assist the agency in developing the RIS. This can include:

- a short term engagement to develop an outline of the RIS and provide instructions for its preparation
- a longer term engagement to coordinate agency-wide input into the RIS

- 
- a long term engagement to write the RIS drawing on best practice consultation processes already undertaken. (OBPR 2011b, p. 1)

There have been up to six outpost officers across various agencies at any one time, though there is no set limit on the number that can be outposted. The fees for services are charged on a cost recovery basis, and were around \$800 to \$900 per day (depending on the nature of service provided) in January 2012 (OBPR 2011c, sub. DR35). They have since risen to around \$940 to \$1400 per day (OBPR, pers. comm. November 2012).

### *Examining and advising on adequacy of RISs*

In all Australian jurisdictions the oversight body examines RISs to determine whether they satisfy the relevant adequacy criteria. This can involve seeking information, explanation and justification from agencies on the contents of RISs. Hence, it is sometimes referred to as the ‘challenge function’.

When the agency determines the RIS is ready to proceed to the decision making stage (or to be published in the case of a *consultation* RIS), the oversight body will examine the RIS. In every jurisdiction, a RIS found to be adequate by the oversight body will proceed to the decision maker (or, in the case of a *consultation* RIS, to publication). Where a *final* RIS is found to be inadequate, the proposal may (depending on the jurisdiction and often also whether the proposal relates to primary or other regulation) either:

- proceed to the decision maker, in some cases with comments attached from the oversight body outlining its concerns with the RIS, or
- be returned to the agency for further development.

In practice, what occurs can vary from proposal to proposal within a jurisdiction. Progression of a proposal can also depend on whether a jurisdiction’s Cabinet office has a RIA ‘gatekeeping’ role (section 3.3).

Of all the functions performed by oversight bodies, the challenge function is perhaps the most important contributor to RIA quality control (chapter 8). The OECD considers it to be a vital mechanism for ensuring regulatory quality:

A central pillar of regulatory policy is the concept of an independent body that can assess the substantive quality of new regulation and work to ensure that ministries achieve the goals embodied in the assessment criteria ... To be effective, the oversight body must be able to question the quality of RIA and regulatory proposals. (OECD 2008, p. 37)

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### *Annual reporting on agency compliance with the RIA process*

The majority of oversight bodies do not publicly report on compliance with RIA requirements — only the OBPR and the VCEC publish RIS adequacy or compliance information annually. The importance of public compliance reporting for transparency of RIA processes is discussed in detail in chapter 7.

### *Compliance reporting in Commonwealth and COAG*

The OBPR publishes compliance information for Commonwealth and COAG in its annual *Best Practice Regulation Report* including aggregated RIS compliance rates and RIS compliance by individual agency and proposal (see for example, OBPR 2011a). The annual report also includes information on compliance with requirements to write and publish annual regulatory plans and post implementation reviews (discussed in chapters 7 and 9 respectively). In addition, the OBPR publishes compliance information online on a central RIS register when each regulatory decision is announced. A summary of recent RIS compliance rates is reproduced in table 3.5. In the Commonwealth process, compliance is reported for two stages:

- the ‘decision making stage’ requires a RIS assessed as adequate by the OBPR to be presented to the decision maker(s) at the time the decision is made
- the ‘transparency stage’ requires this RIS be published as soon as practicable after the regulatory announcement.

**Table 3.5 Australian Government and COAG RIS compliance<sup>a</sup>**

	2007-08		2008-09		2009-10		2010-11		2011-12	
	ratio	%	ratio	%	ratio	%	ratio	%	ratio	%
<b>Commonwealth</b>										
Decision making stage	43/48	90	45/53	85	63/75	84	47/63	75	69/78	88
Transparency stage <sup>b</sup>	41/45	91	41/49	84	59/74	80	45/63	71	70/78	90
<b>COAG</b>										
Consultation stage	26/27	96	22/25	88	29/41	71	8/9	89	13/16	81
Decision stage	25/27	93	24/25	96	32/41	78	9/10	90	13/16	81

<sup>a</sup> The compliance rate is the number of proposals where RIS requirements were met divided by the total number of proposals which required a RIS as determined by the OBPR. <sup>b</sup> There are sometimes fewer RISs at the transparency stage because some proposals have multiple decision stages and, as a result, require more than one decision RIS.

Sources: OBPR (2011a, 2012a).

The COAG process involves two RIS documents, one for the consultation stage and another for the decision stage. Compliance is reported separately for each of these stages, and requires the RIS to be assessed as adequate by the OBPR and published as soon as practicable after the regulatory announcement.

Compliance levels for Commonwealth and COAG have generally been high at both RIS stages over recent years. Lower compliance in some years is largely based on a higher number of proposals with no RIS (where a RIS was required), rather than more proposals where a RIS has been assessed as inadequate by the OBPR. In other words, where a RIS is completed, it is usually assessed as adequate.

### *Compliance reporting in Victoria*

The VCEC reports on compliance in its annual report, stating the number of RISs and business impact assessments (BIAs) assessed and specifying where these were assessed as inadequate (table 3.6). The VCEC does not monitor or report on whether the responsible minister appropriately assessed the need for a RIS/BIA.<sup>3</sup>

**Table 3.6 Victorian RIS and BIA compliance<sup>a</sup>**

	2007-08		2008-09		2009-10		2010-11		2011-12	
	ratio	%	ratio	%	ratio	%	ratio	%	ratio	%
RIS	29/29	100 <sup>b</sup>	27/28	96	29/29	100 <sup>b</sup>	11/11	100 <sup>b</sup>	13/13	100 <sup>b</sup>
BIA	7/8	87.5	12/13	92	14/15	93	2/2	100 <sup>b</sup>	2/2	100 <sup>b</sup>

<sup>a</sup> The compliance rate is the number of RISs or BIAs assessed as adequate divided by the total number of RISs or BIAs assessed by the VCEC. <sup>b</sup> Full compliance is implied but not explicitly stated in the VCEC annual reports.

Sources: VCEC (2008, 2009, 2010, 2011a, 2012).

Compliance rates for both RISs and BIAs have been high in recent years. As for Commonwealth and COAG, where a RIS or BIA is completed in Victoria it is usually assessed as adequate. Only one published RIS has been assessed as inadequate since the VCEC was established in 2004. In its annual report, the VCEC provided explicit reasons for its assessment in that case:

The Commission's assessment was based on the fact that the level of analysis in key components of the RIS did not meet the requirements of section 10(3) of the Subordinate Legislation Act 1994 ... did not provide sufficient or clear analysis of whether the benefits arising from this element of the proposed Regulations exceeded the estimated costs of \$70 million per year, or whether it provided the best overall

<sup>3</sup> The Scrutiny of Acts and Regulations Committee verifies that agencies decided appropriately on the need for a RIS for each proposal that proceeded to Parliament.

outcomes for the community compared with other feasible approaches ... The analysis of the fees imposed through the Regulations also was not sufficiently robust. (VCEC 2009, p. 69)

There have been a small number of BIAs assessed as inadequate in recent years. Where this occurs, the VCEC does not individually identify the proposal or report reasons for its assessment because BIAs are cabinet-in-confidence documents and are not publicly released.

### Cost of RIA: regulatory oversight bodies

Costs and staff levels associated with RIA related activities vary substantially between oversight bodies, due mainly to variations in oversight functions (table 3.7) and RIA activity (chapter 4) between jurisdictions. The cost and staffing figures do not represent total budgets or employee numbers, since some oversight bodies have functions which do not relate to RIA. For example, the Tasmanian ERU has seven staff members undertaking RIA related activities as part of their broader duties, resulting in a RIA full time equivalent (FTE) estimate of only two staff.

**Table 3.7 Oversight body costs and staff for RIA activities**  
2010-11

<i>Jurisdiction</i>	<i>Costs (\$)</i>	<i>Full-time equivalent staff</i>
Cwlt <sup>a</sup>	2 660 000	18.9
COAG <sup>a</sup>	1 140 000	8.1
NSW	500 000 <sup>b</sup>	2-3
Vic	880 000 <sup>c</sup>	5.4
Qld	975 000 <sup>d</sup>	2-3
WA	na	6-8
SA	na	1.1 <sup>e</sup>
Tas	220 000	2
ACT	na	<2
NT	100 000	1.8

<sup>a</sup> Commonwealth and COAG values are reported for 2012-13 based on a total OBPR budget of \$3.8 million and 27 FTEs, OBPR was not able to provide a budget for earlier years. The budget includes \$651 000 of cost recovery revenue and approximately six FTEs (hired since November 2011) associated with the new outposting program. The OBPR estimated the ratio of resource usage between Commonwealth and COAG to be 70:30. The OBPR does not receive separate funding for its COAG work. <sup>b</sup> This is an 'under normal circumstances' estimate; actual cost may have differed during some of 2010-11, which was an atypical year because of the NSW State Election. <sup>c</sup> This value is lower than normal (the VCEC budget is usually around \$1 000 000) possibly due to lower RIS activity in 2010-11 than recent years. <sup>d</sup> This value is higher than normal due to the introduction of a new RIA system which involved engaging extra staff for training. In recent years the figure has been closer to \$600 000. <sup>e</sup> This figure is for 2011-12. na not available.

Sources: PC RIA Survey (2012) and PC information requests to jurisdictions.

The distribution of total oversight body RIA costs between functions was provided in survey responses for seven jurisdictions (table 3.8). Key features are listed below.

- In jurisdictions with a formal preliminary assessment stage (Queensland and Western Australia), a large proportion of oversight body costs relate to this stage of the RIA process. In these jurisdictions, and in Tasmania — where the ERU advises whether a RIS is required based on a ‘Statement of Intent’ provided by the agency — RIS activity is also relatively low (chapter 4), which further explains the relatively high proportion of oversight body effort at the preliminary assessment stage.
- The oversight bodies for Commonwealth, COAG and the Northern Territory spend a large proportion of their costs on assisting agencies to prepare RISs. This is consistent with their survey responses, which flagged a shift from general training to assistance based on agency needs. More generally, most oversight bodies tend to spend more on assisting agencies with RISs than on training, with the Queensland RRB being the only exception.
- Compliance monitoring and reporting, including in those jurisdictions that report annually on compliance, represents a small proportion of oversight body expenditure.

**Table 3.8 Distribution of oversight body costs<sup>a</sup>**  
2010-11

<i>Activity</i>	<i>Cwlth</i>	<i>COAG</i>	<i>Vic</i>	<i>Qld<sup>b</sup></i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>
	%	%	%	%	%	%	%
Advising whether a RIS is required	10	10	20	68 (80)	10	90	30
Assistance preparing RIS	40	40	15	2 (2)	15	4	30
Assessing RIS adequacy	35	35	50	7 (7)	10	4	40
Compliance monitoring and reporting	10	10	5	6 (5)	20	1	0
Training	5	5	5	17 (6)	5	1	0
Other	0	0	5	0 (0)	40 <sup>c</sup>	0	0
Total	100	100	100	100	100	100	100

<sup>a</sup> NSW, SA and ACT oversight bodies were unable to provide estimates. <sup>b</sup> This distribution for 2010-11 was reported as being atypical because of implementation training relating to the new RIA system. A more typical distribution from previous years is shown in brackets. <sup>c</sup> Other costs include assessing the adequacy of Preliminary Impact Assessments and assistance provided to agencies on how to apply RIA to the various stages of policy development.

Source: PC RIA Survey (2012).



### 3.3 Cabinet offices with a formal RIA gatekeeping role

In five jurisdictions, Cabinet offices have a role verifying that proposals have satisfied RIA requirements before they proceed to Cabinet or its sub-committees (table 3.9). This role is formalised in RIA guidance material or other documents such as Cabinet or ministerial handbooks. It is often termed a RIA ‘gatekeeping’ role as, in principle, it involves preventing proposals from proceeding to decision makers where the oversight body has advised that RIA requirements have not been met.

This is distinct from Cabinet offices in other jurisdictions which have an information facilitation role ensuring that the RIS (where submitted by the agency) and oversight body comments are attached to proposals regardless of whether RIA requirements have been met. This does not comprise a RIA ‘gatekeeping’ role because proposals which have not complied with RIA requirements still proceed to the decision maker.

**Table 3.9 Formal RIA gatekeeping roles**

As at January 2012

	<i>Formal RIA gatekeeping role?</i>	<i>Who performs the role?</i>	<i>What should happen if a proposal does not satisfy RIA requirements?</i>
Cwth	Yes	Cabinet Secretariat	The Cabinet Secretariat will not circulate final Cabinet submissions or memoranda or other Cabinet papers
COAG	na		
NSW	Yes	Premier <sup>a</sup>	The Premier can exclude proposal from Cabinet Agenda or not forward Executive Council Minutes for consideration by the Governor-in-Council based on advice from the Department of Premier and Cabinet
Vic	No		
Qld	No		
WA	Yes	Cabinet Services Branch	Cabinet Services Branch may return the Cabinet submission to the Minister
SA	Yes	Cabinet Office	Cabinet Office will not sign-off on the RIS, meaning it cannot proceed for consideration by Cabinet
Tas	No		
ACT	No		
NT	Yes	Cabinet Office	The Cabinet Office will not proceed with the proposal

<sup>a</sup> Performing the role of the Minister for Regulatory Reform as outlined in the NSW guidelines. na not applicable.

Source: Jurisdictional guidance material (appendix B).

Where there is formal RIA gatekeeping, this does not cover decisions made outside Cabinet and its sub-committees. In such cases, and in jurisdictions with no formal

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RIA gatekeeping, the minister responsible for a proposal is typically charged with ensuring RIA requirements have been satisfied before the decision making stage.

In New South Wales and South Australia, the regulatory oversight body is located in the same agency as the RIA gatekeeping role — the Department of Premier and Cabinet (DPC). In New South Wales, the DPC reported that the BRO:

... assessed 132 Cabinet Minutes and 409 Executive Council proposals against the Government's better regulation principles, including 24 significant proposals that required either a Better Regulation Statement or a Regulatory Impact Statement. (NSW DPC 2011, p. 24)

These represent a subset of the Cabinet Minutes and Executive Council proposals for the year, since only regulatory proposals are assessed by the BRO. For Executive Council proposals, the NSW Cabinet Secretariat refers instruments which appear regulatory in nature to the BRO. For Cabinet Minutes, it is up to policy branches in DPC to determine whether a proposal requires comment from the BRO, and refer the Minute to the BRO for 'consideration and advice'. For proposals that will go to full Cabinet (rather than a Cabinet Committee), BRO receives a copy of the proposal during the initial distribution to policy branches. This can allow it to initiate assessment of a proposal without waiting for referral from a policy branch (NSW DPC, pers. comm., July 2012).

South Australia and the Northern Territory are the only jurisdictions which outline, in the RIA guidelines, formal alternative approaches to bringing a proposal to Cabinet. In South Australia, there is a formal appeal process for the decision made by the Cabinet Office:<sup>4</sup>

Where Cabinet Office sign-off is not gained and the agency does not revise the RIS, the agency may access an appeal mechanism. If deemed appropriate, the Minister for Industry and Trade, in his capacity as Chair of the Competitiveness Council, can override the Cabinet Office assessment. The proponent Minister should submit the appeal to the Minister for Industry and Trade. (SA DPC and DTF 2011, p. 10)

In the Northern Territory, proposals without an adequate RIS can proceed to decision makers with approval from the proponent minister:

The Cabinet Office will not proceed with regulatory proposals in the absence of certification from the Regulatory Impact Committee. Ministerial approval is required if regulation is to proceed to Cabinet or Executive Council in the absence of RIS certification or with certification indicating that the regulation does not comply with regulation-making principles. (NT Treasury 2007a, p. 16)

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<sup>4</sup> There have been no formal appeals to the Minister on decisions made by Cabinet Office. As at 1 July 2012, the Competitiveness Council no longer exists; a review of the appeal process will be undertaken in the near future (SA Cabinet Office, pers. comm., July 2012).

However, while not reflected in the Northern Territory guidelines, the proponent minister also needs to obtain the Chief Minister's approval for such a proposal to proceed to Cabinet (NT Department of Treasury and Finance, sub. DR30).

It is important to also note that in jurisdictions with a formal RIA gatekeeping arrangement, there are also informal avenues for circumventing this process. The effectiveness and limitations of formal RIA gatekeeping are discussed in chapter 8.

### 3.4 Parliamentary scrutiny committees

The Commonwealth and all states and territories have parliamentary scrutiny committees which examine legislation that has proceeded to parliament (table 3.10). The mandates of these committees vary, and can include considering whether appropriate procedures and principles have been followed in areas such as human rights, parliamentary propriety and delegation of legislative powers.

**Table 3.10 Parliamentary scrutiny committees**  
As at January 2012

	<i>Parliamentary scrutiny committees</i>	<i>Is there an explicit mandate related to RIA?</i>
Cwth	Scrutiny of Bills Committee	No
	Regulations and Ordinances Committee	No
NSW	Legislative Review Committee	Yes <sup>a</sup>
Vic	Scrutiny of Acts and Regulations Committee	Yes
Qld	Scrutiny of Legislation Committee <sup>b</sup>	Yes
WA	Legislation Committee	No
	Delegated Legislation Committee	No
	Uniform legislation and Statutes Review Committee	No
SA	Legislative Review Committee	No
Tas	Standing Committee on Subordinate Legislation	Yes
ACT	Standing Committee on Justice and Community Safety <sup>c</sup>	Yes
NT	Subordinate Legislation and Publications	No

<sup>a</sup> Scrutinises subordinate legislation with an explicit mandate to consider RIA, also scrutinises Bills but with no explicit requirement to consider RIA. Can recommend disallowance of subordinate legislation (not Bills). <sup>b</sup> This committee ceased to exist on 30 June 2011. Its role has been replaced, under a new committee system established in May 2012, by seven separate portfolio committees, each scrutinising regulation in its respective portfolio area. <sup>c</sup> Performing the duties of the Scrutiny of Bills and Subordinate Legislation Committee.

Source: Jurisdictional parliamentary committee websites.

In five jurisdictions, parliamentary scrutiny committees have an explicit mandate to examine procedural compliance with RIA requirements. These are the same jurisdictions in which RIA requirements are mandated for subordinate legislation

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(see box 1.2). The functions of scrutiny committees with a RIA mandate can include:

- examining whether relevant documents contain appropriate information and are signed by ministers
- considering whether consultation undertaken was adequate
- verifying that the RIS is adequate.

If the committee considers that RIA processes have not been appropriately followed, it can correspond with the responsible minister or departmental official to seek clarification or amendment, report to parliament to inform decision making or recommend disallowance of the instrument to parliament.<sup>5</sup> In practice, scrutiny committees have generally favoured the first two options and have not been active in recommending disallowance based on an inadequate RIA process. The effectiveness of these parliamentary scrutiny committees in supporting the accountability of RIA processes is discussed further in chapter 8.

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<sup>5</sup> Recommending disallowance is distinct from a ‘disallowance motion’ which can be made by any member of parliament and leads to a vote on the instrument. When a scrutiny committee recommends disallowance, this will not lead directly to a vote until a disallowance motion has been made.

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## 4 Scope of regulatory impact analysis

### Key points

- Regulatory impact analysis (RIA) should, in principle, apply to all regulatory instruments where there is an expectation of compliance. In all jurisdictions, RIA applies to new or amended primary and subordinate regulation, and also to quasi regulation, except in New South Wales, Victoria, Western Australia and Tasmania, and to the remaking of sunseting regulations, except in Western Australia (and, in some circumstances, Tasmania).
- All jurisdictions (except the ACT for primary legislation) apply threshold significance tests to decide which regulatory proposals require regulation impact statements (RISs).
- Despite the broad range of regulation subject to RIA, only 1 to 3 per cent of all regulation made across Australia's jurisdictions has had a RIS prepared for it.
- Concerns were raised about the subjectiveness of decisions on the need for a RIS. Agencies provided examples of being asked to prepare RISs where they considered the impacts were not significant; while industry groups raised instances of agencies not preparing RISs for proposals they considered to have significant impacts.
  - The provision of improved guidance and examples of what constitutes significant impacts may reduce the number of judgments that are disputed.
- Significant differences exist across jurisdictions in the initial screening required to determine whether likely impacts are significant. Queensland, Western Australia and the Northern Territory have a formal process of preliminary assessment to determine whether a RIS is required.
- For regulation subject to RIA, it should be presumed that a RIS is required, unless it can be shown that impacts are not significant. Such a presumption is a feature of the RIS trigger only for subordinate legislation in New South Wales and Victoria.
  - Where impacts are assessed as not significant (hence no RIS is required), reasons for the determination should be made public.
- The RIS trigger should consider both positive and negative impacts on any group in the community, as is the case with the Northern Territory.
- Agency self-assessment of the need for a RIS (subject to appropriate auditing) may improve RIA efficiency, particularly in those jurisdictions with a relatively high level of RIA activity.
- Irrespective of who makes the determination as to whether a RIS is required, the initial impact analysis and documentary requirements should be streamlined and the minimum necessary (generally not more than a basic pro forma checklist).
  - Determinations of the need for a RIS should be subject to periodic independent auditing.

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The terms of reference specifically request that the Commission assess ‘whether RIA applies to primary and subordinate legislation, legislative and non-legislative instruments and quasi regulation’. The Commission is also to consider the ‘regulatory significance threshold, and related thresholds, such as impacts on specific sectors and regions, at which mandatory RIA processes are triggered’.

This chapter considers the types of regulations that are subject to RIA requirements, the various significance thresholds and associated processes for determining when the requirement for a RIS is triggered. Regulatory proposals that are outside the scope of RIA (exceptions and exemptions) are covered in chapter 5.

## **4.1 Regulation subject to RIA**

As discussed in chapter 1, ‘regulation’ covers both primary and subordinate legislative instruments, as well as — in certain circumstances — quasi regulation, such as codes of conduct, industry agreements and other guidance documents.

The OECD, when considering the appropriate coverage of RIA, has defined regulation broadly as:

... referring to the diverse set of instruments by which governments set requirements on enterprises and citizens. Regulations include laws, formal and informal orders and subordinate rules issued by all levels of government, and rules issued by non-governmental or self-regulatory bodies to which governments have delegated regulatory powers. (OECD 2012a, p. 21)

In most Australian jurisdictions, the determination of the types of regulatory instruments subject to RIA is based upon whether there is an ‘expectation of compliance’. For example, the Australian Government guidance material states that:

Regulation is any ‘rule’ endorsed by government where there is an expectation of compliance. It includes primary legislation and legislative instruments (both disallowable and non-disallowable) and international treaties. It also comprises other means by which governments influence businesses and the not-for-profit sector to comply but that do not form part of explicit government regulation (for example, industry codes of practice, guidance notes, industry-government agreements and accreditation schemes). (Australian Government 2010a, p. 9)

All Australian jurisdictions state that the RIA requirements apply to all government agencies. The Australian Government, Queensland and South Australian guidance materials expressly state that administrative or statutory independent bodies are subject to the RIA requirements.

## Jurisdictional approaches to regulation coverage

### *Types of regulations covered by RIA*

Most jurisdictions stipulate that RIA applies to new and amending Bills and regulations, as well as to sunseting regulations (table 4.1). The RIA requirements for reviews of regulation are covered in chapter 9.

Amongst the ten jurisdictions, the scope of RIA in the Northern Territory is particularly broad as it includes all primary and subordinate legislation, as well as legislative and non-legislative instruments such as rules, codes, plans of management and quasi regulation. Similarly broad, the COAG RIA guidebook states that:

If regulatory options are being considered (such as self-regulation where governments expect business to comply, quasi regulation, co-regulation and ‘black letter law’) then Ministerial Councils must subject these options to a regulatory impact assessment process through the preparation of a draft and final RIS. (COAG 2007a, p. 7)

Individual jurisdictions adopting a COAG proposal typically determine how intergovernmental decisions and agreements are implemented in regulation. For some regulatory proposals, COAG creates model legislation to assist jurisdictions in developing their own legislation. Chapter 6 discusses individual jurisdictional approaches to COAG regulatory proposals.

**Table 4.1 Regulatory proposals subject to RIA**

<i>Type of regulation</i>	<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
New Bills	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Amending Bills	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
New regulations	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Amending regulations	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Remaking of sunseting regulations	✓	..	✓	✓	✓	x	✓	✓ <sup>a</sup>	✓	✓
Quasi regulation	✓	✓	x <sup>b</sup>	x <sup>c</sup>	✓	x	✓	x	✓ <sup>d</sup>	✓

<sup>a</sup> A RIS is not required for the remaking of subordinate legislation where the original regulation has been in operation at some time in the preceding 12 months, and has been in operation for less than 10 years, and a RIS was prepared in relation to the earlier regulation. In practice, this means that regulation could potentially last for up to 19 years without a review. <sup>b</sup> Quasi regulation is considered a non-regulatory approach in NSW, and hence it is not subject to RIA. <sup>c</sup> Victoria has treated quasi regulation as an ‘other regulatory form’ not subject to RIA. Recent legislative changes have meant that some forms of quasi regulation are now subject to RIA. <sup>d</sup> The ACT classifies quasi regulation as a non-regulatory approach, however a RIS should still be undertaken. .. not applicable.

Source: Jurisdictional guidance material (appendix B).

The application of RIA to quasi regulation is not a feature of all jurisdictions. For example, quasi regulation is not subject to RIA in New South Wales, Victoria,

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Western Australia or Tasmania, whereas the Australian Government explicitly states that quasi regulation is subject to RIA.

Part of the reason for the variable treatment of quasi regulation is that there remain issues around what constitutes quasi regulation. There are also practical difficulties in monitoring the development of quasi regulation, as it often is developed outside parliamentary processes. If quasi regulation were excluded from RIA, this could potentially incentivise agencies to categorise regulatory proposals as quasi regulation so as to circumvent the RIA requirement. However, it is unclear to what extent this concern could be realised due to the low level of monitoring that quasi regulation typically receives.

The Small Business Development Corporation (SBDC) strongly advocated that the scope of RIA in Western Australia be extended by including quasi regulation:

In the SBDC's opinion, the most significant shortcoming of the existing RIA system in Western Australia is that it only applies to primary and secondary legislation, at the expense of other quasi regulatory instruments ... The [Red Tape Reduction Group] found that the majority of the regulatory burden on business in Western Australia did not directly come from legislation or regulations passed by Parliament, but rather from quasi regulations (such as policies, procedures and business rules) and their administration by government. (SBDC, sub. 25, p. 5)

Victoria has recently expanded the types of regulation subject to RIA to include some forms of quasi regulation such as ministerial orders, codes of practice and licence conditions that apply to a class of people (Department of Premier and Cabinet 2010, in VCEC 2010). The second reading speech for the Bill introducing the changes noted:

The changes ... will mean more types of subordinate legislation that have a significant burden on the public will be the subject of analysis, public consultation and scrutiny through the regulatory impact statement (RIS) process. There will be a consistent level of scrutiny for all subordinate legislation based upon an instrument's potential impact, rather than its legal form. (Hulls 2010, p. 3615)

Notwithstanding the potential definitional and practical difficulties of monitoring quasi regulation, the Commission considers that any proposed regulation with a widespread expectation of compliance ought to be subject to RIA.

#### LEADING PRACTICE 4.1

***Subject to appropriate exceptions, outcomes are enhanced where primary, subordinate and quasi regulation are included within the scope of the RIA process.***



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The Commission received a number of submissions from study participants advocating that local government regulation be subject to RIA (for example, Construction Material Processors Association Inc. (sub. 9) and the Small Business Development Corporation (sub. 25)). The Commission's report into the regulatory role of local government noted that only Tasmanian local governments are required to undertake RIA as part of policy development (PC 2012).

The appropriateness of applying RIA to local government regulation making is considered to be outside the terms of reference of this study. However, the costs incurred by local government to implement or enforce state, territory or Commonwealth regulation, are briefly considered in this study, with chapter 6 noting their necessary inclusion in RIS analysis.

### *Level of RIS activity*

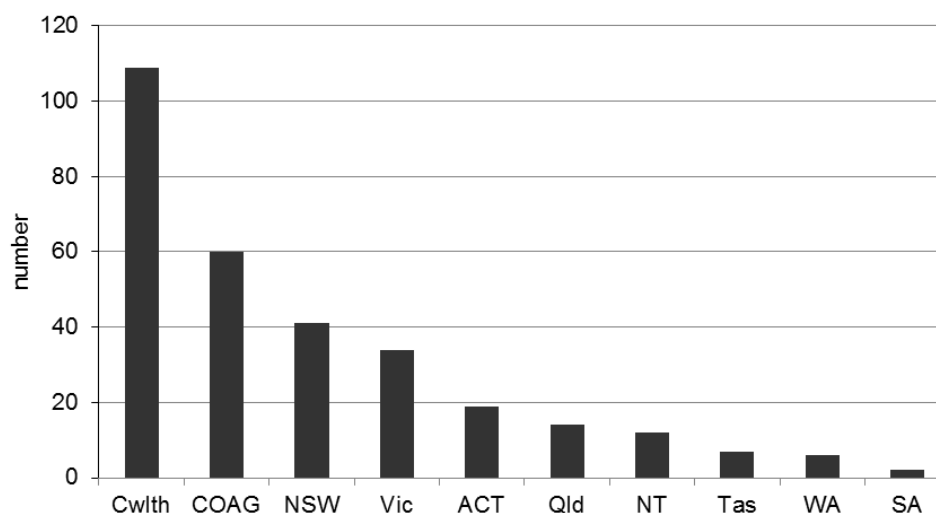
Notwithstanding the broad coverage of instruments in jurisdictional RIA processes, in practice the number of RISs completed is relatively small (figure 4.1). In the most recent two year period, the Commonwealth alone accounted for one-third of all RIS activity, with COAG, Victoria and New South Wales together accounting for a further 50 per cent. However, even in these jurisdictions, RISs were completed for only 1 to 3 per cent of all regulatory instruments made (table 4.2).<sup>1</sup>

Differences in these proportions evident between jurisdictions reflects a range of factors including: differing RIA coverage requirements; level of aggregation of regulations in different jurisdictions; and the devolution of regulatory responsibilities to local governments (which, as noted above, are generally not required to do RISs).

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<sup>1</sup> For the Commonwealth, this is consistent with an estimate for 2007-08 that around 2 per cent of regulatory proposals tabled required a RIS (OBPR 2008a, p. 15).

**Figure 4.1 Total number of completed RISs (or equivalent)<sup>a</sup>**  
2010 and 2011<sup>b</sup>



<sup>a</sup> The reported values are the number of final RISs or equivalent produced. That is, for jurisdictions with a two-stage process, only the final RIS is reported. For jurisdictions which only produce a consultation RIS (Victoria and Tasmania), the number of these is reported. <sup>b</sup> Data for Commonwealth and COAG are for July 2009 to June 2011. For the remainder of jurisdictions, data are for January 2010 to December 2011. The South Australian number is from mid-2011, corresponding with the implementation of a new RIA process.

Data source: PC information request (March 2012).

**Table 4.2 Jurisdictional regulatory and RIS activity<sup>a</sup>**  
2010 and 2011 calendar years

Year	Type of instrument	Cwlth	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
2010	Acts	150	137	80	54	61	28	50	56	49
	Subordinate instruments <sup>b</sup>	3396 <sup>c</sup>	780 <sup>d</sup>	775	391	589	..	165	368	30
	Regulations	334	117	152	378	30	271	159	53	26
2011	Acts	190	73	83	47	62	50	61	57	46
	Subordinate instruments	2793 <sup>c</sup>	708 <sup>d</sup>	712	377	605	..	136	373	61
	Regulations	277	101	166	310	23	283	130	39	56
<b>Total regulatory instruments</b>		<b>6529</b>	<b>1698</b>	<b>1650</b>	<b>869</b>	<b>1317</b>	<b>632</b>	<b>412</b>	<b>854</b>	<b>186</b>
RISs (or equivalent) completed (number)		110 <sup>e</sup>	41	34	14	6	2 <sup>f</sup>	7	19	12
RISs as a proportion of total regulatory instruments (%)		1.7	2.4	2.1	1.6	0.5	.. <sup>f</sup>	1.7	2.2	6.5

<sup>a</sup> By date of assent or notification, which is not necessarily the commencement date. <sup>b</sup> The Commission has attempted to capture the range of instruments subject to gazettal, while acknowledging that processes vary across jurisdictions. <sup>c</sup> Characterised as 'legislative instruments' for the purposes of the *Legislative Instruments Act 2003* (Cwlth). <sup>d</sup> Includes 'statutory instruments' comprising regulations, rules, by-laws, proclamations and environmental planning instruments. <sup>e</sup> Fiscal year, not calendar year. In calendar year 2011, 2.2 per cent of all regulatory instruments made had a RIS. <sup>f</sup> From mid-2011 onwards, as this was the formal commencement of South Australia's RIA system. ..not available.

Sources: Jurisdictional guidance material (appendix B); PC information request (March 2012); Austlii (2010a, 2010b, 2010c, 2011a, 2011b, 2011c, 2012).

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## 4.2 Trigger for RIS requirements

Given there can be significant costs associated with the preparation of RISs (chapter 3), maximum effort and resources should be applied to those regulations where impacts are most significant and where the prospects are greatest for improving regulatory outcomes.

### What types of impacts trigger the RIS requirements?

Australian jurisdictions and COAG have typically adopted a two-part threshold test to establish whether a RIS is required; however, the criteria differ. The first part relates to the level or magnitude of impacts, and the second focuses on who or what is affected (table 4.3).

There are significant differences across jurisdictions in the initial screening or preliminary analysis required to determine whether RIS thresholds are met, and also in who is responsible for determining whether RIS requirements are triggered.

#### *The level or magnitude of impacts*

Most jurisdictions use the ‘significance of impacts’ as a trigger for a RIS; however, the Commonwealth, COAG and South Australia have each adopted a broader ‘non-minor impacts’ threshold. For example, the Australian Government guidance material says that RIA should apply unless the ‘impact is of a minor or machinery nature and does not substantially alter existing arrangements’ (Australian Government 2010a, p. 8). The terms minor and machinery are further defined:

‘Minor’ changes refer to those changes that do not substantially alter the existing regulatory arrangements for businesses or not-for-profit organisations, such as where there would be a very small initial one-off cost to business and no ongoing costs. ‘Machinery’ changes refer to consequential changes in regulation that are required as a result of a substantive regulatory decision, and for which there is limited discretion available to the decision maker. (Australian Government 2010a, p. 10)

The Australian Government lowered its RIS threshold from a significance test to the current non-minor impacts test in 2010, when it amalgamated the requirements for use of the Business Cost Calculator (chapter 6) into the requirement to undertake a RIS (Australian Government 2010a). Potentially, Australian Government regulatory proposals with anything more than a non-minor impact — but not a significant impact — could now require a RIS. In practice, however, there has not been a substantial rise in the number of RISs undertaken (table 3.5) — either because of the narrowing in the scope of impacts to only business and not for profit sectors (see

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below), or a lack of proposals with an impact between ‘non-minor’ and ‘significant’.

In the majority of jurisdictions, no RIS is required for regulatory proposals that impose minor or machinery impacts. However, as a matter of course, in order to determine that impacts are minor or machinery, some minimal regulatory analysis needs to be undertaken. However, in New South Wales and Tasmania, there are further documentary requirements for proposals with minor impacts (discussed later in this section).

Only the Australian Government guidelines *explicitly* state that significant positive as well as negative impacts trigger the requirement for a RIS. In contrast, the RIS trigger is *explicitly* limited to negative impacts in Western Australia and Tasmania, and for subordinate legislation, in New South Wales, Victoria, Queensland, and the ACT (although the Commission was advised of examples in some of these jurisdictions of where RISs have been prepared for proposals which have significant positive impacts). In all other cases, the trigger is not explicit in terms of its coverage of negative or positive impacts and therefore ‘in principle’ positive impacts would also trigger the requirements (table 4.3).

Some stakeholders considered that deregulatory or clearly beneficial proposals should be exempt from the RIA requirements. For example, the Department of Infrastructure and Transport stated its concern about the application of ‘RIA processes to activities that are fundamentally about opening up and removing regulatory burdens’ (sub. 21, p. 1). Although some regulation provides clear net benefits to the community (for example, most health and safety regulation), a rigorous assessment of alternatives (and their relative merits) through RIA processes can still be highly beneficial for improving the regulation and its implementation (chapter 6).

### *Who or what is impacted?*

New South Wales, Queensland, Western Australia, Australian Capital Territory and the Northern Territory all adopt either a community or economy-wide impact approach (table 4.3). The Commonwealth, adopts a narrower approach, focusing only on business or competition impacts, as do Victoria and Tasmania for all regulation apart from subordinate legislation.

**Table 4.3 Threshold test to determine if a RIS is required**

	<i>Type of regulation</i>	<i>Level of impact</i>	<i>Impact on...</i>
Cwth	All covered	Regulatory, unless that impact is of a minor or machinery nature and does not substantially alter existing arrangements	Business or not for profit sector
COAG	All covered	The principles and assessment requirements do not apply to agreements or decisions that result in regulation that is minor or machinery in nature and do not substantially alter existing arrangements	Not applicable
NSW <sup>a</sup>	Subordinate All others covered	Appreciable burden, cost or disadvantage Significant	Any sector of the public Individuals, the community (or a sector of the community), business, competition, <sup>b</sup> or the administrative cost to government
Vic <sup>a</sup>	Subordinate All others covered	Significant economic or social burden Significant	A sector of the public Competition and business
Qld	Subordinate All others covered	Appreciable costs <sup>c</sup> Significant	The community (or a part of the community) Business, community or government
WA	All covered	Significant negative	Business, consumers, or economy
SA	All covered	Any proposal to impose or amend regulation, unless the proposal is likely to have nil or minor impacts, subject to an exemption, or required to be urgently implemented	Business, consumers, public or environment
Tas	Subordinate All others covered	Significant burden, cost or disadvantage Restrict competition in any way or impose significant negative impacts	Any sector of the public Business
ACT	Subordinate All others covered	Appreciable costs No applicable threshold	The community (or a part of the community) A stakeholder group (eg government, community group, general public, industry or business group)
NT	All covered	Material	Business, the economy and the community

<sup>a</sup> New and remade sunseting regulations are automatically subject to a RIS unless it can be shown that the threshold is not met. <sup>b</sup> The threshold for competition impacts is 'impose a material restriction' as opposed to a significant impact test. <sup>c</sup> 'Appreciable costs' are deemed to be a 'significant' impact and require a RIS.

Source: Jurisdictional guidance material (appendix B).

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The current Australian Government guidelines state that the non-minor impacts must be on either business or the not-for-profit sector, including ‘any organisation that aims to make a profit and the commercial activities or transactions of not for profit organisations’ (Australian Government 2010a, p. 9). The previous requirement allowed for a much broader range of impacts, including ‘proposals that are likely to have a significant impact on business and individuals or the economy (whether in the form of compliance costs or other impacts)’ (Australian Government 2007, p. 15).

Study participants advocated several alternative potential triggers for requiring a RIS. For example, the Western Australian Local Government Association stated that the RIS requirement should be triggered if there are impacts on local government (sub. 6, p. 3). The Australian Food and Grocery Council (sub. 5, p. 16) stated that ‘[a]ll regulation that may affect business should be subject to a regulation impact assessment (RIA) process’.

It is important that RISs assess the economy-wide regulatory impacts so as to best estimate the total impacts on the community (chapter 6). Although all jurisdictions advocate economy-wide impacts be assessed once a RIS is required, there may be instances where the initial impact of the proposal does not affect business or competition and hence bypasses the requirement for a RIS. The Commission acknowledges that broadening the threshold may result in an increase in the volume of proposals to assess but, on balance, the increase is justified given the potential to avoid requiring a RIS due to a narrower threshold. Moreover, the Commission has highlighted leading practices in ensuring that only the minimum necessary analysis be undertaken to determine the significance of impacts.

## **Jurisdiction approaches to the significance test**

The majority of Australian jurisdictions provide guidance on indicative impacts that are likely to be deemed significant and hence require a RIS. As an example, box 4.1 draws on the Victorian guidance material.

Victoria has also provided guidelines on interpreting significant impacts for the purposes of the *Subordinate Legislation Act 1992* (Vic):

In general, if the preliminary and indicative analysis suggests the measurable social and/or economic costs to any sector of the public (including costs to the Victorian community as a whole) are greater than \$500 000 per year, compared with the relevant base case, then there is likely to be a significant burden. (Victorian Department of Treasury and Finance 2011b, p. 77)

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#### Box 4.1      **What is meant by ‘significance of impacts’?**

Significance has two aspects, breadth and depth:

- Breadth — A regulatory proposal may be considered to impose significant impacts if it impacts on a wide range of activities in the economy
- Depth — A regulatory proposal may be considered to impose significant impacts even if it affects only one industry (or even one part of the industry), if the impacts are profound.

Most Australian jurisdictions provide detailed guidance on determining whether impacts are likely to be significant. For example in Victoria, the types of impacts that are likely to be significant require an element of judgment, however the guidebook states:

If the legislative proposal will alter the way the activities of a business, or group of businesses are undertaken, then a significant impact may exist. Consideration should also be given to the size of the sector affected by the proposed measure, whether the proposal will impose any restrictions on entry into, or exit out of, the affected industry, and the change in regulatory burden that would result if the proposed measure were introduced.

The definition of ‘significant effects’ on business and/or competition includes situations where the legislative proposal is likely to produce one or more of the following effects:

- affect a significant number of businesses;
- have a concentrated effect on a particular group, region or industry;
- have a large aggregate impact on the Victorian economy;
- create a disincentive to private investment;
- add significantly to business costs;
- place Victorian businesses at a competitive disadvantage with interstate and overseas competitors;
- impact disproportionately on the prospects for small businesses;
- impose restrictions on firms entering or exiting a market;
- introduce controls that reduce the number of participants in a market (e.g. because cost imposts are large enough to result in a significant contraction in the number of businesses);
- affect the ability of businesses to innovate, adopt new technology, or respond to the changing demands of consumers;
- impose higher costs on a particular class of business or type of products or services (e.g. flat rate fees impose a proportionally higher burden on small business);
- lock consumers into particular service providers, or make it more difficult for them to move between service providers; and/or
- impose restrictions that reduce the range or price or service quality options that are provided in the marketplace. (Victorian Department of Treasury and Finance 2011a, pp. 37-8)

As in Victoria, several OECD countries also use monetary thresholds as a rule of thumb for determining significance, usually in conjunction with other criteria. A risk associated with relying on such thresholds is that the proposal proponents may

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have an incentive to understate impacts so that they fall below the threshold or to separate several related proposals in such a way as to avoid triggering the requirements.

In practice, data constraints may render such a threshold impractical to implement. Around 60 per cent of respondents to the Commission's survey of agencies stated that a key challenge of the RIA process is the lack of available quantitative data (PC RIA Survey 2012). Thus, while monetary thresholds may have a use in providing broad orders of magnitude, they are unlikely to be useful as a prescriptive threshold for determining significance. Officers undertaking RIA in the Victorian transport portfolio considered that the monetary trigger in Victoria is appropriate, but nevertheless cautioned:

The temptation in the past has been to try and specify triggers that are so matter of fact that it is easy to determine whether a RIA is necessary. However, attempts have tended to result in extreme outcomes ie either everything requires a RIA or only the most significant changes requires a RIA. (sub. 17, p. 7)

More generally, stakeholders expressed concern regarding the inherent subjectivity of a significance of impacts test, and called for more guidance to be provided (box 4.2). As a consequence of the subjectivity in determining the significance of impacts, there have been instances where stakeholders have felt that a RIS was warranted but none was prepared (box 4.3). On the other hand, several agencies advised the Commission that RISs had, on occasion, been required for proposals without significant impacts. Similarly, the Centre for International Economics stated that:

... full RISs are often required for proposed regulatory changes which do not target significant economic problems. (sub. 14, p. 7)

Notwithstanding the concerns surrounding the subjectivity of a significance test, the Commission considers that such tests are broadly appropriate, but could be improved. To reduce subjectivity in assessing proposals, jurisdictions could consider introducing more detailed guidance on likely impacts. Examples of proposals that have both significant and 'insignificant' impacts in guidance material would help proponent agencies to determine the impacts of specific proposals and help ensure that RISs are undertaken when appropriate.

Alternatively, jurisdictions could consider beginning with the presumption that a regulatory proposal is likely to have significant impacts and therefore requires a RIS. Such an approach has been adopted in New South Wales and Victoria for subordinate legislation and necessitates that the proposing agency demonstrate that no RIS is needed because either an exception applies (chapter 5) or impacts are not significant. This presumption allows for a better integration of the RIA process into



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agency culture as agencies are forced to consider the relative level of impacts of *all* regulatory proposals (chapter 10).

**Box 4.2 Stakeholder views on a ‘significance of impacts’ tests**

Tasmanian Parliamentary Standing Committee on Subordinate Legislation:

It is not clear what tests are applied to determine the significance of any impact, but it does seem that the assessments made are subjective. (sub. 3, p. 2)

Australian Logistics Council:

... what constitutes a ‘minor’ or ‘machinery’ amendment to regulation is a question of fact and degree. In many circumstances, what is regarded as a ‘minor’ change can have significant effect on business and flow-on effects on the supply chain. (sub. 10, p. 1)

Department of Environment and Conservation (WA):

There is insufficient guidance as to the level of impact at which higher level RIA processes (such as the requirement for a RIS) are triggered ... As a result, there are concerns that any negative impact will require a RIS, rather than this being limited to significant impacts ... the process would benefit from clear guidelines on the types of impacts that would trigger the requirement for a RIS (for example, indications of the proportion of impacted businesses in a given region, and the financial scale of the impact on businesses or consumers). (WA State Government, sub. 24, attachment 3, p. 2)

Nevertheless, moving to such an approach is not costless for agencies. If resources required to analyse a regulatory proposal were higher than that proposal’s impacts, then this would create an unnecessary regulatory burden for agencies and negate the overall net benefit of the proposal to the community. Thus, the Commission has advocated the use of a streamlined preliminary impact assessment process (see discussion below) to assess the likely impacts of regulatory proposals, to help avoid an increase in unnecessary regulatory burdens.

**LEADING PRACTICE 4.2**

***To ensure regulations are subject to appropriate scrutiny, the threshold significance test for determining whether a RIS is required should be specified broadly and consider impacts — both positive and negative — on the community or part of the community. To implement this:***

- ***jurisdictions should provide clear guidance to agencies, including a range of specific examples, to assist in determining whether impacts are likely to be significant***
- ***where RIA applies, it should be presumed that a RIS is required (as is currently the case for subordinate legislation in Victoria and New South Wales), unless it can be demonstrated that impacts are likely to be not significant.***

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**Box 4.3 Stakeholder views on proposals introduced without RIA or assessed as having minor impacts**

Australian Food and Grocery Council:

Menu board labelling in Quick Service Restaurant...The NSW [Food Amendment] Bill was gazetted with unseemly haste at the end of 2010 with very limited stakeholder consultation and with no formal RIA being conducted with stakeholders. Indeed, many businesses only found out about the new regulatory requirement when called to an industry consultation after the Bill was gazetted. (sub. 5, p. 9)

Australian Trucking Association:

... a RIS was not undertaken due to the apparent nature of the changes to the charging system involving only minor and machinery changes. The changes are not minor, as they will have huge impact on operators. (sub. 23, p. 9)

Accord Australasia:

Exemptions can be obtained if the matter is a minor administrative or technical matter. It has been Accord's experience that regulatory agencies are able to successfully argue that matters are minor because of the technical nature within which the legislation is based. Accord has had to raise this issue with OBPR [Office of Best Practice Regulation] on a number of occasions to demonstrate that the changes while appearing to be minor would have had a significant detrimental effect upon industry and as such required a RIS. In some cases we have been successful as the insistence of a RIS has dampened the enthusiasm of the regulator for any such reform at that particular time. (sub. 26, p. 8)

## **Documentary or other requirements to establish significance**

A range of approaches is employed for initial screening of regulatory proposals. In Queensland, Western Australia and the Northern Territory, the preliminary screening of proposals is undertaken through a formalised preliminary impact assessment (PIA) process. The PIA process involves, to varying extent, documentation of impacts to assess whether they are likely to be significant. The processes in other jurisdictions are less formal but often still involve agency provision of information on proposals to the regulatory oversight body.

In addition to being an aid to establishing whether impacts are likely to be significant, the PIA may also assist agencies in establishing the need for regulation.

In Western Australia and the Northern Territory, the PIA is submitted to the relevant oversight body which then determines whether impacts are likely to be significant. In Queensland, agencies self-assess the likely significance of impacts, in consultation with the oversight body. If the oversight body does not agree with the agencies' final decision on self-assessment, it may notify the Treasurer to challenge the assessment.

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The extent of documentary evidence required in the PIA differs between the jurisdictions, with processes in Queensland and Northern Territory appearing to be the most streamlined (box 4.4).

**Box 4.4 Elements of the formal PIA processes**

**Queensland**

The PIA is an initial assessment requiring:

... a brief assessment of the potential economic (including competition), social, environmental and compliance impacts on business, community and government. These impacts should be quantified where possible. The PIA must include an estimate of compliance costs unless they are considered to be negligible or trivial. (Queensland Treasury 2010, p. 25)

The four-page pro forma for the PIA requires an outline of: the case for action; the proposal's objective; options analysis; impact assessment of policy options; the preferred proposal; key stakeholders and consultation; and an overall assessment on whether the impacts are likely to be significant.

**Western Australia**

The PIA seeks an early assessment of the costs and other likely impacts to enable determination of a proposal's likely impacts. The seven page template requires a short description of the proposal and responses to a series of questions on specific elements such as: consideration of small business impacts; whether the proposal relates to a COAG or other intergovernmental agreement; problem identification, objectives and options; consultation; market and competition impacts; and compliance and 'other' costs on business, consumers or the Government. Additionally, a PIA is required for an agency to apply for an exception from RIA (chapter 5).

**Northern Territory**

The PIA is used to establish whether the proposal is likely to impact significantly on the community, and therefore whether a full RIS is warranted. '[A] secondary function of the [PIA] process is for early policy consideration to take place' (Northern Territory Department of Treasury and Finance, sub. DR30, p. 5). The PIA requires analysis of the problem, likely impacts (a one-page 'yes/no' competition and business compliance cost checklist), whether the proposal satisfies the 'clear and obvious public interest' test, and to outline the proposed consultation processes.

*Sources:* Queensland Treasury (2010); Western Australian Treasury (2010a, 2010b); Northern Territory Treasury (2007a).

Provided that the PIA process is streamlined and the minimum necessary to establish that a proposal is unlikely to have significant impacts, the PIA process can be an effective early screening mechanism. However, if the PIA process requires extensive impact assessment — then the cost of this assessment for the vast majority of proposals is likely to outweigh the benefit. The Commission

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understands that in some jurisdictions, most evidently in Western Australia, a substantial amount of departmental and oversight body resources are being devoted to assessing what turn out to be regulatory proposals with ‘insignificant’ impacts.

Some regulatory proposals (for example, the banning of a widespread activity) would, by their very nature, impose significant impacts on the community. These proposals should not require a preliminary assessment, but instead proceed immediately to a RIS. As noted by the Western Australian Department of Transport:

A cost saving could be possible where prior to completing the PIA the agency has identified that the proposal will have a [significant] negative impact on business, consumers and/or the economy. The agency could then elect to develop an RIS rather than initially completing a PIA. Currently in this circumstance, the agency is still required to complete a PIA which often requires significant effort and numerous iterations ... Significant resource and time savings could be achieved by agencies electing to proceed to a full RIS process. (sub. 12, p. 3)

In those three jurisdictions with formal PIA requirements, only 32 out of nearly 1400 proposals formally assessed under PIA in 2010 and 2011, resulted in a RIS being required (table 4.4).

**Table 4.4 Preliminary impact assessment by relevant jurisdiction**  
January 2010 to December 2011

<i>Jurisdiction</i>	<i>Number of PIAs</i>	<i>Number of RISs</i>
Queensland	437	14
Western Australia	778	6
Northern Territory	173	12

Source: PC information request (March 2012).

There are a number of reasons why, after being subjected to PIA, regulatory proposals usually do not result in a RIS:

- the best solution may be a non-regulatory option, hence further RIA (or a RIS) would not be required — only 6 per cent of agencies in Queensland, Western Australia and the Northern Territory reported instances of a regulatory proposal for which either the status quo or a non-regulatory option was preferred
- the agency may amend or remove a proposal so that a RIS would not be required — 95 per cent of agencies in Queensland, Western Australia and the Northern Territory reported that in less than 10 per cent of instances were ‘proposals modified in a significant way or withdrawn’ (PC RIA Survey 2012)
- impacts may not be significant and hence no RIS would be required
- the proposal may relate to a RIA exception or have been granted an exemption from preparing a RIS.

Given that not many preliminary assessments related to a preferred non-regulatory option, or were amended or removed once the proposal triggered the RIS requirement (the first two reasons listed above) — it appears that the majority of proposals were assessed as having not significant impacts or related to either an exception or exemption (the latter two reasons listed above).

This outcome is consistent with the evidence from when the Australian Government RIA process included formal preliminary self-assessment. Specifically, it appears that the vast majority of regulatory proposals were assessed as having ‘no or low impacts’ and required no further RIA (table 4.5).

As part of the 2010 Australian Government RIA system changes, the Office of Best Practice Regulation (OBPR) became responsible for determining whether a RIS was required. This change resulted in no marked increase in the number of RISs prepared, despite the fact that more preliminary assessments were undertaken (Borthwick and Milliner 2012).

**Table 4.5 Australian Government preliminary assessment activity<sup>a</sup>**  
20 November 2006 to 30 June 2011

	2006-07 <sup>b</sup>	2007-08	2008-09	2009-10	2010-11 <sup>c</sup>
Preliminary self-assessments	342	753	662	823	1060
RISs required	18	51	59	75	63
BCC reports required	2	7	4	2	n/a <sup>d</sup>

<sup>a</sup> As these values relate to compliance reporting, they are not directly comparable, but rather provide broad orders of magnitude. <sup>b</sup> 20 November 2006 to 30 June 2007. <sup>c</sup> As of 1 July 2010, preliminary assessments were conducted by the OBPR. <sup>d</sup> As of 1 July 2010, a RIS was required in place of a BCC report.

Sources: Borthwick and Milliner (2012), OBPR (2007, 2008a, 2009, 2010, 2011a).

## Analysis required for proposals with no significant impacts

New South Wales and Tasmania have additional documentary and analytical requirements for proposals without significant impacts. New South Wales requires that the Better Regulation Statement principles be demonstrably adhered to in every proposal that is submitted to Cabinet or the Executive Council for approval (NSW Department of Premier and Cabinet 2009).

In Tasmania, a RIS is required for primary legislation with a ‘major’ impact and, for proposals with a ‘minor’ impact, a Minor Assessment Statement (MAS) is required. As stated in the Tasmanian guidance material, the MAS needs to outline:

- the costs and benefits of the restriction on competition;
- the impact of the legislation on business; and

- 
- whether the restriction(s) on competition or the impact on business is warranted in the public benefit.

Public consultation is encouraged, although not mandatory, on the MAS. Once completed, the MAS must be submitted to the ERU [Economic Reform Unit] for endorsement. (Tasmanian Department of Treasury and Finance 2011, p. 7)

For regulatory proposals which have no significant impacts, it is unclear what additional benefit there could be from documentation of the analysis undertaken. However, there may be some transparency and accountability benefits for stakeholders from publication of preliminary assessments which determined proposals to have minor or machinery impacts.

## **4.3 Who assesses whether a RIS is required?**

The decision on whether a RIS is required is made by the oversight body in four jurisdictions, and by the relevant agency (or proposing Minister) in five jurisdictions (chapter 3). In Tasmania, who has responsibility for determining the need for a RIS depends on the type of regulatory instrument proposed (figure 4.2).

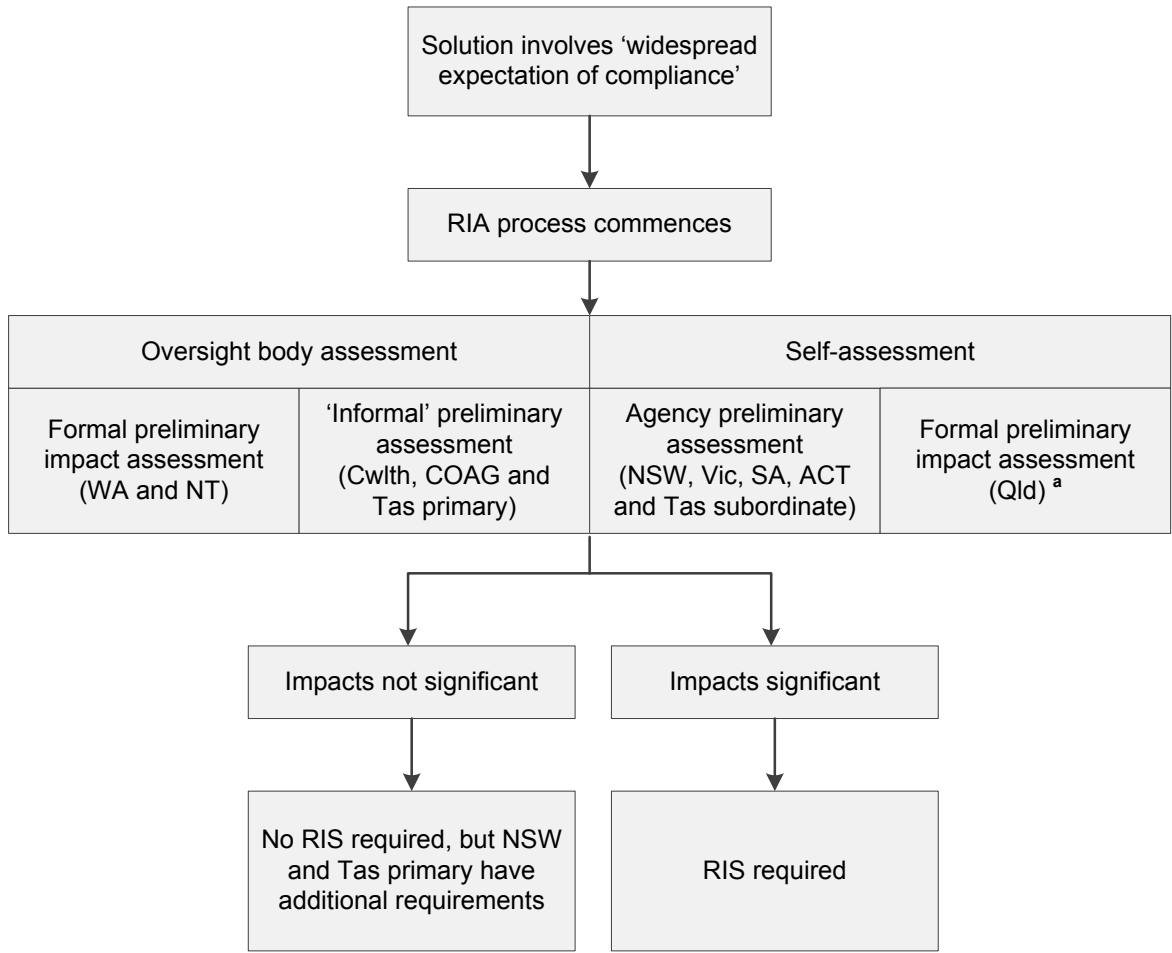
### **Oversight body assessment**

The OBPR is responsible for determining whether impacts are ‘not minor or machinery’ for both Commonwealth and COAG proposals. As noted earlier, the Australian Government had a model of preliminary assessment until 2009-10 at which point it was replaced with the current system whereby significance is determined by the OBPR (Australian Government 2010a).

The COAG guidelines state that the first step in the RIA process is to contact the OBPR and to seek advice about whether a RIS should be prepared. There is no further guidance about what factors may be taken into account. In contrast, the Australian Government guidelines state:

The OBPR is required to assess whether the proposal requires a RIS or whether it is minor or machinery in nature and does not require one. In order to make this assessment, the OBPR will require information in writing from the agency on what the proposed regulation entails and the likely impacts of the proposal. In general terms, the more the proposed regulation impacts on business operations, and the greater the number of businesses or not-for-profit organisations that will be affected, the more likely it is that a RIS will be required. (Australian Government 2010, p. 11)

**Figure 4.2 Responsibility and steps for assessing whether a RIS is required**



<sup>a</sup> From late 2012, responsibility for assessing whether a RIS is required is to move from agencies to the Queensland Office of Best Practice Regulation.

*Data sources:* Jurisdictional guidance material (appendix B).

The oversight bodies in Western Australia and the Northern Territory are responsible for assessing significance, however this is on the basis of the formal PIA processes previously discussed.

For primary legislation in Tasmania, the agency determines whether the proposal imposes any competition or business impacts and submits a 'statement of intent' to the oversight body. Where such impacts are identified, the oversight body then determines whether they are minor or major. If the competition or business impacts are likely to be major, a RIS is required. If the impacts are likely to be minor then a MAS is required (discussed above).

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## Agency or ministerial assessment

Self-assessment is undertaken by proponent agencies in all other jurisdictions. Queensland's process of self-assessment is undertaken via a PIA approach and was discussed previously.

New South Wales, Victoria, Tasmania and the ACT all have subordinate legislation Acts which govern the different processes of assessing whether a RIS is required for regulations. Additionally, these jurisdictions have adopted differing approaches in assessing primary legislation. South Australia assesses all regulation through the same method.

For subordinate legislation in New South Wales, Victoria and the ACT, the process of assessing whether a proposal has appreciable costs is at the discretion of the proposing Minister. In New South Wales, this is done with the advice of the Attorney General or the Parliamentary Counsel, whereas in Victoria and the ACT the decision is solely that of the Minister.

For primary legislation in New South Wales, the relevant portfolio Minister is responsible for determining whether a RIS is required. The decision of the Minister is however subject to the views of the Premier and Cabinet (NSW Department of Premier and Cabinet 2009). In Victoria, agency self-assessment is not subject to external scrutiny, however, the oversight body is able to provide comments to inform Cabinet decisions if necessary. In South Australia, the proposing agency is responsible for determining whether a RIS is required. Where the agency assesses that the proposal does not trigger the RIS requirements, a statement to that effect is required in the Cabinet submission for the proposal. The Cabinet Office has an oversight role in determining whether a RIS is required:

Where agencies make decisions based on self assessment they need to consider the risk that Cabinet Office will make a finding contrary to that of the agency. This may result in delayed implementation/amendment of regulation while a RIS is prepared, or the agency may have their red-tape reduction target adjusted if the regulation would impose additional burden on business. (SA Department of the Premier and Cabinet and Department of Treasury and Finance 2011, p. 7)

The South Australian RIA system has been in operation for only a short period of time. It remains to be seen whether the design of the self-assessment model will in practice see agencies relying heavily on up-front advice from the oversight body in order to avoid the consequences of making an incorrect decision.

According to the ACT guidance material, *all* primary legislation requires a RIS, regardless of the significance of impacts. However, in practice, some primary legislation has been introduced without a RIS.



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## **The merits of alternative assessment approaches**

As the proponent agency is ultimately responsible for compliance with the RIA requirements, it can be argued that the agency should be responsible for determining whether a RIS is required. If determining the significance of a proposal's impacts requires technical knowledge or skills that are embodied in the proponent agency (and not the oversight body), then self-assessment can potentially reduce the costs for both the agency and the oversight body. When the vast majority of regulatory proposals do not impose significant impacts, having less resources devoted to preliminary assessments may be appropriate. A self-assessment model is also consistent with a risk-management approach to compliance, adopted in many other areas of regulation, such as taxation and customs.

On the other hand, an advantage of having the jurisdictional oversight body determine the significance of impacts is that it is done at arm's length from the agency introducing the regulatory proposal. The skills and expertise of the oversight body may be able to produce more consistent decisions, both within and across agencies. Under a self-assessment approach, agencies may have an incentive to decide that a particular regulatory proposal with significant impacts does not require a RIS (in order to minimise further use of agency resources or to delay stakeholder engagement). Alternatively, if the consequences of a wrong decision are substantial, agencies may heavily consult with the oversight body, reducing the relative cost-effectiveness of the self-assessment model.

Where self-assessment is employed, some additional system design features may be necessary. For example, the option of an agency referring a proposal to the relevant oversight body to make the final decision should be retained, to enable agencies to draw on the skills and expertise of their oversight body. To encourage agencies to appropriately judge the need for a RIS, the oversight body may conduct a periodic audit of the agencies' judgments where no RIS was required. If the audit finds that an agency has repeatedly misjudged the need for a RIS, a sanction could be applied, such as withdrawing that agency's right to self-assess — that is, the agency would be required to refer future proposals to the oversight body for determination.

In general, the Commission considers that agency assessment is likely to be a leading practice but recognises that it might not be immediately feasible in all agencies/jurisdictions. Whichever method of assessment is selected, the Commission considers that key features should include:

- reducing any documentary and analytical requirements to the minimum necessary through the use (for most proposals) of a pro forma or checklist-based preliminary assessment system

- 
- agencies undertaking and publishing annual regulatory plans to highlight forthcoming regulatory proposals (chapter 7)
  - where impacts can be assessed as prima facie significant, the RIS process should immediately commence
  - where impacts are assessed as not significant, the decision with accompanying reasons should be made public with a periodic audit of decisions to not undertake a RIS.

#### LEADING PRACTICE 4.3

*The efficiency and effectiveness of processes for determining whether RIS requirements are triggered are likely to be enhanced where jurisdictions have adopted the following practices:*

- *agency self-assessment of the need for a RIS (in consultation with the oversight body when necessary)*
- *a preliminary assessment process that ensures only the minimum necessary analysis is undertaken — for proposals that will clearly impose significant impacts no preliminary assessment should be required*
- *where impacts are assessed as not significant (hence no RIS is required), reasons for the determination are made public*
- *in the case of agency self-assessment of the need for a RIS, the periodic independent auditing of these determinations by the oversight body and in the event of performance failure, the removal of the agency's responsibility for determinations for a period of time.*

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## 5 Exceptions and exemptions

### Key points

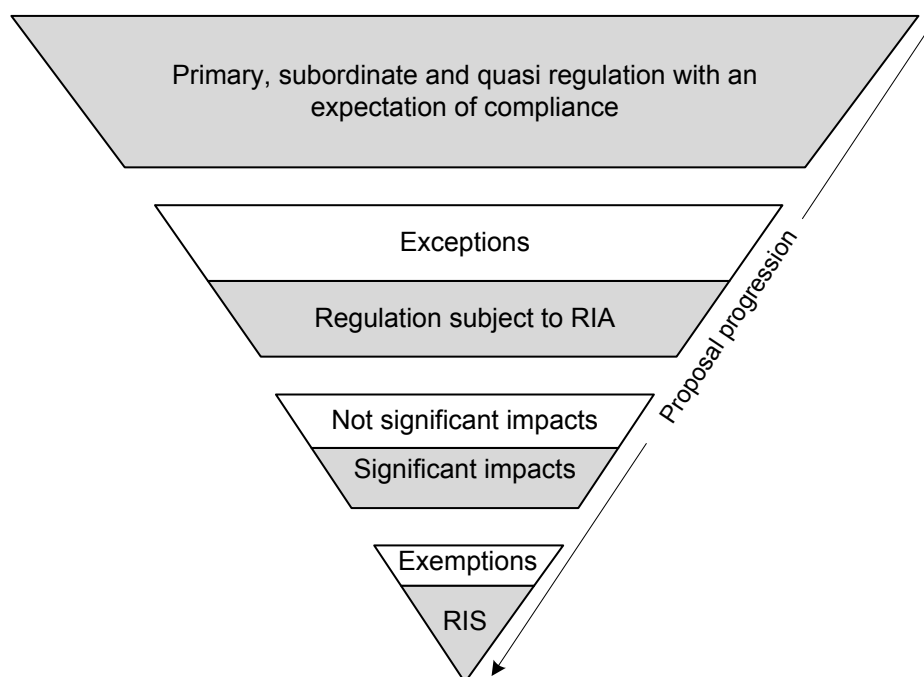
- All jurisdictions exclude certain types of regulatory proposals, or proposals in certain circumstances, either as *exceptions* from regulatory impact analysis (RIA) requirements or as *exemptions* from the requirement to prepare a regulation impact statement (RIS).
- There is scope to improve the transparency of exceptions in particular jurisdictions, and/or to reduce the degree of discretion in their application.
- Where exceptions clearly apply it should not be necessary to conduct any preliminary impact assessment.
  - In some jurisdictions excepted proposals are not being filtered out early enough in the process and as a consequence RIA resources are being used inefficiently.
- Subjecting election commitments to RIA requirements enhances the integrity of the process. Where the requirement for a RIS is triggered, the impact analysis should ideally reflect the full RIS requirements, but at a minimum include analysis of the costs and benefits of implementing the announced regulatory option.
- In all Australian jurisdictions, significant proposals that would otherwise trigger the requirement to prepare a RIS can, in certain circumstances, be granted an exemption.
- Exemptions should be limited to genuinely exceptional circumstances, such as emergency situations, where a clear public interest can be demonstrated and be granted as soon as possible after the requirement for a RIS has been triggered.
  - Participants raised concerns about the number of exemptions being granted (particularly at the Commonwealth level); the propensity for more sensitive or highly significant proposals to be exempted; and the lack of transparency around the process.
  - To ensure independence of the process and improve accountability, the responsibility for granting exemptions should reside with the Prime Minister, Premier or Chief Minister and not the Minister proposing the regulation.
- To discourage excessive use of exemptions, particularly where a government's motivation may principally be to avoid the scrutiny that impact analysis provides, all exemptions granted and the justification should be made public and a post implementation review conducted.

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## 5.1 Introduction

All jurisdictions exclude certain types of regulatory proposals, or proposals in certain circumstances, either from the requirement to conduct any RIA or from the requirement to prepare a RIS. Generally, these exclusions fall within various categories of exceptions or exemptions, but these terms are not used consistently across jurisdictions. For ease of discussion, in this chapter, the Commission will use the term ‘exceptions’ to cover those categories which exclude proposals from RIA requirements. The term ‘exemption’, on the other hand, is used here to cover exclusions or waivers from the requirement to prepare a RIS. Exemptions are typically sought on a case-by-case basis once impacts have been assessed as significant (and the requirement to prepare a RIS has been triggered). A diagrammatic representation of the process of excluding and filtering regulatory proposals is shown in figure 5.1.

Figure 5.1 **A regulatory proposal’s progression through the ‘RIA filter’**



In addition to exceptions and exemptions, proposals assessed as having not significant impacts are excluded from requiring further analysis (chapter 4). Ultimately, only the small proportion of regulatory proposals which have significant impacts, do not fall into an exception category and are not granted an exemption, require a RIS.

It is generally accepted that certain exclusions, or exclusions in particular circumstances, are necessary and appropriate. However, the large number of

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proposals bypassing RIA, particularly those that business consider to have more significant impacts, is one of the principal complaints about RIA processes in some jurisdictions (box 5.1).

This chapter examines the various exceptions, exemptions and other agreed exclusions in jurisdictions' RIA systems. It identifies a number of leading practices that could help ensure exclusions are justified and transparent and, in particular, that major or politically sensitive regulatory proposals are subjected to timely RIA. However, there are other explanations for significant proposals not being subjected to appropriate analysis, including a failure to prepare RISs (or RISs of an adequate standard) where required. These non-compliance issues are discussed in chapter 8.

**Box 5.1      Exceptions and exemptions: views of stakeholders**

The following are illustrative of the concerns raised by participants:

*Master Builders Australia*

Master Builders has a particular concern with the level of exceptions and exemptions under RIA processes. (sub. 19, p. 3)

*Small Business Development Corporation (Western Australia)*

Anecdotally, the SBDC believes there has been a substantial, and disproportionate (which is contrary to its intent), number of Treasurer's Exemptions granted to agencies. (sub. 25, p. 10)

*The Centre for International Economics*

Presently, some important regulatory changes are escaping the review process (sub. 14, p. 7)

*Australian Chamber of Commerce and Industry*

Businesses are concerned that most of the proposed regulations that proceeded without undergoing the RIA processes often imposed the greatest cost and compliance burden on their businesses. (sub. 2, p. 2)

## 5.2      Exceptions to RIA

In all Australian jurisdictions, some specific types of regulatory proposals are excepted from the RIA process. Typically, these exceptions are based on either the specific subject matter of the proposal, or agreed on a case-by-case basis between the oversight body and the relevant agency. These exceptions (in some cases referred to in jurisdictional guidance material as exemptions) typically exclude the relevant regulatory proposals from any requirement to conduct formal impact analysis, not just from the requirement to prepare a RIS document. The Commission recognises that exceptions form part of a well-functioning RIA system, however improvements can be made to their transparency and applicability.

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## Commonwealth and COAG exceptions

In the Commonwealth and COAG systems, regulation subject to RIA is defined broadly (chapter 4), however, certain types of proposals are deemed to be outside the scope of RIA:

- Australian Government — the definition of ‘regulation’ does not include grant programs; government procurement of specific goods or services; or government agreements, unless more general regulatory requirements are imposed on the organisations receiving funding or providing goods and/or services.
- COAG — regulation subject to RIA does not include purchasing policies or industry assistance schemes.

### *Commonwealth ‘carve outs’*

The Office of Best Practice Regulation (OBPR) has reached agreements with individual agencies on a number of specific regulatory proposals for which RIA is not required. From October 2012, there has been an external guidance note setting out the criteria for the use of RIA carve outs together with a list of the existing carve outs (sub. DR35).

There are currently 49 approved ‘carve outs’ on the OBPR list. The carve out removes the need for the relevant agency to produce an assessment of a proposal’s likely impacts. Potential carve outs need to be regulatory changes that occur on a regular basis and be either minor or machinery in nature. Possible categories of carve outs include:

- routine indexation changes that use an established formula such as the Consumer Price Index
- regular changes consistently assessed as minor or machinery in nature
- routine administrative changes identified as minor or machinery and will continue to not require a RIS for future changes
- machinery changes. (Australian Government 2012c)

Either OBPR officers or relevant agencies can suggest potential regulatory proposals that would benefit from being carved out from the RIA process.

In principle, such exclusions may enhance the efficiency of RIA systems and help to ensure that efforts are targeted where they have the greatest potential to contribute to improved regulatory outcomes. However, before such arrangements are negotiated with agencies, stakeholders affected should be given an opportunity

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to comment on whether there would be value in subjecting the relevant regulations to RIA.

More generally, the criteria used for carve outs should be consistently applied and made public, together with an up-to-date listing of all such exclusions. The exclusions should also be reviewed periodically to ensure that they continue to be justified.

## **State and territory exceptions**

State and territory RIA systems (apart from the Northern Territory) identify a much wider range of specific exception categories than do the Commonwealth and COAG systems, and there is a fair degree of commonality across jurisdictions. For example, common exceptions relate to correcting drafting errors, standard fee increases, police powers and rules of court and for the implementation of national reforms (where a suitable national RIS has been prepared).

In all the states there are exceptions for both primary and subordinate legislation, while in the ACT exceptions only apply for subordinate legislation (table 5.1). In the Northern Territory, specific exceptions are limited to taxation and budgetary proposals.

In those jurisdictions with subordinate legislation Acts, general exceptions apply for machinery or transitional regulations.<sup>1</sup> Some additional exceptions are set out in the specific subordinate legislation acts of particular jurisdictions (box 5.2).

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<sup>1</sup> That is, in New South Wales, Victoria, Queensland, Tasmania and the ACT, where the legislation contains requirements to conduct RIA.

Table 5.1 Exceptions to state and territory RIA

RIA process	NSW		Vic <sup>a</sup>		Qld		WA	SA	Tas		ACT		NT
	BRS	RIS	BIA	RIS	RAS	RIS	RIS	RIS	RIS	RIS	Pri.	Sub.	RIS
Taxation	x	x	x	x	✓ <sup>b</sup>	✓ <sup>b</sup>	✓ <sup>c</sup>	✓ <sup>d</sup>	✓	x	x	x	✓
Management of the public sector	✓	✓	x	x	✓ <sup>e</sup>	✓ <sup>e</sup>	✓	x	x	x	x	x	x
Corrects drafting errors, makes consequential amendments or is of a machinery nature	✓	✓ <sup>a</sup>	x	✓	✓	✓	✓ <sup>f</sup>	✓ <sup>g</sup>	x	✓	x	✓	x
Standard fee increases <sup>h</sup>	✓	✓	x	✓	✓	✓	✓	✓	x	✓	x	✓	x
Police powers, general criminal laws, and administration of courts	✓	✓	x	✓	✓	✓	✓	✓ <sup>i</sup>	x	✓ <sup>j</sup>	x	✓ <sup>j</sup>	x
Electoral rules	✓	✓	x	x	x	x	✓	✓	x	x	x	x	x
Regulatory proposals previously assessed	✓	✓	x	✓ <sup>k</sup>	✓	✓	✓	x	x	x	x	x	x
National reforms with a COAG RIS	✓ <sup>l</sup>	✓ <sup>l</sup>	✓	✓	✓	✓	x	✓	✓	✓	x	✓	x <sup>m</sup>
Substantially uniform or complementary matters of another Australian jurisdiction	x	✓	x	x <sup>n</sup>	x	✓	x	x	x	✓	x		x
Adoption of international or Australian standards or codes of practice, where an assessment of the costs and benefits has already been made	x	✓	x	x	✓	✓	✓	x	x	✓	x	✓	x
Notice of the proposed regulation would render it ineffective or provide unfair advantage/disadvantage	x	x	x	✓	x <sup>o</sup>	✓	x	x	x	x	x	✓	x

<sup>a</sup> For subordinate legislation, these are defined as an exemption from requiring a RIS rather than an exception to RIA. <sup>b</sup> Excluding the administration of taxation. <sup>c</sup> Unless the oversight body requests further RIA assessment. <sup>d</sup> Or other revenue raising policy measures which are purely budgetary in nature. <sup>e</sup> Or for the internal management of a statutory body. <sup>f</sup> Also includes minor legislative amendments. <sup>g</sup> Only for regulation which provides solely for commencement of all or part of enabling legislation and a RIS has already been completed. <sup>h</sup> In accordance with actuarially determined assessments or an accepted indexation factor such as the Consumer Price Index. <sup>i</sup> Unless the proposal impacts on third parties. <sup>j</sup> Only for rules of court. <sup>k</sup> For legislative instruments only. <sup>l</sup> This may include Ministerial Council and COAG processes or other processes undertaken on behalf of government by independent bodies such as the Independent Pricing and Regulatory Tribunal or the Productivity Commission. <sup>m</sup> A preliminary impact assessment is still required that includes, where necessary, supplementary analysis at the Northern Territory level. <sup>n</sup> An assessment of the costs and benefits needs to be undertaken as part of the scheme. <sup>o</sup> In Queensland, this is a Treasurer's Exemption rather than a RIA exception. Therefore, both the Regulatory Principles Checklist and preliminary impact assessment must be undertaken for the proposal, prior to granting an exemption. 'Pri.' Primary legislation. 'Sub.' Subordinate legislation.

Source: Jurisdictional guidance material (appendix B).



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## Box 5.2 Exceptions specified in subordinate legislation acts

### New South Wales

- A management plan for a share management fishery or a supporting plan made under the *Fisheries Management Act 1994*.
- A zoning plan for a marine park under the *Marine Parks Act 1997*.
- A regulation under the *Homebush Motor Racing (Sydney 400) Act 2008*.

### Victoria

- A proposed legislative instrument is required to undergo, or has undergone, an analytical and consultation process which, in the opinion of the responsible Minister, is equivalent to the process for a RIS.

### Queensland

- Codes of practice made under the *Work Health and Safety Act 2011* s 274; *Electricity Safety Act 2002* s 44; *Workers' Compensation and Rehabilitation Act 2003* s 486A.

### Tasmania

- The body is a Government Business Enterprise (GBE) and the Department Secretary certifies that the:
  - proposal relates to its fees, charges, tariffs or other commercial operations
  - proposal does not concern its public regulatory functions, powers or administration
  - commercial operations of the GBE would be impeded if a RIS was required.

Sources: *Subordinate Legislation Act 1989* (NSW); *Subordinate Legislation Act 1994* (Vic); *Statutory Instruments Act 1992* (Qld); *Subordinate Legislation Act 1992* (Tas).

## Determining the applicability of exceptions

In some jurisdictions, proposals covered by exceptions are not excluded from the requirement to undertake preliminary impact analysis (PIA). For example, while the Western Australian PIA template does provide for the completion of a shortened registration process when agencies are making a 'request for an exception', this still requires provision of information on the need for government action, objectives of the proposal, options to resolve the issue, consultation undertaken and reasons for the exception. In Queensland, however, agencies self-assess whether a regulatory proposal is covered by an exception to the Regulatory Assessment Statement (RAS) System. Where it is determined that an exception applies, the agency is only required to fill out the section of the Regulatory Principles Checklist (RPC) relating to establishing the case for government action, and the reasons that the regulatory

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proposal is excluded from the RAS system, rather than undertake a formal PIA (Queensland Treasury 2010).

The Commission considers the requirement to conduct PIA in relation to proposals covered by exception categories to add no real value and may reflect a lack of clarity or certainty in the definition of exceptions.

While states and territories generally have an ‘approved list’ of exceptions to RIA, in many cases the scope and application of specific exceptions is uncertain or open to interpretation. As an example, in determining whether the common exception for ‘regulatory proposals previously assessed’ applies in relation to a specific proposal, agencies might be unclear as to how recent the previous assessment needs to be and what criteria the previous assessment needs to meet (see next section).

There will always be some degree of judgment involved in determining the applicability of particular exceptions to individual proposals. A very high level of specificity or prescription is unlikely to be appropriate or feasible and inevitably some ‘grey areas’ will exist. However, there is scope for jurisdictions to provide further information and examples in guidance material so as to minimise uncertainty and ambiguity.

Greater clarity around exceptions will contribute to improved compliance with RIA requirements and also reduce the scope for agencies to abuse any discretion they have in their determinations. Where little or no guidance is provided on the types of circumstances that justify an exception, there is an increased risk of subjectivity and inconsistency in determinations. Moreover, there is not a clear and objective basis for challenging determinations.

In Victoria, at least in principle, there is a particularly high level of transparency around exceptions (termed exemptions in that jurisdiction) with certificates, including reasons for their granting by the proposing Minister or Premier, made public (discussed further in relation to exemptions, below). Whereas in Tasmania, the Tasmanian Parliamentary Standing Committee on Subordinate Legislation (TPSCSL) identified the need for additional information to be provided on the reasons for exceptions:

... it would be useful for the Committee to receive more detail when [exceptions] from the RIA process are granted by the Secretary of the Department of Treasury and Finance. ... It would be beneficial to the Committee for the [exception] certificate to indicate the particular section(s) [of Part 2 of the Subordinate Legislation Act] that have been determined to apply that remove the requirement for a RIS to be provided. (TPSCSL, sub. 3, p. 3)

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## Proposals that have been subjected to prior analysis

In certain cases, the RIA process may have effectively been satisfied through earlier policy development processes, but as discussed above there is often a lack of clarity in guidance material around the type of assessment that would be deemed sufficient in order for a regulatory proposal to avoid RIA. The guidance material in New South Wales provides useful additional information:

... proposals which have already been subject to a detailed assessment against the better regulation principles as part of an earlier Cabinet Minute or Executive Council Minute [may be excepted from RIA]. In such cases, this should be identified and no further demonstration of meeting the principles is required. This ... is contingent on adequate and prior assessment of the specific regulatory proposal.

Regulatory proposals developed and assessed through external processes ... may include Ministerial Council and COAG processes or other processes undertaken on behalf of government by independent bodies such as the Independent Pricing and Regulatory Tribunal (IPART) or the Productivity Commission. Where these processes demonstrate the elements of good quality regulatory development, which at a minimum includes detailed regulatory impact assessment and public consultation, it is not necessary to duplicate this work when seeking approval at a NSW level. However, a short description of the process undertaken and a web link to relevant supporting information should be provided. (NSW Department of Premier and Cabinet 2009, p. 10)

Other jurisdictions have permitted exclusions to the RIA process to avoid unnecessary duplication of previous impact analysis. These include exceptions covering:

- regulatory proposals previously assessed or reviewed
- national reforms for which a suitable national or COAG RIS has been prepared
- adoption of Australian or international standards, where an assessment of the costs and benefits has already been made.

### *Previous reviews*

The Commission considers that where comprehensive and rigorous reviews have been conducted that have established the case for a regulatory proposal, it could be appropriate to waive the requirement to undertake any further RIA. However, judgments need to be made on a case-by-case basis and should be limited to those instances where the review and the regulatory proposal meet certain criteria, including that the:

- review is recent, say within the last two to three years (the Commission notes that Victoria uses three to five years as a rough guide (Victorian Department of

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Treasury and Finance 2011a)) — with older reviews, there is a risk that the analysis has become irrelevant or misleading, but to ignore or repeat earlier analysis could be costly and inefficient

- conduct of the review and the analysis in the review report are consistent with all the essential elements of the RIA framework, including with respect to adequate consultation
- review contains sufficiently detailed analysis relevant to the specific regulatory proposal
- proposal is largely consistent with the recommendations of the review.

Ideally, the review would also have been public and independent — that is, it would have been conducted at arm's length from the agency proposing the relevant regulation.

Where previous reviews have been conducted, consideration could be given to parts of these reviews substituting for specific aspects of the RIS requirements. This would include, for example, public discussion papers or exposure drafts which address the same problem as that conducted in the RIS, and potential options for resolving it. Nevertheless, at a minimum, the RIS should summarise what was presented in the review, as well as feedback from stakeholders. If there was no, or only limited opportunity for affected parties to provide input into the review, then consultation with stakeholders would still be necessary to meet the RIS requirements.

The Commission understands that previous reviews have been accepted by the Western Australian oversight body on occasion as a substitute to the requirement to undertake a consultation RIS. The Western Australian Department of Treasury noted that 'prior analysis is a ground for exception from full RIA examination' (sub. DR37, p. 3). Accordingly, it reported that of the concerns expressed over the number and frequency of Treasurer's exemptions granted in Western Australia, the majority related to proposals which had been subject to previous policy development.

### *Agreed national reforms*

All states and the ACT have a specific exception for regulatory proposals that have been assessed as part of national reform (COAG) processes.

As noted above, the Northern Territory permits exceptions where 'a sufficient level of analysis' has been undertaken in other national reform processes. In Queensland, Western Australia, South Australia and the ACT, jurisdictional-specific impacts

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need to have been identified and assessed in a national RIS for the exception to apply. In addition to assessing jurisdictional impacts, Victoria and New South Wales explicitly require that the national RIS satisfy their respective state RIS requirements. Further issues in relation to the content of COAG RISs and, in particular, the extent to which they consider jurisdiction-specific impacts, are discussed further in chapter 6.

In most jurisdictions, there are examples of primary legislation containing clauses that expressly exclude the application of RIA to regulations that are subsequently made under the relevant Act. In some cases these exclusions relate to the implementation or subsequent amendment of national framework laws and have the objective of preserving uniformity and avoiding duplication of national RIA processes. A recent example of such an exclusion surrounded the introduction of the National Energy Retail Law (NERL) in the ACT (Standing Committee on Justice and Community Safety (SCJCS) 2012a).

While production of an ACT RIS was considered ‘unnecessarily duplicative’, the Commission notes that when the NERL was adopted in NSW, the adoption Act included provision for further analysis to meet NSW RIS requirements (SCJCS 2012b).

Where national reforms are adopted by individual jurisdictions, it is important that the RIS give adequate consideration to jurisdictional impacts. Individual jurisdictions would need compelling reasons for pre-emptively excluding the application of their own RIA processes to their jurisdiction adoption of such national reforms. The RIA requirements of RISs for national reforms are discussed in chapter 6.

### *Adoption of an international or Australian standard*

Another common exception relates to proposals adopting international or Australian standards or codes of practice, where an assessment of the costs and benefits has already been made. For example, in Western Australia and the ACT, no national RIS is required in order to adopt an international or Australian standard or code of conduct.

Some stakeholders are of the view that RIA should generally not be required if a proposal is merely adopting an international standard. For example, the Australian Accounting Standards Board (AASB) considers that:

if ... adopting an IFRS [International Financial Reporting Standard], there could be a presumption that RIA processes are not required because of the established benefits of remaining IFRS-compliant (and therefore remaining consistent with our international

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peers). Alternatively, if the AASB is contemplating not adopting an IFRS, there could be a presumption that a rigorous RIA process would be needed. (AASB, sub. 15, p. 2)

While the Commission has previously stated (see for example, PC 2006a) that there should be a presumption in favour of adopting international standards because they facilitate trade, promote competition and potentially provide consumers with greater choice, they will not always be the best option for adoption in Australia. Any decision to reference an Australian Standard in regulation or to align with an international standard must be based on a case-by-case assessment of whether there are net benefits to the Australian community as a whole. It is therefore appropriate that RIA be conducted before any such decisions are taken, unless suitable previous assessments have demonstrated the case for such adoption in Australia. There may additionally be merit in a memorandum of understanding between the oversight body and the proposing agency specifying the criteria that would need to be satisfied before adopting international standards (chapter 10).

## **International treaties**

Australia's participation in international treaties is currently subject to the Commonwealth RIA requirements. The Australian Government Handbook states that:

At [the negotiation] stage, the RIS should focus on the nature of the problem being addressed, the objectives of the proposed treaty and a preliminary discussion of options and their respective costs, benefits and levels of risk ... When endorsement is sought to sign the final text of a treaty, the RIS would need to include a more detailed analysis that assesses the likely impacts ... A further RIS is not required for domestic legislative changes that are required to implement a treaty if the terms of the treaty determine the action required to implement it. However, a RIS may be required for the domestic legislation if there is any discretion about the nature of the action to be taken to implement the treaty. (Australian Government 2010a, p. 22)

Some stakeholders suggested that international treaties should not be subject to RIA requirements, or should be subject to only one RIS. For example, the Department of Infrastructure and Transport submitted that:

[t]he treaty itself does not impose any rules on any parties other than the state parties. In such a circumstance, current RIA requirements (in theory) subject both the treaty and the subsequent implementing "regulation" (e.g. legislation, regulation, quasi-regulation) to RIA requirements, creating a situation where multiple RIA processes may be required. (sub. DR36, p. 1)

In principle, the approach to treaties as outlined in the Handbook is broadly appropriate. The decision maker ought to be informed — prior to making a decision — that there is in fact a problem, and the potential avenues to resolve it.

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Nevertheless, it is foreseeable that in certain circumstances this would be difficult to operationalize. For example, it would be difficult to adequately describe the range of feasible options to address a problem if negotiations are yet to take place, and there is no available information as to what may be negotiated. Moreover, assessing the benefits, costs and risks of the various options prior to negotiations taking place is likely to prove unworkable. Therefore, at the negotiation stage, the RIS should be required to outline the problem, objectives and alternative options — and any information on impacts if available. Once negotiations have been finalised, the remaining RIS elements should then be completed.

## **Election commitments**

Some stakeholders raised particular concerns about election commitments avoiding RIA (see, for example, Centre for International Economics, sub. 14).

There appears to be a widely held misconception that RIA requirements generally do not apply to election commitments. However, an exception applies only in Western Australia ‘[w]here options for the implementation of the commitment would not benefit from a RIA style options analysis’ (WA Treasury 2010a, p. 6).

Since 2010, the Commonwealth has required a modified RIS for election commitments — ‘the RIS should focus on the commitment and the manner in which the commitment should be implemented, not on the initial regulatory decision’ (Australian Government 2010a, p. 15).

Although there is often little prospect of RIA conducted for an election commitment influencing policy outcomes in the short-term, there can be an important transparency benefit from a full disclosure in a RIS of the impacts of the announced policy relative to alternative options that may or may not have been considered. The Commission recognises that there may be a strong disincentive for agencies to show the Government’s preferred option in a bad light. However, with appropriate oversight, transparency and accountability measures in place, a requirement for a full RIS for election commitments could actually work to force agencies to release rigorous assessments and in turn to discourage ill-considered commitments being made during election campaigns or implemented thereafter.

### **LEADING PRACTICE 5.1**

***Subjecting election commitments to RIA requirements enhances the integrity of the process. Where the requirement for a RIS is triggered, analysis would ideally reflect the full RIS requirements, but at a minimum include analysis of the implementation of the announced regulatory option.***

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## **Taxation and other commercially sensitive proposals**

In Queensland, South Australia, Western Australia, Tasmania and the Northern Territory, regulatory proposals relating to budgetary matters are not subject to RIA. In the other jurisdictions the normal RIA requirements apply, including the preparation of a RIS document. The Commission notes though that Commonwealth taxation proposals have, under previous RIA arrangements, been subject to separate ‘Taxation RIS’ requirements (that focus primarily on implementation aspects and compliance costs, rather than policy alternatives).

Given taxation proposals typically have significant impacts on businesses or individuals and indirectly on consumers and other groups in the community, it is important that they are subjected to rigorous RIA. Unrestricted consultation and wide dissemination of information to stakeholders are important principles of effective policy making processes. That said, because of the sensitive nature of taxation proposals and the scope to induce speculative or avoidance behaviour, it may not always be appropriate to widely publicise draft proposals. Hence, special considerations may need to be taken into account in designing consultation processes (such as the need for confidentiality agreements with stakeholders). Similar considerations may apply more generally to financial measures or other sensitive proposals, where advance notice of intended changes can lead to responses in markets that can undermine their effectiveness and/or increase associated costs.

However, it is important that any exception processes that might allow agencies to adopt more restrictive practices are applied only in very limited circumstances to proposals that are clearly in the public interest, rather than being applied in a blanket way to broad categories of proposals.

It has also been argued that changes in rates of taxation (as opposed to more substantive policy changes) should be excluded from the requirement to undertake RIA, in the same way that standard fee increases are excepted (Borthwick and Milliner 2012). The Commission considers that generally the case for special treatment for any taxation proposals should be considered on a case-by-case basis as an exemption to RIS requirements (see below) instead of an exception to RIA.



*Exceptions to RIA are a necessary part of a well-functioning RIA system. Determining as early as possible in the policy development process whether a regulation falls within an exception category, helps ensure that RIA resources are better targeted.*

- *All categories of exceptions should be set out in RIA guidance material, together with sufficient information and illustrative examples to assist agencies in determining the applicability of particular exceptions.*
- *Where exceptions clearly apply it should not be necessary to conduct any preliminary impact assessment.*

### **5.3 Exemptions from RIS requirements**

In all jurisdictions, regulatory proposals assessed as significant that would otherwise trigger the requirement to prepare a RIS can, in exceptional circumstances, be granted an exemption. However, Tasmania and the ACT do not permit exemptions for ‘exceptional circumstances’ for primary legislation. New South Wales has no process for exemptions for either primary legislation or for amending regulations. In Western Australia, the Treasurer can grant an exemption in a range of specific circumstances (WA Department of Treasury, sub. DR37).

The Australian Government guidance material has no definition of what constitutes exceptional circumstances. In practice, exemptions have been granted for a wide range of situations — occasionally natural disasters but more commonly for what would appear to be non-time critical proposals that are politically sensitive in nature (see later discussion).

Guidance material in other jurisdictions typically limits the granting of exemptions to circumstances where an urgent response (for example to an emergency situation) is required and/or where an exemption is in the public interest.

In South Australia, for example, exemptions relate only to:

... exceptional emergency matters relating to the administration of justice or the protection of personal and public safety, where the impact of the regulatory proposal on business costs (either one-off or ongoing) is not significant. (SA DPC and DTF 2011, p. 6).

Given that the South Australian RIA system was only fully implemented in 2011, it remains to be seen how the exemption will be interpreted in practice.

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The criteria for the granting of an exemption from a Regulation Assessment Statement in Queensland incorporate a broader unfair advantage/disadvantage test in addition to an emergency element whereby:

- an immediate regulatory response is required
- notice of the proposal may render the rule ineffective or unfairly advantage or disadvantage any person likely to be affected by the regulation (Queensland Treasury 2010, p. 28).

In jurisdictions with subordinate legislation Acts which embody RIA requirements — New South Wales, Victoria, Queensland, Tasmania and the ACT — the ‘public interest exemption’ is available where ‘[i]n the special circumstances of the case, the public interest requires that the regulation be made without a RIS’. In Victoria, for legislative instruments only, an additional exemption may be granted (but the instrument must expire within 12 months — see below) where it is necessary to respond to:

- (i) a public emergency; or
- (ii) an urgent public health issue or an urgent public safety issue; or
- (iii) likely or actual significant damage to the environment, resource sustainability or the economy ... (*Subordinate Legislation Act 1994* (Vic), s. 12F (h))

It is appropriate that the types of circumstances that would justify an exemption are limited so as to constrain the degree of discretion in granting such exemptions. As the SBDC have stated, this would prevent exemptions being used ‘to circumvent due process when the situation does not warrant it’ (SBDC, sub. 25, p. 13).

## **How is an exemption sought and granted?**

As noted earlier, exemptions are typically sought on a case-by-case basis. In most jurisdictions it is a requirement that the request for an exemption be made in writing. The decision maker with responsibility for granting a RIS exemption varies across jurisdictions (table 5.2).

For subordinate legislation in New South Wales, Victoria, Tasmania and the ACT, the proposing Minister is generally responsible for granting a RIS exemption. Although in the case of public interest exemptions, the Premier is responsible for granting exemptions in Victoria and the Treasurer in Tasmania. Under the Australian Government and COAG RIA requirements, the Prime Minister is responsible for granting a RIS exemption. In Queensland and Western Australia, the Treasurer is responsible for granting all RIS exemptions.

Consistent with the need for independent oversight of RIA processes more generally and principles of good governance, the proposing Minister should not have the responsibility for determining whether their own regulatory proposal should be granted an exemption. This ensures the necessary clear separation of decision making responsibilities in such circumstances to avoid conflicts of interest as the Minister would generally have a strong vested interest in the adoption of the proposal.

**Table 5.2 Responsibility for granting a RIS exemption**

	<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
	<i>RIS</i>	<i>RIS</i>	<i>BRS</i>	<i>RIS</i>	<i>BIA</i>	<i>RIS</i>	<i>RAS</i>	<i>RIS</i>	<i>RIS</i>	<i>RIS</i>
Prime Minister	✓	✓	..	..	..	..	..	..	..	..
Premier	..	..	..	..	✓ <sup>a</sup>	..	..	..	..	..
Treasurer	..	..	..	..	..	✓	✓	✓	..	..
Proposing Minister	..	..	..	✓ <sup>b</sup>	..	✓	..	..	..	✓
Cabinet Office	..	..	..	..	..	..	..	..	✓	..
Oversight Body	..	..	..	..	..	..	..	..	..	✓

<sup>a</sup> Only for granting the public interest exemption for subordinate legislation. All other exemptions are granted by the proposing Minister. <sup>b</sup> Includes instances where no RIS is required based on the advice of the Attorney General or the Parliamentary Counsel. .. not applicable. 'Pri.' Primary legislation. 'Sub.' Subordinate legislation.

Source: Jurisdictional guidance material (appendix B).

### *Timing of exemptions*

The timing of applications for exemptions during the RIA process is not restricted in any jurisdiction. The guidelines in Western Australia explicitly state that the 'treasurer's exemption from the RIA process may be sought at any stage during policy or regulatory development' (WA Treasury 2010, p. 2).

During discussions with stakeholders, the Commission was informed of instances in some jurisdictions where proposals had been granted exemptions after a RIS had commenced. This tended to occur because of pressure on decision makers to act on the proposal before the RIS was completed or an inability to complete the RIS in a manner that would satisfy the jurisdiction's RIA requirements. Exemptions granted at a late stage of the RIA process discourage integration of RIA into agency culture and subvert the integrity of the RIA process.

There is scope to minimise potential abuse of exemptions by allowing applications only immediately after the requirement for a RIS has been triggered. At this stage, the responsible minister should decide between proceeding with the RIS or seeking

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an exemption — any genuine emergency circumstance should already be evident. If the minister decides to proceed with the RIS, there should be no further opportunity to seek an exemption and, if the proposal proceeds to decision makers with an inadequate RIS or no RIS, it should be deemed non-compliant with the RIA process, rather than being able to disguise this non-compliance with a late exemption.

### *Consequences of an exemption*

A post implementation review is required within two years for regulatory proposals exempted in the Commonwealth, Queensland and Western Australia and a late RIS, within 12 months of implementation for COAG, South Australia, and New South Wales (subordinate legislation only).

There are no specific consequences following the granting of an exemption in Tasmania and the ACT or for primary legislation in Victoria. There are also no consequences in the Northern Territory if it is determined that a regulatory proposal has a ‘clear and obvious net public benefit’.

The consequences following the granting of an exemption for subordinate legislation in Victoria arguably create the strongest disincentive for such exemptions. In addition to the requirement that the exemption certificate with reasons be made public, for a Premier’s exemption to be granted, the proposed instrument must be scheduled to expire on or before 12 months after its commencement date:

If a Premier’s certificate is granted, the RIS process will still need to be commenced and completed within the lifetime of the certificate. Only in exceptional circumstances will more than one certificate be granted. Moreover, the duration of the certificate will be the shortest possible period to enable the RIS process to be undertaken (unless exceptional circumstances are involved). In practice, a six-month period is often the maximum period granted. (Victorian Department of Treasury and Finance 2011a, p. 51)

The Commission considers that consequences for exemptions should be sufficient to discourage unwarranted exemption requests and ensure some transparency of the likely impacts of regulatory proposals. One consequence should be the requirement for a post-implementation review (chapter 9).

### **Information on exemptions granted**

According to jurisdictional guidance material, exemptions are made public in around half of Australia’s jurisdictions (table 5.3). However, in practice the

Commission has been able to locate public information on exemptions granted only in the Commonwealth and Victoria.

**Table 5.3 Public information on granting exemptions**

	<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
								<i>Pri. Sub.</i>	<i>Pri. Sub.</i>	
	<i>RIS</i>	<i>RIS</i>	<i>BRS</i>	<i>RIS</i>	<i>BIA</i>	<i>RIS</i>	<i>RAS</i>	<i>RIS</i>	<i>RIS</i>	<i>RIS</i>
Publication	✓ <sup>a</sup>	✓ <sup>a</sup>	..	✗ <sup>b</sup>	✗	✓ <sup>c</sup>	✗	✗	✗ <sup>d</sup>	✗
Reasons are provided	✗	✗	..	✗	✗	✓	✗	✗	✗	✗

<sup>a</sup> Published in real-time online by the OBPR. <sup>b</sup> Exemption certificates are forwarded to the Legislative Review Committee, but are not made public. <sup>c</sup> The exemption is presented to both Houses of Parliament. <sup>d</sup> The Regulatory Gatekeeping Unit monitors, assesses and will report on the granting of Treasurer's Exemptions and subsequent compliance with the post implementation review requirements, however the reports have not been made public. <sup>e</sup> Exemptions are forwarded to the Subordinate Legislation Committee, but are not made public. <sup>f</sup> A RIS exemption is presented to the Legislative Assembly, but is not made public. .. not applicable. 'Pri.' Primary legislation. 'Sub.' Subordinate legislation.

Source: Jurisdictional guidance material (Appendix B).

In Victoria, although there is some public reporting, actual practice also falls short of what is stated to be required in that jurisdiction. The guidance material states that a RIS exemption certificate must be published with accompanying reasons and presented to the Scrutiny of Acts and Regulation Committee (SARC) and to both Houses of Parliament (Victorian Department of Treasury and Finance 2011a). The Commission found references to exemptions granted in the SARC Annual Review and in statements from the Clerk of the House in relation to specific statutory rules — but in both cases no information on the reasons for exemptions were provided.

In Western Australia, guidance material notes that the oversight body will monitor, assess and report on the granting of exemptions, but none of the reports are publicly available. As noted above, the Small Business Development Corporation (SBDC) has concerns about the number of Treasurer's exemptions it perceives are being granted in Western Australia. The SBDC has also noted the lack of transparency surrounding the granting of such exemptions:

Of course without Biannual Agency Regulatory Reports or the annual report from the RGU [Regulatory Gatekeeping Unit] being made available to the public there is no way of knowing how many Treasurer's Exemptions have been granted since the introduction of the RIA regime. (SBDC, sub. 25, p. 10)

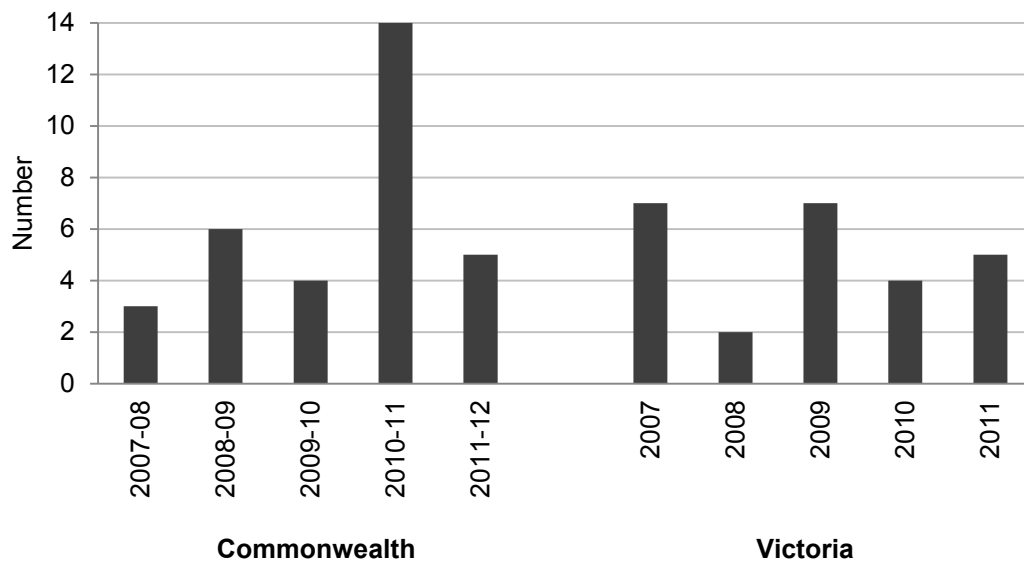
The recent review of the Commonwealth RIA system (Borthwick and Milliner 2012) recommended that when exemptions are granted, the proponent minister's reasons be made public. This recommendation is under consideration by the Government (Australian Government 2012b).

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### *Evidence from the Commonwealth and Victoria*

In the Commonwealth, the number of exemptions granted by the Prime Minister has ranged between three and six per year in recent years, with the exception of 2010-11 (figure 5.2). In that year, the number of exemptions rose substantially with seven exemptions granted for separate taxation proposals related to the implementation of the Government's response to the Henry Tax Review (OBPR 2011a).

**Figure 5.2 Public reporting of exemptions granted in Australia<sup>a</sup>**



<sup>a</sup> The Australian and Victorian Governments are the only jurisdictions that have publicly reported exemptions granted.

*Data sources:* OBPR (2008, 2009, 2010, 2011a, 2012a); SARC (2008, 2009, 2010, 2011, 2012).

In Victoria, there have been up to seven Premier's exemptions, per year, in recent years. The number of exemptions granted in 2007 and 2009 were higher, compared with other years, in both absolute terms and relative to the number of regulatory proposals requiring a RIS.

As previously noted, a common concern raised by stakeholders is that the proposals that have been granted exemptions have tended to be those with more major impacts or those that are politically sensitive (box 5.3). For example, the Australian Chamber of Commerce and Industry (ACCI) noted:

Politically sensitive regulations that have a significant impact on [the] business community are more likely not to have their RIA adequately completed. (ACCI, sub. 2, p. 1)

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### Box 5.3 Stakeholder concerns about exemptions

#### Industrial relations:

... it is concerning that a number of major pieces of legislation and regulations have not been subject to regulation impact statements in recent years, including those that affect all businesses, such as industrial relations legislation. (Business SA, sub. 18, p. 3)

#### National Broadband Network:

The first NBN [National Broadband Network], the FTTN [fibre to the node] version, was proposed to be essentially a commercial undertaking supplemented with a public equity contribution ... [G]iven the Government proposed to contribute up to A\$4.7bn it was careful to conduct its own evaluation to assure it received value for money. As well, if there were to be any concessions on regulation or in some other form, it would be worth assessing if these delivered benefits greater than any costs of such concessions ...

However, the second iteration of NBN, the FTTP [fibre to the premises] version, was not subject to even this level of evaluation – that is, an assessment of whether it offered value for money. Surely, this would be a more important evaluation than that for the FTTN version of NBN, given the 10-fold increase in potential government spending; that the Government now proposed to be the lead investor; that there may need to be a Government guarantee to get any private investment; and that a radical restructuring of the industry and associated regulation would be required. (Martin 2010, p. 30.4)

The limited recent public reporting on exemptions does not allow the Commission to provide any definitive breakdown of exemptions by significance. The OBPR's reporting did, until 2009-10, identify which of the exempt proposals were more significant (they used the terms 'highly significant' or 'major regulatory initiatives'). Some of these more significant proposals identified by the OBPR are listed in box 5.4.

The Commission notes that two of the exemptions were highly significant<sup>2</sup> or related to 'major regulatory initiatives' in each year from 2007-08 to 2009-10, at which point OBPR stopped separately reporting this information. For the years where reporting by significance was not undertaken by the OBPR, and for Victoria, the Commission has also included in box 5.4 examples of regulatory proposals that the Commission judges may possibly have been highly significant.

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<sup>2</sup> The Australian Government Best Practice Regulation Handbook provided the following guidance on significance. 'In terms of the nature of proposals, a ban on popular or widespread activities would generally be regarded as highly significant. Placing conditions on activities, such as requiring licences or specific standards, would be regarded as a significant intervention. An example of low significance might be a change in the format of reporting requirements for businesses' (Australian Government 2007, p. 23).

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## Box 5.4 Examples of highly significant exempted regulatory proposals: Commonwealth and Victoria

### Commonwealth

- Northern Territory National Emergency Response (2007-08)
- Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 (2007-08)
- Fair Work Bill 2008 (2008-09)
- Carbon Pollution Reduction Scheme Bill 2009 (2008-09)
- Structural separation arrangements for Telstra (2009-10)
- National Broadband Network implementation plan (2010-11)
- Changes to Anti-siphoning Scheme (2010-11)
- Banning home loan exit fees (2010-11)
- Australia's future tax system review — Minerals Resource Rent Tax (2010-11)
- Response to Super System (Cooper) Review (2010-11)
- Creation of a default superannuation product called MySuper (2011-12)

### Victoria

- Radiation (Tanning Units Amendment) Interim Regulations 2007
- Road Safety (Drivers) (Peer Passenger Restriction) Interim Regulations 2008
- Building Amendment (Bushfire Construction) Interim Regulations 2009
- Gambling Regulation (Pre-Commitment) Interim Regulations 2010

Sources: OBPR (2008, 2009, 2010, 2011a, 2012a); Scrutiny of Acts and Regulations Committee (2008, 2009, 2010, 2012).

## LEADING PRACTICE 5.3

### *For exemptions from the requirement to prepare a RIS:*

- *limiting the granting of exemptions to exceptional circumstances (such as emergency situations) where a clear public interest can be demonstrated, is necessary to maintain the integrity of RIA processes*
- *the exemption should not be granted after a RIS has commenced*
- *independence of the process and accountability requires that responsibility for the granting of exemptions resides with the Prime Minister or Premier/Chief Minister and not the Minister proposing the regulation*
- *publishing all exemptions granted and the reasons on a central register maintained by the oversight body, and requiring the responsible minister to provide a statement to parliament justifying the exemption, improves RIA transparency and accountability.*



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## 6 Analytical requirements and impact assessment

### Key points

- Key analytical requirements for sound regulatory impact analysis (RIA) are broadly similar across Australian jurisdictions and largely conform with internationally recognised leading practice. However, what occurs in practice often falls short of those requirements and there is substantial scope for improvement.
- The benefits that a RIS provides are enhanced where all feasible options (including 'no action') are explicitly identified and assessed and the RIS is timed to inform decision making. Ministers and decision makers should not close off options for consideration prior to RIS analysis being undertaken.
- Regulatory outcomes are likely to be enhanced where the option that yields the greatest net benefit to the community — encompassing economic, environmental and social impacts (where relevant) — is recommended in RISs.
- Impacts should be quantified wherever possible. Where this is not possible, a qualitative assessment should be undertaken and explicitly included in the overall assessment of net benefits.
- National reform processes are more likely to work effectively when:
  - detail on individual jurisdictional impacts, including implementation costs, is included in RISs wherever possible, in particular where the impacts are uneven across jurisdictions.
- Requiring a competition statement in all RISs, irrespective of whether the regulatory proposal is ultimately assessed as having competition impacts, should ensure such issues are considered by agencies.
- While many RISs are of a high standard, quality varies substantially both within and between jurisdictions. Victorian and COAG RISs were generally more comprehensive and were considered closest to leading practice.
- Common improvements necessary to reduce the gap between RIA principle and practice include:
  - clearer identification of the nature and magnitude of the problem; more consistent consideration of a wide range of options; greater clarity in specifying objectives; consideration of a broader range of impacts, quantified wherever possible; and greater consideration of implementation, monitoring and compliance issues.

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This chapter examines the analytical requirements for RIA in each jurisdiction and how these are being implemented in practice.

In the terms of reference for the study, the Commission is directed to establish ‘the extent to which the benefits and costs of options are robustly analysed and quantified and included in a cost benefit or other decision-making framework.’ Additionally, the Commission has been asked to examine specific analytical requirements across the jurisdictions including the consideration of: regulatory and non-regulatory options; competition impacts; and national market implications.

In seeking to address these matters, jurisdictional performance is examined both in terms of analytical requirements as set out in guidance material, as well as the resulting RIA outputs as documented in RISs produced in each jurisdiction.

For the latter, the Commission examined 182 RISs prepared and published in 2010 and 2011 for all Australian jurisdictions to assess the extent to which key analytical features were present. This was the most comprehensive RIS analysis so far undertaken in Australia; the Commission estimates that these 182 RISs account for about two-thirds of all the RISs prepared in those years. All RISs examined were assessed as adequate by the relevant oversight body (in jurisdictions where formal assessment takes place) and covered a wide range of subject areas and types of regulation.

The results of the RIS analysis reflect a range of factors including differences in: jurisdictional RIS requirements and significance thresholds and the magnitude of the impacts of regulatory proposals examined. Many of the indicators relate to basic RIA elements which, when taken together as a group, provide a broad snapshot of the relative comprehensiveness of RISs across jurisdictions in the period examined. Further information on the Commission’s RIS analysis and qualifications to its interpretation is presented in appendix E.

## 6.1 The elements of a RIS

The seven key elements of a RIS identified in the COAG *Best Practice Regulation Guide* (COAG 2007a) are:

1. *problem* identification
2. a statement of *objectives* to be achieved
3. consideration of *options* (including both regulatory and non-regulatory solutions), one of which should be ‘no action’ to achieve the desired objectives

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4. assessment of *impacts* (costs and benefits) for consumers, business, government and the community
  5. a *consultation* statement
  6. *conclusion and recommended option*
  7. *implementation, monitoring and review*.

Incorporation of these elements in RIA has long been recognised as leading practice in Australia (see for example Office of Regulation Review (ORR) 1996) as well as internationally (see for example, Toornstra 2001). While guidance material in all Australian jurisdictions incorporate these elements, the nature and extent of detail provided differ substantially.

Each element — with the exception of ‘consultation’ (discussed in chapter 7) and the review component of ‘implementation, monitoring and review’ (discussed in chapter 9) — is examined in more detail below to identify key differences between jurisdictions and leading practices.

### *Proportionality principle*

An element of sound analysis that is not an explicit RIS element but conditions all of them is the proportionality principle. The principle states that the depth of analysis to be undertaken on a regulatory proposal should be commensurate with the significance of that proposal’s likely impacts.

The OECD has long endorsed the proportionality principle (OECD 1995). In its recent guidelines on regulatory policy adopted in March 2012 the OECD reiterated its importance, stating that jurisdictions should: ‘Adopt *ex ante* impact assessment practices that are proportional to the significance of the regulation’ (OECD 2012a, p. 10).

The Australian Government’s best practice regulation requirements provide an example of how the proportionality principle operates in practice for Commonwealth and COAG RISs (box 6.1). An examination of jurisdictional requirements as set out in guidance material indicates that all Australian jurisdictions have embraced proportionality as central to RIA.

The extent to which the proportionality principle and the examined RIS elements are reflected in impact analysis is discussed below.

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## 6.2 Problem identification and objectives

Sound problem identification is crucial in conditioning the analysis in the remainder of the RIS. As the COAG guidelines note ‘an elaborate and detailed analysis of a problem that has been wrongly conceptualised may well be worthless’ (COAG 2007a, p. 25). Moreover, the problem needs to be of a nature that government intervention is able to address. As stated by the OECD in its recent recommendations on regulatory policy:

*Ex ante* assessment policies should require the identification of a specific policy need, and the objective of the regulation such as the correction of a market failure, or the need to protect citizen’s rights that justifies the use of regulation. (OECD 2012a, p. 10)

### Box 6.1 The proportionality principle in practice

The Australian Government Best Practice Regulation Handbook states that the level of analysis in a RIS has to be commensurate with the likely impact of the proposal, and that:

[I]f the proposal is likely to have significant impacts on business and the community more broadly, you will need to provide a detailed analysis of those impacts; if the impacts are likely to be less significant, then a less detailed analysis will be required. (Australian Government 2010a, p. 15)

In making judgments about the likely impact of proposals the OBPR examines:

- the nature and magnitude of the proposal (and the problem it is addressing), and
- the scope (or breadth) of its impacts.

The Handbook notes:

An increase in the rate of excise on petrol would, for example, be quite broad in its impact, while a curfew on flights into a small airport would be relatively narrow in its impacts.

A complete ban on providing particular goods or services would be regarded as ‘large’ in magnitude, while an example of a less significant ‘small’ intervention might be an amendment to regular reporting requirements imposed on business. (p. 15)

Based on information collected, the OBPR internally assigns each RIS to one of four categories, ‘A’ – ‘D’. Proposed regulation is assessed as having a major impact (category A or B) or less significant (but non-minor) impact (category C and D).

The vast majority of Commonwealth and COAG regulatory proposals that require a RIS fall into the second category. In 2009-10, for example, only 8 RISs were assessed as having a major impact — 5 of 122 Australian Government RISs and 3 of 34 COAG RISs. (RIS data broken down by level of significance were not included in the OBPR’s Best Practice Regulation Reports for 2010-11 and 2011-12.)

Sources: Australian Government (2010a); OBPR (2010).

Information on the scale or magnitude of the problem is also needed to determine what, if any, policy response is warranted. While neither essential, nor an end in itself, quantification of the problem that the regulation seeks to address, can often provide a broad indication of the scale or significance of the issue, and inform judgments about whether proposed responses are commensurate. In contrast, limited concrete information on the scale and magnitude of the problem makes estimating the likely benefits of proposed responses very difficult. This, in turn, limits direct comparison of costs and benefits — a point taken up later in the chapter.

## Jurisdictional guidance on problem identification and objectives

All Australian jurisdictions, apart from Tasmania, provide explicit guidance on problem identification, requiring the RIS to illustrate the depth of the problem, likely impacts and any risk or uncertainty that may be present, as well as clearly identifying the objectives, outcomes, goals or targets sought (table 6.1).

Table 6.1 **Guidance on identification of the problem and objectives in RISs<sup>a</sup>**

	<i>Cwllth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas<sup>b</sup></i>	<i>ACT</i>	<i>NT</i>
<b>Problem</b>										
Source, nature, magnitude or extent of the problem	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓
- Scope or scale of the impacts	✓	✓	✓	✓	✓	✓	✓	✗	✗	✓
<b>Objectives</b>										
Clearly identify the objectives, outcomes, goals or targets sought	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
- Do not confuse 'means' with 'ends'	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗
- Do not pre-justify a solution	✓	✓	✗	✗	✓	✓	✓	✗	✓	✗
- Assess broad objectives so that all relevant alternatives are considered	✓	✓	✗	✓	✗	✓	✗	✗	✓	✓
- Avoid making objectives too broad	✓	✓	✗	✗	✗	✗	✗	✗	✓	✓
- Clear objectives are valuable for later evaluation reviews	✓	✗	✓	✓	✓	✗	✓	✗	✗	✗

<sup>a</sup> A 'tick' indicates that jurisdictional guidance material requires this be considered or taken into account when preparing the RIS. <sup>b</sup> Tasmanian guidance material assumes that all non-regulatory approaches to dealing with the problem have been exhausted prior to the preparation of the RIS, and a regulatory approach is the only solution. The objectives of the RIS are canvassed only in regulatory terms.

Source: Jurisdictional guidance material (appendix B).

In addition, COAG, New South Wales, Queensland and Western Australia require agencies to identify any constraints (for example, budgetary) on attaining the desired objectives. South Australian guidance material states that as far as possible,

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multiple objectives should be avoided. That is, a RIS needs to clearly distinguish the primary problem that needs addressing from other, ancillary, objectives.

Establishing a policy problem may be relatively straightforward in some instances, however it is often more difficult to make the case that the problem requires government intervention. In-principle rationales for government intervention are well established and are included in jurisdictional guidance material. Victoria's requirements and guidance on rationales for intervention are summarised in box 6.2.

**Box 6.2      Guidance on rationales for government intervention — Victoria**

The Victorian *Guide to Regulation* notes that legitimate rationales for government intervention include:

- *Addressing market failures* — common market failures are: market power, externalities, information asymmetries and public goods
- *Addressing social welfare objectives* — common social welfare objectives are: redistributive goals, policing of crimes and protection of human rights
- *Protective regulation* — examples include: measures to promote public health and safety, to reduce the risk of harm to vulnerable sections of the community, and to restrict the practice of certain occupations and professions.

*Source:* Victorian Department of Treasury and Finance (2011a).

Once a policy problem has been identified — and it is established that it can be addressed by the government — the stated objective of the government intervention needs to be included in the RIS. The objective must be characterised as a goal or end, rather than the means with which it will be achieved. This helps ensure that objectives are not defined in a way that unduly narrows the possible solutions. The RIS should also explicitly state any risks associated with government intervention, particularly where consequences of intervening are uncertain. Setting out clear objectives in the RIS also allows for a more thorough and accurate review of the proposal, if it becomes law. (Reviews of regulation are considered in more detail in chapter 9.)

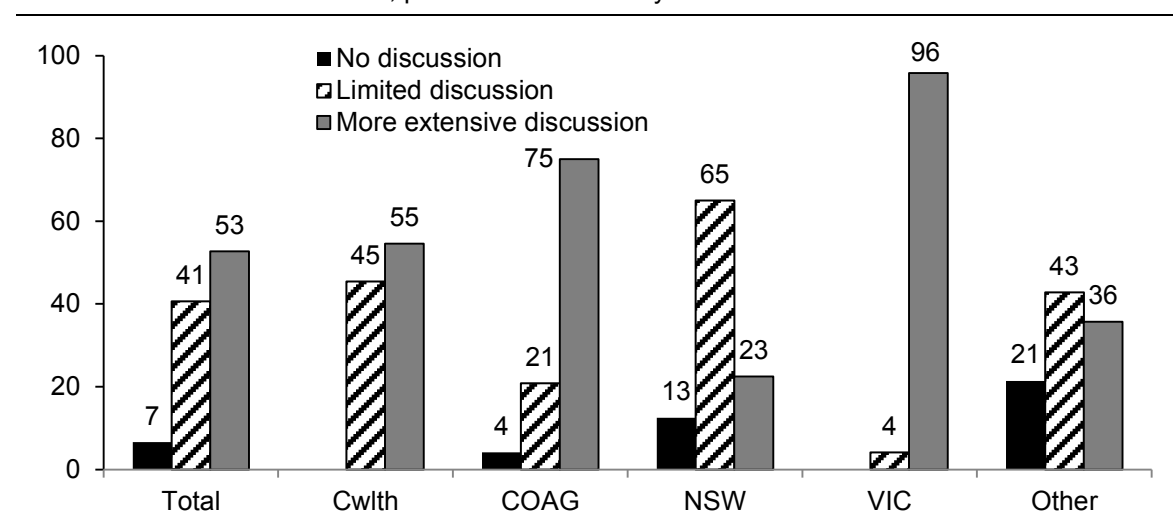
## **Observed practices on problem identification and objectives**

### *Intervention rationale*

The majority of RISs prepared and published by Australian jurisdictions in 2010 and 2011 contained some discussion of the rationale for intervention (figure 6.1). However, in many cases this discussion was a brief or cursory statement noting the

presence of a market or government failure. In some instances the existence of ‘spillovers’, ‘externalities’, ‘information problems’ or ‘regulatory failures’ were asserted, with little or no subsequent analysis of their significance, incidence or likely impacts. Overall, just over half of RISs included a more extensive discussion of the intervention rationale.

**Figure 6.1 Extent to which intervention rationale was discussed in RISs**  
2010 and 2011, per cent of RISs analysed<sup>a</sup>



<sup>a</sup> A total of 182 RISs produced during 2010 and 2011 were included in the analysis. ‘Other’ comprises jurisdictions with insufficient numbers of RISs to enable meaningful analysis at a jurisdictional level — specifically: Qld, WA, SA, Tas, ACT and NT.

Data source: PC RIS analysis (appendix E).

Results differed across jurisdictions. Almost all Victorian RISs, over three-quarters of COAG RISs and more than half of the Commonwealth RISs included extensive discussion of the intervention rationale. While most RISs in NSW discussed the intervention rationale, discussion was less extensive. Discussion of the intervention rationale was generally less common and less extensive in the smaller jurisdictions.

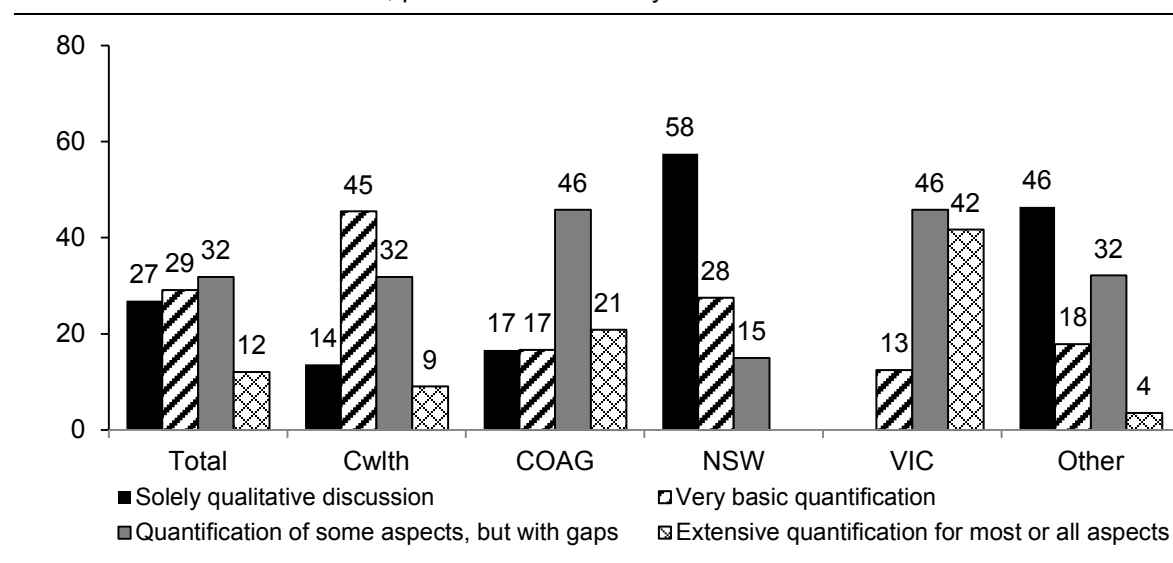
### *Quantification of problem*

Similarly mixed results were evident in terms of the proportion of RISs in which the problem identification discussion included some quantification. A solely qualitative discussion of the nature and extent of the problem was present in 27 per cent of RISs; and a further 29 per cent included only the most rudimentary quantification to help identify the size of the problem (figure 6.2).

Victoria had the highest rates of quantification, with all RISs containing at least some quantification when discussing the problem being addressed. While the time period and methodology employed differed slightly, the results of the Commission’s

analysis for Victoria are broadly consistent with those found in analysis by the VCEC (2012). That study found that for all Victorian RISs produced between 2007-08 and 2011-12, the vast majority included some form of quantification in discussing the problem being addressed.

**Figure 6.2 Extent of quantification of problem in RISs**  
2010 and 2011, per cent of RISs analysed



Data source: PC RIS analysis (appendix E).

## Stakeholder views on problem identification and objectives

Concerns about poor problem specification were evident in submissions to the study (box 6.3). A number of stakeholders stated that this was the most important element of RIA, and that when done poorly, had the greatest potential to adversely impact the other elements of RIA and hence overall RIS and regulatory quality.

Poor problem identification can also contribute to unclear or inappropriate specification of objectives in RIA and, potentially, consideration of an insufficiently wide range of options, and/or too early dismissal of non-regulatory approaches. For example, CropLife Australia noted that:

An important element of any regulatory impact analysis process is clear identification of an issue that is sought to be resolved through a regulatory process. CropLife has observed impact analyses that rather than identifying a desired outcome, described the problem to be resolved as the lack of a regulatory measure. All options that do not include the preferred regulatory measure can therefore be dismissed as not addressing the problem being considered by the impact analysis. (CropLife Australia, sub. 7, p. 6)



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### Box 6.3      **Stakeholder views on problem identification in RISs**

#### *The Centre for International Economics (CIE)*

If the problem and policy mechanisms are not reasonably defined, the other steps of the RIS process tend to become somewhat unbounded and confused. The relevance of the exercise is not clear and it may seem like a benefit cost analysis looking for a problem or indeed a regulatory agency looking for a cause. (sub. 14, p. 5)

#### *Officers undertaking RIA in the Victorian transport portfolio*

Most weaknesses [in RIA] relate to a lack of problem statement and insufficient options analysis. A really good understanding of the problem, backed up by as much evidence as possible, is of paramount importance. (sub. 17, p. 10)

#### *Australian Food and Grocery Council*

[T]he AFGC [Australian Food and Grocery Council] expressed the view that the Packaging Impacts Consultation RIS (PICRIS) does not establish the case for action and ministers should examine more closely whether there is a problem and if further regulation is required and would be of benefit. The AFGC is of the view that the PICRIS does not make a clear and robust case for further government regulation in relation to packaging waste management. (sub. 5, p. 15)

#### *Construction Material Processors Association*

There is a paucity of detail of the problem that is being dealt with. Without clearly setting out the problem and its scope the policy responses can only be best guesses. So often the response reflects the 'sledge hammer to crack a nut' approach. (sub. 9, p. 18)

In the COAG context, the Victorian Department of Premier and Cabinet noted:

... the nature of the problem is often taken to be the need for harmonisation or to avoid regulatory fragmentation rather than the imposition of unnecessary costs on business or the community. Harmonisation should not be seen as an end in itself, rather as one of a number of options for responding to a clearly identified problem. For example ... the National Marine Safety Regulator reforms greatly increase the number of vessels subject to regulation ... in spite of the fact that harmonisation would only benefit the 1.6 per cent of the national fleet that is transferred interstate each year. (sub. DR32, pp. 3-4)

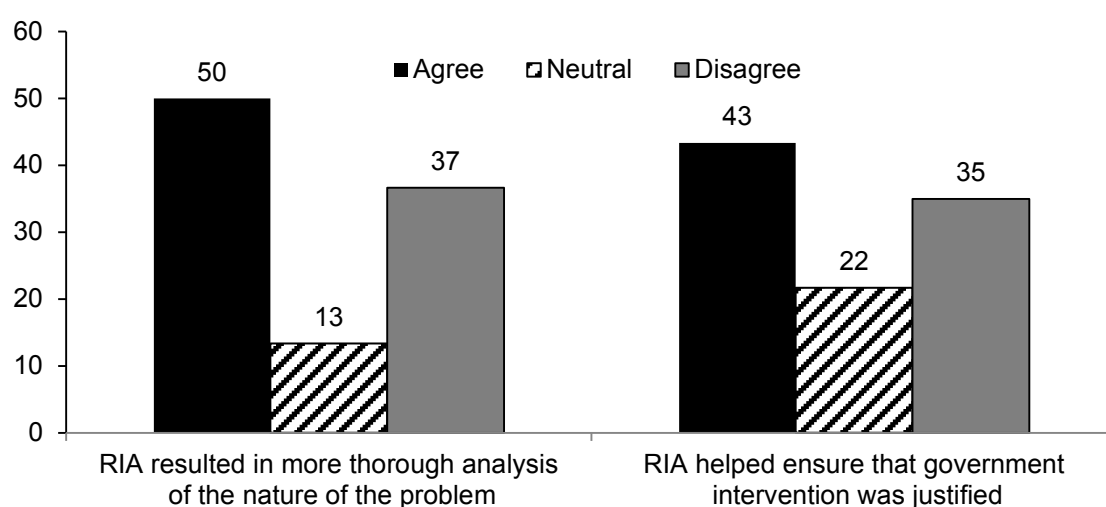
Despite warnings in RIA guidance material that objectives should be specified in terms of ends and not means, the Commission noted that similar problems were apparent in some RISs examined.

The Commission also surveyed the views of government agencies on the impact of formal requirements on a range of key elements including problem identification. Overall, half of respondents agreed that the formal RIA framework had resulted in a more thorough analysis of the nature of the problem, with a smaller proportion

concurring that RIA has helped ensure government intervention is justified (figure 6.3).

Responses by oversight bodies to the same set of questions were, not unexpectedly, more positive, with 75 per cent agreeing that formal requirements improve analysis of the problem and 90 per cent agreeing that RIA helped ensure that government intervention was justified.

**Figure 6.3 Agency views on the impact of RIA on problem identification**  
Per cent of respondents



<sup>a</sup> Based on 60 agency survey responses. 'Agree' comprises both 'strongly agree' and 'agree'. Disagree comprises both 'strongly disagree' and 'disagree'.

Data source: PC RIA Agency Survey (2012).

These results suggest that formal RIA requirements have helped improve problem analysis in policy development. However, there remains scope for further improvement. The Commission found evidence of a clear gap between the guideline requirements for problem identification — which are sound in all jurisdictions — and the analysis provided in many RISs, which was often quite limited.

## 6.3 Consideration of options

It is important that a RIS canvasses a wide range of options to improve the likelihood that the best approach to addressing the problem will be identified. As stated by the OECD:

Ex ante assessment policies should include a consideration of alternative ways of addressing the public policy objectives, including regulatory and non regulatory alternatives to identify and select the most appropriate instrument, or mix of

instruments to achieve policy goals. The no action option or baseline scenario should always be considered. *Ex ante* assessment should in most cases identify approaches likely to deliver the greatest net benefit to society, including complementary approaches such as through a combination of regulation, education and voluntary standards. (OECD 2012a, p. 10)

In all jurisdictions except Tasmania, non-regulatory options have to be considered in the RIS. Queensland is the only jurisdiction which limits the range of options to be considered to be narrower than all feasible options (table 6.2). However, in all jurisdictions it is possible for overarching legislation to narrow options which can be implemented via subordinate legislation.

**Table 6.2 Guidance on ‘options’ required in the RIS**

	<i>Cwlth</i>	COAG	NSW	Vic	Qld <sup>a</sup>	WA	SA	Tas <sup>b</sup>	ACT	NT
No action	✓ <sup>c</sup>	✓	✓ <sup>c</sup>	✓	✓	✓ <sup>c</sup>	✓	✓	✓	✓ <sup>d</sup>
Status quo	✓	✓	✓	✓	x	✓ <sup>c</sup>	✓	✓ <sup>e</sup>	✓ <sup>d</sup>	✓ <sup>d</sup>
Non-regulatory option	✓	✓	✓	✓	✓ <sup>d</sup>	✓	✓	✓ <sup>e</sup>	✓ <sup>d</sup>	✓
All feasible options	✓ <sup>f</sup>	✓	✓	✓	x	✓	✓	✓	✓	✓

<sup>a</sup> Under the *Subordinate Instruments Act 1992* (Qld), if appropriate, a brief statement of any reasonable alternative must be included. <sup>b</sup> For primary legislation it is assumed that agencies have fully considered all other possible options to achieve the desired objectives, including non-regulatory approaches. <sup>c</sup> No action is treated analogously to ‘status quo’. <sup>d</sup> Considering no action or the status quo should be implicitly examined in determining the need for regulation. <sup>e</sup> For subordinate regulation, the Secretary of the Department of Treasury and Finance assesses the RIS adequacy against these criteria, but they are not required as part of the RIS. <sup>f</sup> Unless Cabinet directs that a RIS only consider certain options.

Source: Jurisdictional guidance material (appendix B).

In addition to canvassing all feasible options, the RIS needs to offer the decision maker genuine choice between the options. That is, if all the alternative options proposed in a RIS are infeasible (for instance, they may be unduly restrictive on market participants), the decision maker may be offered no real choice other than to select what appears to be the more ‘moderate’ option. The Standing Council on Energy and Resources (SCER) warned in its recent review of the limited merits review regime that:

... this can lead to the Goldilocks syndrome, a source of bias in assessment, whereby change options tend to be developed in ways that make one ‘too hot’, one ‘too cold’ and one ‘neither too hot nor too cold’. (SCER 2012, p. 16)

In all Australian jurisdictions, ‘no action’ is a required option to be considered in a RIS for new regulations. Guidance material in all jurisdictions (except Queensland) requires the status quo to be an option for amending regulations.

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The difference between adopting the ‘no action’ base case and the ‘status quo’ base case is explained by the *Victorian Guide to Regulation*:

In identifying the costs and benefits likely to arise from the viable options, the base case needs to be defined for comparison purposes (i.e. what are the potential costs and benefits compared to the situation where the proposed approach is not adopted). For new regulations and sunseting regulations, the base case is the scenario of there being no regulation. In the case of proposals for amended regulation, the base case is the previous, non-amended regulation situation. (Victorian Department of Treasury and Finance 2011a, p. 74)

The importance of selecting the correct base case for the evaluation of options cannot be overstated. The likely benefits and costs of a regulatory proposal could be markedly different depending on whether there are already regulations or other government intervention measures in place.

The COAG guidance material states that giving decision makers genuine scope for exercising choice requires RISs to analyse the costs and benefits of a number of alternatives and ensure these alternatives are clearly distinguished, and that:

[A] ‘do nothing’ alternative should always be identified, implicitly if not explicitly. This will be the base case against which alternatives can be compared. Then costs and benefits would be incremental to what would have happened in the absence of regulatory action. (COAG 2007a, p. 23)

Stakeholders also noted the importance of consideration of a range of policy options. The Australian Chamber of Commerce and Industry (ACCI), for example, commented that:

The RIA process should include a detailed consideration of ways to address policy objectives through the most appropriate policy responses ... Moreover, no action/regulation option should always be the baseline scenario. (sub. 2, p. 3)

## **Curtailling options in a RIS**

A RIS should assess all feasible options so as to ensure that the preferred option is the one that generates the greatest net benefit to the community. As the RIS develops, it may become apparent that particular options are infeasible. Where this occurs, it should be made transparent in the RIS to the decision maker and stakeholders. However, some jurisdictions permit options to be excluded from impact assessment.

The Australian Government and Queensland guidance material explicitly permit a reduction in the range of options that the RIS needs to consider. In Queensland,

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options can be curtailed when there are certain constraints, including in relation to the:

- budget available for the policy
- timeframes for implementing policy (while policy design should not be rushed, not all alternatives will be capable of implementation within available timeframes)
- extent of consistency with existing policies. (Queensland Treasury 2010, p. 59)

The Australian Government Handbook (2010a) states that:

... agencies may be given direction regarding which options to analyse in a RIS for the Cabinet or a committee of the Cabinet. (p. 15)

The practical effect of this is that options developed by Cabinet (or a sub-committee) could be included in a RIS. (In principle, such an option, if feasible, should already be included in the RIS.) However, if an agency is constrained (by Cabinet direction) from considering all viable options, the Cabinet-preferred option may not be the one that yields the greatest net benefit to the community. Moreover, if Cabinet were to propose an infeasible option and close off on any alternatives, the ‘preferred option’ may result in increased costs to the community.

After the RIS has been completed, a decision on the preferred option is made by the decision maker (section 6.4). The Australian Government Handbook allows for the RIS to be modified after the decision, but prior to publication:

- where a draft RIS refers to commercial-in-confidence or national security information, or
- to include analysis of the option adopted where that option was not considered in the original RIS. (Australian Government 2010a, p. 20)

Permitting the modification of a RIS post-decision may result in greater transparency in communicating the government’s decision to stakeholders. However, there is a potential for ‘retrofitting’ of a RIS to take into account an option not originally considered, in order to reflect the government’s decision. The principal rationale of a RIS is to inform decision making, rather than to reflect the decision taken. Hence, including analysis for an option that was not formally considered as part of the set of feasible options in the RIS would appear to be at odds with the objectives of the RIA framework.

#### LEADING PRACTICE 6.1

***The benefits that a RIS provides are enhanced where all feasible options (including ‘no action’) are explicitly identified and assessed and the RIS is timed to inform decision making. Ministers and decision makers should not close off options for consideration prior to RIS analysis being undertaken.***

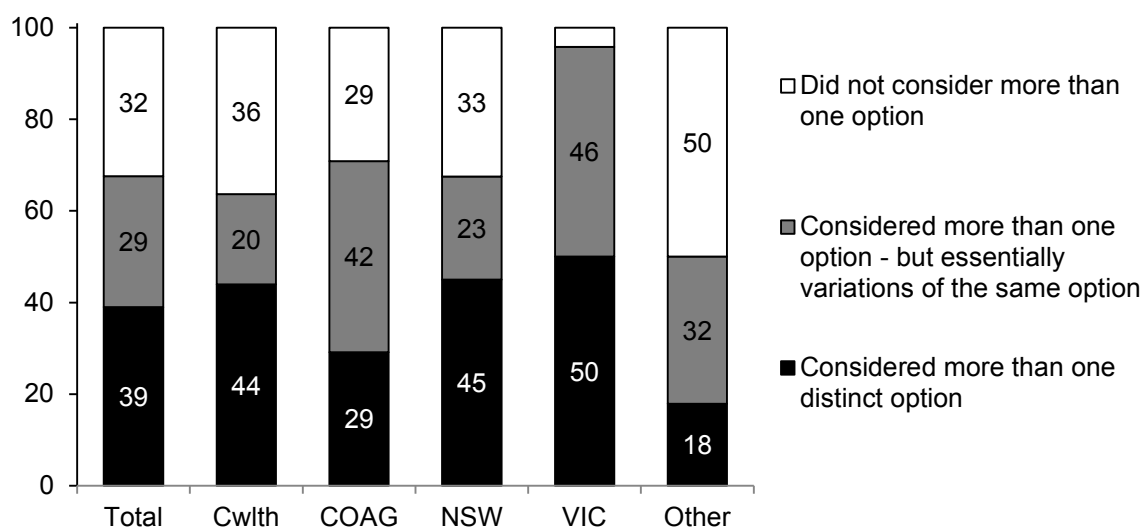
## Observed practices on consideration of options in RISs

Based on an assessment of the consideration of options documented in RISs in Australian jurisdictions, the Commission found that:

- the number of options considered was often low
- ‘no action’ was often either not considered explicitly as a discrete option, or it was quickly dismissed
- consideration of non-regulatory alternatives was either very limited or, more commonly, absent.

Overall, two-thirds of RISs considered more than one option (excluding ‘no action’) — figure 6.4. However, in many cases these were essentially variations of the same option. Results varied by jurisdiction, with almost all Victorian RISs considering more than one option in addition to ‘no action’, although in many cases these were variations of the same option. One half of RISs in the smaller jurisdictions did not consider more than one option.

**Figure 6.4 Share of RISs that included more than one option (excluding a ‘no action’ option)**  
2010 and 2011, per cent of RISs analysed



*Data source:* PC RIS analysis (appendix E).

These results were broadly consistent with Ergas (2008) which examined 22 Australian Government and COAG RISs and found that around 70 per cent included consideration of more than one alternative (in addition to the status quo).

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Just over two-thirds of RISs across all jurisdictions explicitly considered ‘no action’ as an option, however many of these RISs either included limited discussion of that option, or it was quickly dismissed. Non-regulatory alternatives were considered in around half of all RISs, with just under a third of all RISs including a more extensive discussion.

The Commission’s findings on the breadth and depth of options considered are broadly consistent with findings from studies that have examined RISs in the United States, United Kingdom and the European Union (appendix E).

### **Stakeholders views on consideration of options in RISs**

A number of stakeholders highlighted the importance of RISs examining a wide range of regulatory and non-regulatory options.

The Australian Government Attorney-General’s Department, for example, noted that all officers, when developing Commonwealth legislation, should adopt the following as a guiding principle: ‘Consider all implementation options — don’t legislate if you don’t have to.’ (sub. 4, p. 4)

Officers undertaking RIA in the Victorian transport portfolio noted that while sufficient time is allowed to consider all feasible options for reviews of major regulations:

[F]or many miscellaneous amendment bills it is not possible to consider the full scope of options because many parameters are fixed ... Some RIAs are still being prepared after policy decisions and announcements have been made. While this is undesirable, it is still worthwhile undertaking a RIA as the RIA can be used to optimise the details of any scheme even if the range of options under consideration is artificially constrained. (sub. 17, pp. 8-9)

Stakeholders provided examples of regulatory proposals that they considered to have examined an insufficient range of options or that in some instances the ‘do nothing’ or non-regulatory option was misrepresented. For example, CropLife Australia noted:

CropLife has concerns that some regulatory impact analyses tend to be used by regulators to justify decisions that have already been taken by regulators and to support preferred regulatory options. This approach undermines the true purpose of regulatory impact analysis, which is to objectively identify the most efficient and effective option for achieving a regulatory or policy outcome. (sub. 7, p. 3)

In this example [Hazardous Chemicals Work Health and Safety RIS], the ‘do nothing’ option misrepresented the status quo as not being able to address the problem as described. The most efficient and effective option was not identified by the regulator

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seeking to impose a desired regulatory option rather than genuinely assess impacts. (sub. 7, p. 5)

Responses to the Commission's survey of agencies were mixed on whether the formal RIA framework had contributed to consideration of a broader range of options than would otherwise have occurred. Overall, just over a third of respondents thought that it had, with the remainder disagreeing or neutral.

The results of the Commission's analysis of RISs, as well as input from stakeholders, highlights that a gap exists between the requirement in all jurisdictions that a wide range of regulatory and non-regulatory options be considered as part of RIA and what occurs in practice.

## 6.4 Assessment of impacts

One of the central elements of RIA is the assessment of impacts expected to arise from regulatory proposals. To be comprehensive, a RIS should consider all *significant* costs and benefits that a regulatory proposal is likely to impose on the community. As stated by the OECD, the RIS should:

Adopt *ex ante* impact assessment practices that are proportional to the significance of the regulation, and include benefit cost analyses that consider the welfare impacts of regulation taking into account economic, social and environmental impacts including the distributional effects over time, identifying who is likely to benefit and who is likely to bear costs. (OECD 2012a, p. 10)

The appropriate depth of analysis in a RIS varies with the likely impacts of the proposal. Application of the proportionality principle would suggest that the level of analysis to be undertaken on a proposal is commensurate with the significance of that proposal's expected impacts.

Consistent with OECD guidance, agencies in all Australian jurisdictions are, for at least some types of regulatory proposals, required to assess (and wherever possible, quantify):

- community, economic, social and environmental impacts
- competition impacts
- business impacts
- government, compliance and administration costs (table 6.3).



**Table 6.3 Guidance on the types of impacts to be assessed in a RIS**

	<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
	<i>RIS</i>	<i>RIS</i>	<i>BRS</i>	<i>RIS</i>	<i>RIS</i>	<i>RIS</i>	<i>RIS</i>	<i>RIS</i>	<i>RIS</i>	<i>RIS</i>
								<i>Pri.</i>	<i>Sub.</i>	
Community, economic, social and environmental	✓	✓	✓	✗	✓	✓	✓	✓	✗	✓
Competition	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓
Business	✓	✓	✓	✗	✓	✓	✓	✓	✗	✓
Small business	✓	✓	✓	✗	✓	✗	✓	✗	✗	✓
Government, compliance and administration	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓

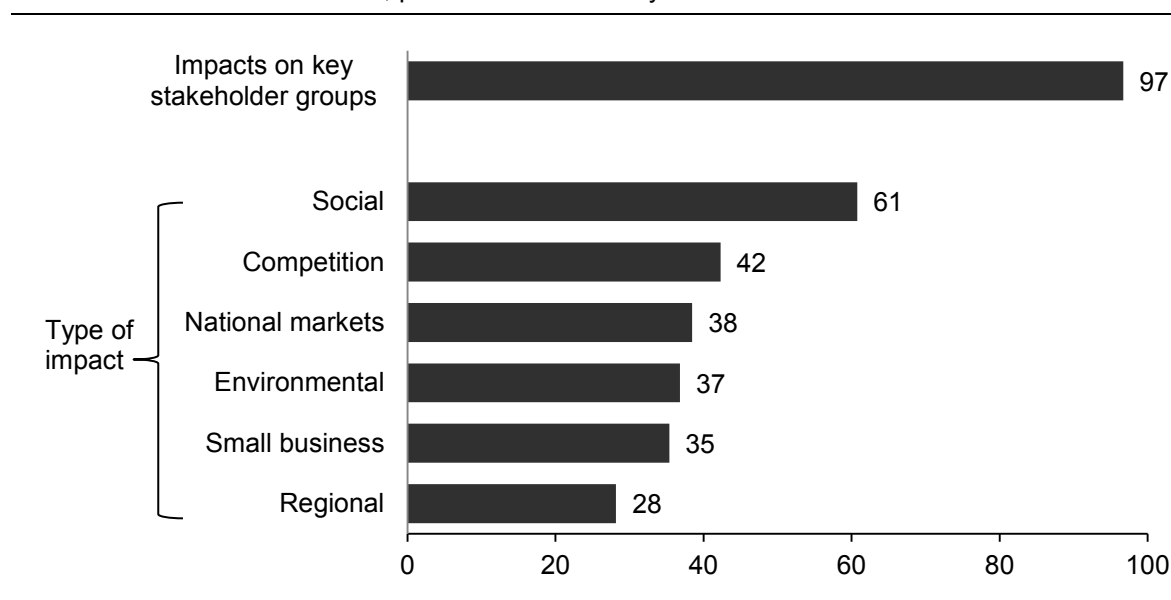
'Pri.' Primary legislation. 'Sub.' Subordinate legislation.

Source: Jurisdictional guidance material (appendix B).

## Observed practices on range of impacts considered

While the impacts on key stakeholder groups were considered in most RISs (figure 6.5), it was often the case that discussion of impacts was very brief. For example, discussion was limited to which broad groups may be impacted by the proposed regulatory change, or a very general description of potential impacts.

**Figure 6.5 Consideration of impacts in RISs by type**  
2010 and 2011, per cent of RISs analysed



Data source: PC RIS analysis (appendix E).

There was substantial variation in specific types of impacts assessed, with social impacts (broadly defined) most commonly assessed, followed by competition,

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national market and environmental impacts. These differences largely reflect: the types of regulatory proposals examined; the areas of the economy affected; and the ease with which various types of impacts can be identified, consulted on and/or analysed.

### *Competition impacts*

The Competition Principles Agreement (COAG 1995) agreed by all Australian governments requires that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restrictions to the community as a whole outweigh the costs, and
- the objectives of the regulation can only be achieved by restricting competition.

The OECD has stated that:

*Ex ante* assessment policies should indicate that regulation should seek to enhance, not deter, competition and consumer welfare, and that to the extent that regulations dictated by public interest benefits may affect the competitive process, authorities should explore ways to limit adverse effects and carefully evaluate them against the claimed benefits of the regulation. This includes exploring whether the objectives of the regulation cannot be achieved by other less restrictive means. (OECD 2012a, p. 10)

Restrictions on competition can enable businesses to pass on costs as higher prices to customers. Where this involves inputs into other economic activities (as with utilities and transport) these higher prices have a ripple effect on costs and productivity across the economy. Moreover, there is evidence that competition can stimulate innovation, improving dynamic efficiency and the diversity of goods and services available in an economy (PC 2008).

The competition test is an important requirement of RIA in Australia and is applied, to varying extents, as part of the assessment of new regulation in all Australian jurisdictions. The requirement to assess competition impacts as part of RIA has also been adopted internationally, with the OECD noting that:

...in the United Kingdom, assessment of competition impacts has been a mandatory part of RIA since 2002. In the European Commission, competition assessment has been part of the RIA process since 2005. In the United States, RIA guidance documents explicitly require consideration of market impacts. (OECD 2009b, p. 122)

To assist governments in identifying and assessing likely competition impacts, the OECD has provided a competition checklist. The checklist (adopted by COAG in its guidance material) should be completed wherever a proposal is likely to limit:

- 
- the number or range of suppliers
  - the ability of suppliers to compete
  - the incentive of suppliers to compete
  - the choices and information available to customers (OECD 2007).

All jurisdictions provide guidance on the types of impacts that can affect competition and, where a restriction exists, how it can be assessed to determine whether it is in the public interest. For instance, key examples of competition restrictions identified in Tasmania's guidelines (Tasmanian Department of Treasury and Finance 2011) include restrictions on market entry, competitive conduct, product or service innovation, the entry of goods or services, and administrative discretion that is anti-competitive such as favouring incumbent suppliers or preferential purchasing arrangements.

While not all regulation will have an impact on competition, these impacts were discussed in only around 40 per cent of RISs examined. Some RISs included more extensive discussion, however in many cases statements on competition impacts were very brief. The Commission did not attempt to identify the number of RISs in which the associated regulatory proposal was likely to have competition impacts, but were not discussed in the RIS.

The payoff from greater attention to competition impacts in RISs is likely to be large, relative to the costs. As noted by the OECD:

[s]ignificant public benefits can be obtained from even a relatively small investment of public sector resources in competition assessment processes if it is done systematically and integrated within the regulatory policy cycle. (OECD 2009b, p. 147)

Given this, there are likely to be benefits for transparency and RIA thoroughness, from other jurisdictions following the Tasmanian and Victorian practice of requiring some form of explicit competition statement in all RISs, regardless of whether a competition impact is likely. Such a statement would provide stakeholders and decision-makers with an assurance that these issues received adequate consideration in the RIS. The public scrutiny would likely provide an added incentive for those undertaking RIA to ensure a robust competition assessment was undertaken.

Further, the Commission considers that in general, improving the overall robustness and quality of impact assessment in RISs — including assessment of both direct and indirect impacts on market participants — would contribute to better competition assessment in RIA.

***Requiring a competition statement in all RISs, irrespective of whether the regulatory proposal is ultimately assessed as having competition impacts, should ensure such issues are identified and assessed by agencies.***

## Methods for assessing costs and benefits

Costs and benefits should be assessed in a systematic and objective manner so as to enable identification of the option likely to be of the greatest net benefit to the community. Jurisdictions have generally adopted at least one of three alternative methods for assessing costs and benefits in a RIS — cost-benefit analysis (CBA), cost-effectiveness analysis (CEA) and multi-criteria analysis (MCA) (table 6.4). By way of illustration, New South Wales guidance material provides a broad introduction to each method and outlines when each may be appropriate (box 6.4).

**Table 6.4 Guidance on methods of assessing costs and benefits**

	<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic<sup>a</sup></i>	<i>Qld<sup>b</sup></i>	<i>WA<sup>c</sup></i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
Cost-benefit analysis	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓
Cost-effectiveness analysis	✓ <sup>d</sup>	✓	✓	✓	✓	✗	✗	✓	✓	✗
Multi-criteria analysis	✗	✗	✓	✓	✓	✗	✗	✗	✗	✗

<sup>a</sup> Where potential costs and benefits are likely to be particularly large, then an even closer examination of the impacts is warranted, and this may include an assessment of indirect effects (eg through general equilibrium modelling). <sup>b</sup> Break-even analysis also accepted. <sup>c</sup> Western Australia does not adopt a particular method for formally assessing costs and benefits, however costs and benefits do need to be assessed in order to establish which option yields the greatest net benefit. <sup>d</sup> As part of the CEA, cost-utility analysis can be used.

Source: Jurisdictional guidance material (appendix B).

As suggested in box 6.4, CBA is the preferred method of assessing costs and benefits in a RIS, however it tends to be highly data intensive, typically requiring that impacts be monetised. When assessing costs and benefits, the guidance material in all Australian jurisdictions states that:

- impacts should be quantified wherever possible
- where quantification is possible, impacts should be monetised
- where quantification (and hence monetisation) is not possible, impacts should be qualitatively assessed.

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In terms of the quantification of impacts, the OECD states that:

When regulatory proposals would have significant impacts, ex ante assessment of costs, benefits and risks should be quantitative whenever possible. Regulatory costs include direct costs (administrative, financial and capital costs) as well as indirect costs (opportunity costs) whether borne by businesses, citizens or government. (OECD 2012a, p. 10)

#### **Box 6.4 New South Wales guidance on CBA, MCA and CEA**

##### ***Cost benefit analysis (CBA)***

Cost benefit analysis involves expressing all relevant costs and benefits of a regulatory proposal in monetary terms in order to compare them on a common temporal footing. This technique is most usefully applied to proposals where the major benefits can be readily quantified...

*Net present value (NPV)* – The NPV of an option is the estimated value in present terms (today's dollars) of the flow of benefits over time less costs. Calculating the NPV involves estimating the annual costs and benefits of an option over a fixed period, and then discounting that stream of net benefits to its present value. A positive NPV indicates that an option results in a net benefit. The higher the NPV, the greater the net benefit.

The key strength of cost benefit analysis is it allows a range of options to be compared on a consistent basis. However, the focus on valuing impacts can sometimes lead to the omission of impacts which cannot be valued quantitatively. Cost benefit analysis can also require considerable data. Where the impacts of a proposal are not significant, the cost and effort required for this type of analysis may not be warranted.

##### ***Cost effectiveness analysis (CEA)***

Cost effectiveness analysis is a useful approach where benefits of an option cannot be quantified readily in dollar terms but where the desired outcome can be clearly specified. In cost effectiveness analysis, the level of benefit desired is pre-specified and held constant for all options. Options are then assessed to identify the least cost means of achieving that objective.

For example, where an environmental outcome can be quantified in terms of environmental quality (such as the volume of environmental flows needed to ensure a healthy river) but not in dollar terms, cost effectiveness analysis can be used to determine the least costly way of achieving the outcome.

##### ***Multi-criteria analysis (MCA)***

If it is not feasible to assign monetary values to costs or benefits of an option, qualitative analysis should be used to compare options or elements of those options. Multi-criteria analysis (MCA), or the balanced scorecard approach as it is sometimes called, is one technique for doing this. MCA requires judgments about how proposals will contribute to a set of criteria that are chosen to judge the benefits and costs associated with the proposals.

A number of different evaluation criteria are defined. A score is then assigned for each criterion depending on the impact of the policy option being considered ... Weightings should also be assigned to each of the criterion, reflecting their relative importance in the decision making process, and an overall score can be derived by multiplying the score assigned to each criterion by its weighting and summing the result.

*Source:* NSW Department of Premier and Cabinet (2009, pp. 37-38).

The Australian Food and Grocery Council advocated a similar position to the OECD in that:

For regulatory proposals that are perceived to have significant economic, social and environmental impact, ex ante assessment of costs, benefits and risks of the proposed regulatory response should be quantitative when possible. It should be compulsory for the RIA process to include a proper cost–benefit analysis. The assessment of regulatory cost should include both direct cost (e.g. administrative and compliance costs) and opportunity cost borne by the government, industry and consumers. (sub. 5, p. 17)

In all jurisdictions, except Western Australia, detailed guidance material on undertaking CBA is provided. This ranges from guidance on recommended discount rates and performing sensitivity analysis, to taking into account inflationary effects and the underlying assumptions in the CBA (table 6.5).

Guidance material for the Commonwealth, New South Wales, Victoria and the Northern Territory have listed some pitfalls in undertaking CBA, including:

- failing to correctly identify the base case
- failing to consider all relevant impacts (such as indirect costs and benefits)
- incorrectly assuming the effectiveness of regulations (and omitting associated enforcement costs)
- inappropriate or inconsistent discounting of future costs and benefits
- not undertaking sensitivity analysis
- not considering risk appropriately.

**Table 6.5 Guidance on specific cost-benefit analysis elements**

	<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
Discounting	✓	✓	✓	✓ <sup>a</sup>	✓	✗	✓	✗	✓	✓
Recommended discount rate	✓ <sup>b</sup>	✗	✗	✓ <sup>c</sup>	✗ <sup>d</sup>	✗	✓ <sup>e</sup>	✗	✗	✗
Sensitivity analysis	✓ <sup>b</sup>	✓	✓	✓	✓	✗	✓	✗	✓	✗
Risk analysis	✓	✓	✓	✓	✗	✗	✓	✓	✓	✓
Inflationary effects	✓	✓	✓	✓	✓	✗	✓	✗	✗	✗
Assumptions	✓	✗	✗	✓	✓	✓ <sup>f</sup>	✓	✗	✓	✓

<sup>a</sup> The Opportunity Cost of Capital is deemed appropriate. <sup>b</sup> A discount rate of either 7 or 8 per cent real, with sensitivity analysis conducted at 3 and 10 per cent real. <sup>c</sup> 3.5 per cent real rate. <sup>d</sup> However the Queensland Treasury does provide reference rates which are 10-year Treasury Bonds, the long-term average real economic growth rate (with an adjustment for major risks and time preference), and the rate of return on debt and equity for comparable private sector projects. <sup>e</sup> Department of Treasury and Finance default rate. <sup>f</sup> Any assumptions and any other limitations need to be clearly stated as part of the assessment of costs and benefits.

Source: Jurisdictional guidance material (appendix B).

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In practice, the Commission found that a discount rate was used when assessing future impacts in almost one third of all RISs, with most Victorian and COAG RISs using a discount rate. The use of sensitivity analysis to check the robustness of assumptions was not common (16 per cent of RISs). The most common form of sensitivity analysis involved allowing the discount rate to vary, typically in a range from 3–11 per cent. Less frequently, assumptions about the likely effectiveness of proposed regulatory approaches were allowed to vary.

### *Why quantify?*

Quantification can add rigour to impact assessment, as the search for evidence and the tools applied require clear definitions of impacts and the assumptions that underlie the estimates of costs and benefits (PC 2011). While it is not always possible to quantify all impacts of regulatory proposals, some quantification can still provide valuable information alongside qualitative evidence. The discipline imposed by attempting to quantify impacts also encourages a more systematic and transparent consideration of the counterfactual — what would have happened in the absence of the regulatory proposal.

Stakeholders noted that where objective analysis — particularly quantified estimates in RISs — was unavailable, it was difficult to engage in the RIA process and provide more useful input. For example, the Construction Material Processors Association commented:

The most prevalent weakness in RISs reviewed by the Association is a general lack of identification of the costs associated with options for regulatory intervention. A far greater emphasis must be given to researching these costs. A corresponding weakness is the lack of quantification of the benefits of the options. Benefits are most often estimated in qualitative terms and these are typically exaggerated. (sub. 9, p. 16)

Quantification can allow for better engagement with stakeholders about the anticipated impacts of regulatory proposals. For example, the Construction Material Processors Association submitted that:

[N]ew requirements for cultural heritage management plans (CHMP) required in Aboriginal heritage legislation were estimated in the relevant RIS to cost \$20,462 each. In practice, the costs of preparing these plans range from \$25,000 for a desktop plan to in excess of \$300,000 for a comprehensive plan prepared by a consultant for a small operation. These costs do not include the proponent's time or the holding costs of stalling the project. The quality of the RIS and the oversight arrangements were clearly incompetent in this case. (sub. 9, p. 3)

Despite the fact that the quantified impacts were contested in this instance, quantifying impacts in the RIS allowed stakeholders to better engage with the

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consultation process for the regulatory proposal. Such a process should enable the final RIS document that goes to the decision maker to be based on the best available information. As noted by the Western Australian Department of Treasury:

... a larger degree of quantification of costs and benefits in all elements of the RIS (particularly for implementation) would improve decision-making and [the Department] has this as a focus for reform. (sub. DR37, p. 4)

Moreover, by quantifying impacts, the regulatory changes imposed may be more likely to be accepted by affected stakeholders — particularly if they have had an opportunity to provide feedback on estimated impacts, and see this feedback taken into account in the final RIS and decision making process.

### *Assessing business compliance costs*

It is COAG agreed best practice (2007a) that consideration be given to using a Business Cost Calculator (BCC) to assess business compliance costs — and around half of Australian jurisdictions explicitly state that one should be used. For example, when new regulations are proposed by Australian Government agencies, estimates of compliance costs (based on the BCC or an equivalent approach approved by the OBPR) are to be included in the RIS (box 6.5).

In its study, *Identifying and Evaluating Regulatory Reforms* (PC 2011), the Commission noted that compliance cost calculators can be used to evaluate the direct impacts of regulatory changes that arise from reductions in compliance costs (or the costs arising from increased compliance costs). However, the BCC is not useful for evaluating dynamic effects, flow-on effects (through the reallocation of resources) or other ‘spillover’ effects.

In practice, the Commission found that the extent to which compliance costs were calculated in RISs varied considerably (discussed below).



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### Box 6.5      **The Business Cost Calculator (BCC)**

The BCC is an IT tool derived from the Standard Cost Model (SCM Network 2005). Eight types of regulatory compliance tasks are included in the Business Cost Calculator (BCC). These include administrative costs (record keeping, publication and documentation and procedural tasks) and substantive compliance costs (education, permission, purchase costs and enforcement) and 'other' tasks.

When the BCC is used to carry out ex ante evaluations of proposed reform, the process followed involves:

- setting out the regulatory options (for example, ban a product, restrict access to licensed users or take no action)
- identifying the actions that would have to be taken for each of the regulatory options (such as providing information, keeping records and purchasing equipment)
- identifying the total number of firms in the industry, and the percentage likely to face obligations for each action
- estimating the number of affected staff for each affected business, the number of times per year they would have to act and the time taken for the activity
- entering the labour costs (manually, or using an in-built wage calculator).

Based on this information, the BCC calculates the estimated cost to each affected firm and to the industry as a whole, of each of the activities that would be required under each of the regulatory options.

*Source:* Australian Government (2010a).

### *Assessing qualitative impacts*

As noted earlier, quantifying regulatory proposals' impacts in a CBA framework is not always possible. The Australian Government Attorney-General's Department acknowledged that while CBA is a core focus of RIA:

... this focus may not always be the determinative factor in the final decision, particularly if there are strong public or national interest factors to be considered. For example, societal expectation can be a strong values-based driver that is difficult to value in monetary terms. (sub. 4, p. 6)

It is often difficult (or not cost-effective) to obtain data in order to quantify impacts. However, where quantification is not possible, impacts should be qualitatively identified and assessed (Australian Government 2011c). As the Northern Territory guidance material notes:

Where quantitative information is not available, a discussion on the probable impacts and their likelihood of occurring, including any assumptions made, will need to be provided so a reliable assessment is possible. (NT Treasury 2007b, p. 4)

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All significant impacts that have been qualitatively assessed should be transparently presented in the RIS. The OECD has stated that as part of the broad assessment of costs and benefits:

*Ex ante* assessments should, where relevant, provide qualitative descriptions of those impacts that are difficult or impossible to quantify, such as equity, fairness, and distributional effects. (OECD 2012a, p. 10)

Regulatory proposals may result in ‘winners and losers’ as they redistribute resources throughout the community, to the benefit of some, and to the detriment of others. These considerations should be clearly and separately identified in a RIS, with limited, if any, judgements on equity expressed by the proponent agency in the RIS. As the COAG guidelines note:

Distributional judgements are properly made at the political level. In the interests of avoiding subjective bias, analysts should, by and large, refrain from attaching distributional weights to cost and benefit streams. Exceptions might be where there are unambiguous government policy objectives to assist specific groups in the community, and where the justification for special assistance to these groups relative to other groups is clearly established. However, for reasons of transparency, decision-makers and the public should be made fully aware of the costs of government action aimed at benefiting particular individuals or groups in the community. (COAG 2007a, p. 26)

Where explicit in guidance material, jurisdictions generally require that equity considerations be assessed separately to economic benefits and costs. For example, the Victorian guidance material states:

In cost-benefit analysis, it is important to identify both the allocative and distributional effects of particular proposals, but these effects need to be kept separate to ensure that the distributional effects are not included in the overall net [economic] impact of a proposal. (Victorian Department of Treasury and Finance 2011a, p 10)

Hence, the RIS should come to a conclusion based on an assessment of all significant costs and benefits — quantified wherever possible. Where these impacts cannot be quantified, they need to be qualitatively identified and assessed. Finally, any relevant equity considerations need to be stated in the RIS.

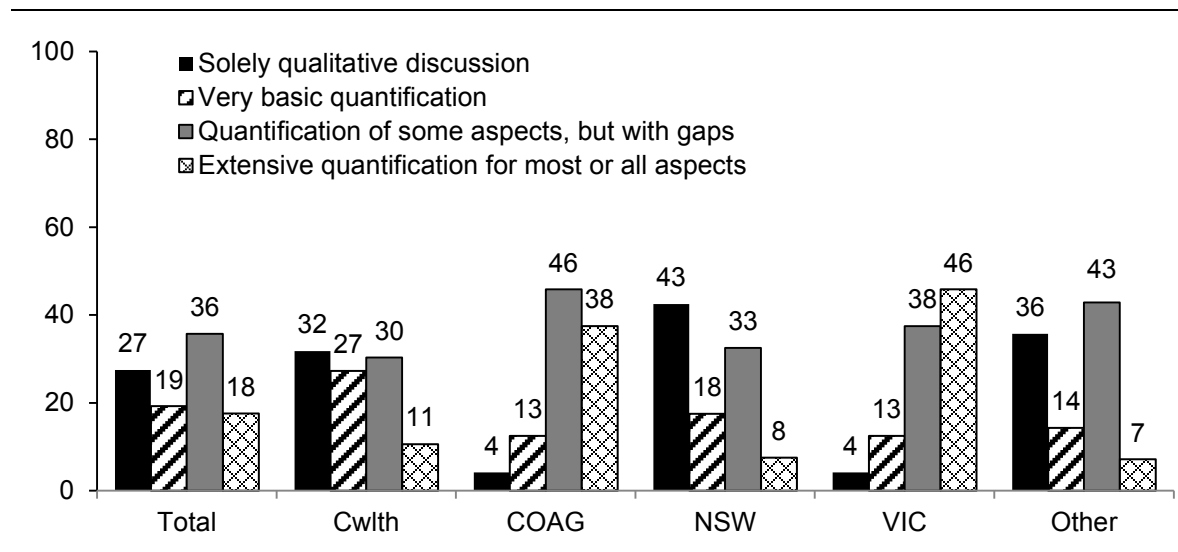
## **Evidence on assessment of costs and benefits**

Based on its analysis of RISs produced by jurisdictions in 2010 and 2011, the Commission found that, in practice, comprehensive assessment of costs and benefits relatively infrequent. Further, benefits and costs were directly compared in only one quarter of all examined RISs. Data constraints were identified by agencies as a key impediment to undertaking impact analysis in RISs (PC RIA Survey 2012).

## Costs

RISs were examined to determine the extent to which the impact analysis included quantification of costs. Overall, 27 per cent of RISs (across all jurisdictions) contained a solely qualitative discussion of costs; and a further 19 per cent of RISs included only the most basic quantification (that is, numbers/quantification for any aspects of costs) (figure 6.6). Extensive quantification of most or all aspects of costs occurred in less than 20 per cent of RISs.

**Figure 6.6 Quantification of predicted costs**  
2010 and 2011, per cent of RISs analysed



Data source: PC RIS analysis (appendix E).

COAG and Victoria had the highest rates of quantification of costs, with almost all RISs containing either some or extensive quantification of costs. The Victorian results were broadly in line with those identified in previous studies (VCEC 2012). For Commonwealth RISs, 32 per cent contained a solely qualitative discussion and 27 per cent included only the most basic quantification. These results are broadly consistent with those found in a smaller study by CRA International (2006) (appendix E). Rates of quantification were lowest in NSW, in part reflecting the larger number of RISs prepared for comparatively minor issues relative to other jurisdictions.

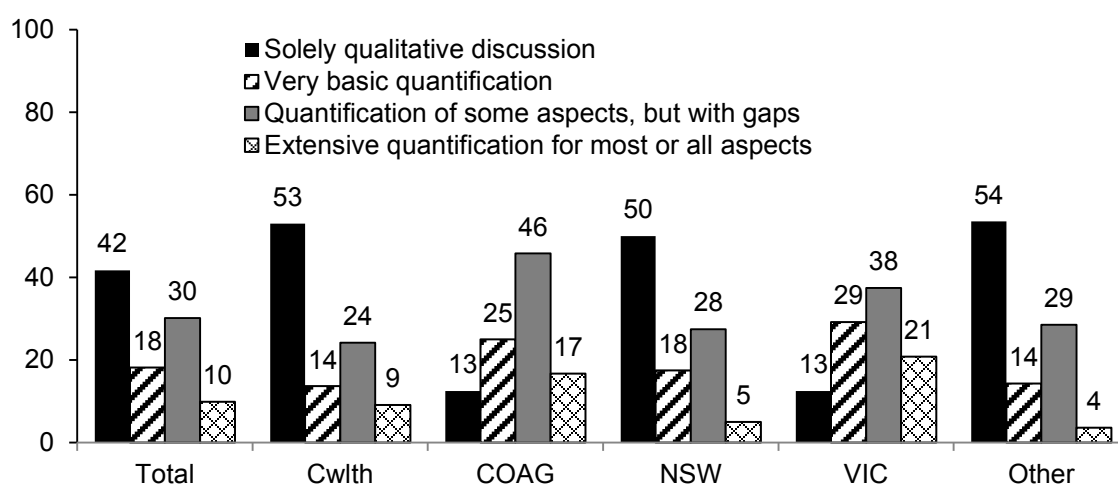
The extent to which administrative and compliance costs for business were assessed in RISs was also examined. Overall, there was some quantification in 66 per cent of all RISs, with the remainder containing a solely qualitative discussion. Even where compliance costs were quantified, in many cases the quantification was very basic or contained gaps (appendix E).

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## Benefits

Quantitative assessment of benefits was less prevalent than quantification of costs. Across all jurisdictions, 42 per cent of all RISs contained a solely qualitative discussion of benefits; and a further 18 per cent of RISs included very basic quantification (figure 6.7). Almost a third of all RISs quantified some aspects of benefits, while extensive quantification was less frequent.

**Figure 6.7 Quantification of predicted benefits**  
2010 and 2011, per cent of RISs analysed



Data source: PC RIS analysis (appendix E).

COAG and Victoria had the highest rates of quantification of benefits, with around 60 per cent of RISs in both jurisdictions containing either some or extensive quantification.

The lower rates of quantification of benefits relative to costs evident in all jurisdictions are unsurprising, given the inherently greater challenges that are often present in attempting to quantify benefits. However, they are also reflective of the frequent lack of information on the size of the problem, discussed earlier. Where a RIS provides a more comprehensive assessment of the scale of the problem it is correspondingly better able to assess the likely benefits of regulatory approaches that seek to address the problem.

These findings on the variable levels of quantification of costs and benefits are broadly consistent with those from a range of international studies. For example, the UK National Audit Office (NAO) reported that 86 per cent of final impact assessments examined in the United Kingdom in 2008-09 quantified some costs and 60 per cent quantified some benefits (NAO 2010) (appendix E).

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## Views of stakeholders on analysis of costs and benefits in RISs

Submissions to the study emphasised the importance of rigorous and objective assessment of costs and benefits in RISs whenever possible, and noted that there was substantial scope for improvement.

Issues identified with impact assessment were broader than simply a lack of quantification. Even in the RISs where cost estimates are provided the Commission found they were often incomplete, sometimes with key costs omitted. In particular, insufficient consideration of indirect costs was evident in many RISs:

[I]t is clear that the use of the RIA process has not been as widespread or as robust as intended. A RIA must clearly indicate the costs to business of not only complying with the proposed regulation, but also the cost in terms of industry funding the regulation, lost opportunities, reduced incentives and loss of competitiveness. (ACCI, sub. 2, p. 1)

Regulatory impact analyses are regularly able to identify and assess the *direct* cost to industry and other stakeholders from regulatory proposals. However, the magnitude and impact of indirect costs are usually insufficiently addressed. Agricultural chemicals are a key input to Australia's agricultural industries and as a result, the indirect costs of additional regulation are magnified as costs flow through the supply chain. Indirect costs are regularly many times the magnitude of direct costs. (CropLife Australia, sub. 7, p. 4)

Other issues flagged include concerns about:

- the factual accuracy of material included in RISs (Queensland Consumers Association, sub. 1; Plastics and Chemicals Industries Association, sub. 8)
- lack of supporting evidence for assumptions and costs (Victorian Department of Premier and Cabinet, sub. DR32; Plastics and Chemicals Industries Association, sub. 8; Australian Food and Grocery Council, sub. 5)
- use of unreliable data and an over-reliance on subjective analysis (CropLife Australia, sub. 7; Construction Material Processors Association, sub. 9)
- inclusion of ancillary benefits (by assessing all improvements as a function of the proposed reforms) that increased the assessed benefit of preferred regulatory options (CropLife Australia, sub. 7; Australian Logistics Council, sub. 10).

The Commission found some evidence that RIA had been beneficial in improving analysis of costs and benefits for new regulatory proposals. In response to the Commission's survey almost 60 per cent of government agencies agreed that the formal RIA framework had resulted in a more systematic consideration of costs and benefits.

However, while these results are encouraging, there appears to be substantial scope for further improvement. In particular, the Commission has found that while some

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RISs contain comprehensive and rigorous analysis, many others lack detailed analysis of costs and benefits. More generally, there is often a clear gap between RIA requirements (which largely conform with internationally recognised leading practice) and what is observed in practice.

## 6.5 RIS conclusion and recommended option

As a document to inform decision making, the RIS needs to reach a conclusion (based upon the analysis of the options) and recommend a preferred option. A greatest net benefit test helps to ensure that the recommended option is the one that is most likely to benefit the overall community. The Regulation Taskforce notes a key principle of good regulatory process is that:

[t]he option that generates the greatest net benefit for the community (taking into account economic, social, environmental and equity impacts) should be adopted. (Regulation Taskforce 2006, p. 146)

South Australia's guidance material provides a clear definition of what a RIS needs to demonstrate in order to satisfy the greatest net benefit test (box 6.6).

### Box 6.6 What does a 'greatest net benefit test' mean?

The South Australian guidance material details what is meant by the greatest net benefit and how it is to be applied in practice:

[The greatest net benefit approach]...allows decision makers to:

- only recommend the implementation of those options that make the whole community better off (i.e. they have an estimated positive net benefit); and
- compare the net benefits of the different feasible regulatory options being considered and rank them according to the size of the net benefit thereby facilitating the decision maker's choice of the option which delivers the greatest net benefit to the community.

However the net benefit calculation is not in all instances the bottom line of the CBA. The CBA may ultimately contain:

- 1) A net benefit calculation for those items where monetary values can be assigned;
- 2) A discussion of whether any costs and benefits which cannot be expressed in monetary terms are sufficiently large to alter the net benefit finding;
- 3) A discussion of whether distributional outcomes are sufficiently concerning to alter the conclusion drawn from the first two steps above as to the appropriate policy decision.

Source: SA Department of the Premier and Cabinet and Department of Treasury and Finance (2011).

Each element should be separately identifiable in a RIS so as to ensure that any uncertainties with the analysis are clearly made known to the decision maker. In

addition, the information should be presented in a manner that allows clear comparison of the different options.

## Jurisdictional guidance on net benefits

RISs in all jurisdictions apart from the Commonwealth must select the option that yields the ‘greatest net benefit to the community’ overall. Additionally, most jurisdictions need to demonstrate reasons for rejecting other alternative options (table 6.6).

**Table 6.6 Recommended option requirements in a RIS**

<i>Recommended option demonstrates:</i>	<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
Greatest net benefit to the community	✗	✓	✓	✓	✓ <sup>a</sup>	✓	✓ <sup>b</sup>	✓ <sup>a</sup>	✓	✓ <sup>c</sup>
Reasons for rejecting other options	✓	✓	✗	✓	✓	✗	✓	✓	✓	✗

<sup>a</sup> Or least net cost. <sup>b</sup> While maximising the net benefits to the community (in NPV terms) is the primary objective, agencies should be mindful also of the government’s objectives to reduce regulatory costs imposed on business. If two (or more) options have a similar net benefit NPV result, but the costs imposed on business vary considerably, consideration could be given to the lowest cost option even if not the option which maximises the net social benefit. <sup>c</sup> On the balance of probabilities.

Source: Jurisdictional guidance material (appendix B).

The Commission notes that the Commonwealth guidance material previously did mandate that the preferred option be the one that yields the greatest net benefit, but this requirement was removed when the guidance material was updated in 2010. Under the current requirements:

... the RIS must describe the impacts of all the feasible options and identify the preferred option but, unless the option restricts competition, it is not necessary to demonstrate that the preferred option has the greatest net benefit to the community. (Australian Government 2010a, p. 26).

The stated rationale for changing the Australian Government Handbook was that it was a clarification of the pre-existing requirement to recommend the option with the greatest community net benefit:

What [the Office of Best Practice Regulation] found was that that was driving a lot of very perverse behaviour. People were doing economic modelling, for example, and coming up with options that were decimal points different in terms of the net benefit to the community and distorting that in order to meet the rules ... (Australian Senate, 2012b, p. 38)

While the Handbook seems clear, there nevertheless appears to be some uncertainty around how the new requirements are interpreted (see, for example, Australian Senate 2012b).

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As discussed previously, a RIS needs to explicitly identify and assess quantifiable and qualitative impacts for each feasible option canvassed. By definition, the resulting net benefit of each option will *not* be a monetised value, as qualitative impacts, by definition, cannot be monetised or even quantified. Indeed, the current Australian Government Handbook notes:

The challenge is to consider non-monetised impacts adequately, but not to overplay them. For example, if a proposal is advocated despite monetised benefits falling significantly short of monetised costs, the RIS should explain clearly why non monetised benefits would tip the balance and the nature of the inherent uncertainties in the size of the benefits. (Australian Government 2010a, p. 72)

Therefore, if one particular option ('option A') resulted in a higher economic net benefit than another ('option B'), the RIS needs to explicitly state why the relevant unquantifiable impacts of option B would result in a greater community net benefit overall; and hence is the option recommended. At an extreme, if a regulatory proposal results in *net economic costs* to the community, the RIS needs to explicitly state why the unquantifiable impacts would 'tip the balance' and result in the greatest community net benefits, relative to all other feasible options.

The RIS should clearly demonstrate the forgone efficiency costs ('opportunity costs') of choosing an option with particular unquantifiable impacts, and this is best done by directly comparing options.

## **Observed practices on net benefits in RISs**

The relatively low rates of comprehensive quantification and monetisation evident in RISs across most jurisdictions means that costs and benefits were seldom directly compared in RISs, with net benefits estimated in just over a quarter of all RISs.

COAG and Victoria were the jurisdictions where a net benefit was calculated most frequently. Estimation of net benefits in other jurisdictions was infrequent. The infrequency with which costs and benefits were directly compared in RISs was compounded by the fact that in many instances where a net benefit was estimated it was for the preferred option only, rather than for all options considered.

To be most useful to decision makers, RISs should assess all significant costs and benefits that the community will likely incur, clearly set out the net benefit for each option in the RIS, and recommend the option that yields the greatest net benefit to the community, taking into account all impacts.



*Regulatory outcomes are enhanced where the option that yields the greatest net benefit to the community — encompassing economic, environmental and social impacts (where relevant) — is recommended in RISs.*

- *Impacts should be quantified wherever possible. Where quantification is not possible, a qualitative assessment should be undertaken and explicitly included in the overall assessment of net benefits.*
- *Stating the reasons an option is preferred, and why the alternatives were rejected, is regarded as an important element in strengthening RIA.*

## 6.6 Implementation, monitoring and enforcement

Participants in this study, as well as a number of previous Commission studies, have emphasised that the manner in which regulations are applied and enforced can be a significant driver of costs for businesses and the community. Similarly, the OECD identifies implementation issues as a very important element of RIA, noting:

Regulators should assess how regulations will be given effect and should design responsive implementation and enforcement strategies (OECD 2012a, p. 5).

The Commission's review *Identifying and Evaluating Regulation Reforms* (PC 2011) noted that administration and enforcement practices will vary depending on such matters as the nature of the regulations being administered, who is responsible for implementing them and the characteristics of the businesses or groups being regulated. Administrative and enforcement matters which could be discussed in RISs include: reporting requirements on business; risk-based monitoring and enforcement strategies; mechanisms to address consistency in legislative interpretation; graduated responses to regulatory breaches; and communication with those being regulated. Most Australian jurisdictions include guidelines on the inclusion of implementation, enforcement and compliance strategies in RISs (table 6.7). COAG guidance, for example, notes that:

Consideration should be given to the effectiveness of implementation and administration and, as relevant, an assessment of likely compliance rates should be made taking into account matters such as incentive structures and costs to regulated parties. (COAG 2007a, p. 6)

The New South Wales guidance material emphasised the impact of sound implementation for administrative and compliance costs, noting:

[A]n implementation and compliance strategy should be developed for the preferred option to ensure the objectives will be effectively and efficiently achieved. This is an important part of the process, as even a well-designed regulatory solution can impose

unnecessary administrative or compliance costs if it is not implemented well. Planning can help to achieve the greatest level of compliance at the lowest possible cost. (NSW Department of Premier and Cabinet 2009, p. 18)

**Table 6.7 Guidance on implementing and enforcing the preferred option**

<i>The RIS should discuss:</i>	<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
Implementation and enforcement strategies	✓	✓	✓	✓	✓	✓	✓	✗	✓	✗
Compliance strategies	✓	✓	✓	✓	✓	✗	✓	✗	✓	✗

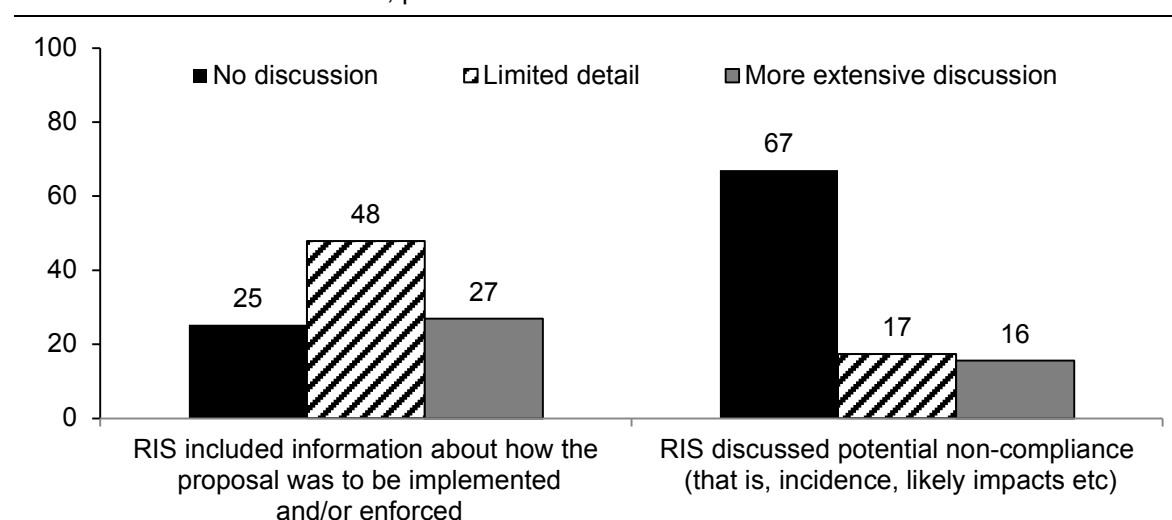
Source: Jurisdictional guidance material (appendix B).

## Observed practices for consideration of implementation and enforcement in RISs

In practice, the extent to which Australian RISs considered implementation and enforcement issues varied substantially. A quarter of all RISs included no discussion, and where these issues were discussed, most RISs included only a brief statement of timing and basic institutional arrangements, such as the establishment of a monitoring agency. Only 27 per cent of RISs included a more extensive discussion of these issues (figure 6.8).

**Figure 6.8 Extent to which RISs considered implementation and enforcement issues**

2010 and 2011, per cent of RISs



Data source: PC RIS analysis (appendix E).

An indicator of the low priority placed on implementation and enforcement issues is the very low proportion of RISs (one third) that considered potential rates of

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non-compliance with regulatory proposals; included estimates of monitoring and enforcement costs for government; or included evidence of a risk-based approach to the design and enforcement of the regulatory compliance strategy. The latter is particularly important in minimising costs on individuals and business associated with compliance and enforcement procedures (OECD 2012a).

These results are consistent with more widespread concerns that relatively low attention has been paid to administration and enforcement of regulation (see for example OECD 2010c and VCEC 2011b).

A number of business groups consulted as part of the study expressed concerns that in some instances costs associated with implementation and compliance were not covered systematically in RISs (for example, CropLife Australia, sub. 7, Construction Material Processors Association, sub. 9, Australian Financial Markets Association, sub. 11, and Master Builders Australia, sub. 19).

The Commission also found in its recent benchmarking report *Performance Benchmarking of Australian Business Regulation: Role of Local Government as Regulator* (PC 2012) that insufficient consideration is given to the capacities of, and costs to, local governments in implementing and enforcing many state regulations. Similar issues were also raised with regard to some national reforms through COAG processes not adequately assessing the implementation costs for states and territories (discussed in the following section).

Following the release of the Commission's Draft Report, the Western Australian Department of Treasury noted that:

The immediate priority in Western Australia is to prompt agencies to give greater attention to implementation, monitoring and compliance issues in their RISs. (sub. DR37, p. 4)

In its 2011 review of the Victorian regulatory system, the VCEC recommended specific improvements to the consideration of implementation issues in RISs, as well as improvements to regulation once enacted. These recommendations were accepted by the Victorian Government (Victorian Government 2012).

### *Implications for RIA quality*

Where costs of implementation for regulators, business and/or the community are substantive, their omission risks giving a too positive picture of the relative merits of the regulatory proposal. Similarly, if unduly high rates of compliance are assumed, the expected benefits will be overstated. As Victoria's guidance material notes:

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A regulation is neither efficient nor effective if it is not complied with or cannot be effectively enforced. Thus, compliance considerations should be a significant element in the choice between different regulatory approaches. Realistic assessment of expected compliance rates may suggest that a policy instrument that appears more effective in theory, but in practice is more difficult to implement, is therefore the less preferred option.

... the predicted level of compliance is a key assumption that determines the extent to which the identified problem will be reduced, and thus the benefits received. It is unrealistic for some regulations to achieve 100 per cent compliance, particularly given the expected level of resources proposed to assist and enforce compliance. Consequently, if 100 per cent compliance was assumed then this would overstate the expected benefits. (Victorian Department of Treasury and Finance 2011a, pp. 28, 75)

A longer term risk where implementation and monitoring issues do not receive sufficient attention in a RIS is a greater likelihood that unexpected costs associated with implementing the regulatory proposal will subsequently emerge.

One possible contributing factor to the limited consideration of these issues is that ‘implementation, monitoring and review’ is the last of the seven RIS elements, and is generally included after the conclusion and recommended option. While much of the focus of the implementation discussion in RISs tends to relate to implementation of the preferred option, it is important that implementation, monitoring and compliance issues are also considered for each option as part of the impact analysis in the RIS.

This point is reinforced in jurisdictional guidance. For example, the ACT guidance material states:

After establishing the best option that will address the problem, the final stage in the RIS process is to state how the option will be implemented and enforced, and how it will be reviewed after a period of implementation. Note, however, that these issues should be considered when identifying and quantifying the costs and benefits of the proposals and incorporated in the impact analysis. (ACT Department of Treasury 2003, p. 24)

Based on the evidence observed by the Commission, it appears that there is considerable scope for improving the consideration of implementation issues in RISs. Hence, greater efforts by agencies to include explicit statements on implementation, enforcement and assumed compliance rates (and the costs of achieving them) within the impact analysis section of RISs are likely to yield substantial dividends in terms of overall RIS quality.

*Greater consideration of implementation, monitoring and compliance issues in RISs is important for maximising the net benefits of regulation, and would involve:*

- *inclusion of implementation costs for government (including local governments), business and the community, as part of the impact analysis*
- *explicit acknowledgement of monitoring costs*
- *consideration of the impacts of different compliance strategies and rates of compliance (as required under Victoria's guidance material) in the estimation of a proposal's expected costs and benefits.*

## **6.7 Assessing national market implications**

As noted earlier, the terms of reference for this study direct the Commission to examine the extent to which 'national market implications' are considered in RIA.

The OECD study into regulatory reform, *Australia: Towards a seamless national economy* noted that Australia represents something of a 'role model' for OECD countries in its approach to regulatory reform. However, it also stated that costs associated with inconsistent or duplicative regulatory regimes between Australian jurisdictions were a significant issue for competitiveness. It concluded that:

Further streamlining of regulatory frameworks as part of the multi-level strategy will enhance market openness, as well as the ability to compete globally in knowledge intensive industries. (OECD 2010a, p. 13)

Assessing the 'national market implications' of regulatory proposals as part of RIA requires consideration of how the proposed regulation:

- affects transaction/compliance costs for businesses and individuals operating across multiple jurisdictions through introducing regulatory or technical barriers, and hence impacts on:
  - cross border trade in goods and services, and the mobility of capital and labour across jurisdictions, and
- impacts on, or leads to, externalities or spillovers affecting other jurisdictions.

In assessing these impacts, an important consideration is how the proposed regulation is likely to interact with regulations in other jurisdictions — including impacts on national 'coherence' such as through a reduction in regulatory duplication, or alternatively, the introduction of overlapping or inconsistent regulations.

## State-territory guidance on national market considerations

Guidance material for national market considerations in RIA varies substantially across jurisdictions both in terms of the issues covered and their comprehensiveness (table 6.8).

**Table 6.8 Jurisdictional guidance on ‘national markets’**

<i>Selected guidance material</i>	
NSW	National or cross border harmonisation of regulation should be considered as an option where possible, recognising that businesses that operate in several jurisdictions can face significant costs when forced to comply with different regulatory regimes ... Harmonisation should not be a goal in itself — NSW policy objectives and the impacts of regulation on NSW businesses and community should be the key consideration.
Vic	Adoption of national schemes can reduce costs to businesses, particularly those operating in more than one jurisdiction...There may be advantages in undertaking a national impact assessment because the resources and expertise can be pooled with counterparts in other jurisdictions dealing with similar issues.
Qld	It is also important to consider how the policy problem is addressed and managed in other jurisdictions, and whether a nationally consistent, or harmonised approach may be the most appropriate option.
WA	What are the implications for inter-jurisdictional trade in goods and services where relevant? ... Has relevant existing regulation, at all levels of Government, been documented, and demonstrated to not adequately address the issue?
SA	For the majority of proposals, the scope of the assessment of costs and benefits should extend to the entire State. However, where there are likely to be flow on effects to interstate businesses, consumers, governments or the wider community, including environmental spillovers, these should be taken into consideration. For example: a regulatory regime which differs from interstate regimes may impose costs on nationally operating businesses and these costs should be brought to account in the CBA; or, a reduction in greenhouse gas emissions from South Australia may result in higher emissions elsewhere in Australia under a fixed national cap/allocation of permits.
Tas	Legislation can restrict the entry of goods and services from interstate or overseas, giving a competitive advantage to local producers. In most cases such restrictions relate to quarantine matters, are scientifically based and are designed to stop the spread of animal or plant pests or diseases. However, in some cases the restrictions have no scientific basis and serve to protect existing businesses from interstate and overseas competition.
ACT	Mutual recognition reduces compliance costs to business and improves their efficiency and competitiveness when conducting transactions across State and Territory borders...The increasing emphasis given to cross-jurisdictional policy and legislative development means that regulations are no longer developed in isolation. Consideration must be given to regulatory regimes operating in other jurisdictions to ensure that consistency is achieved wherever possible, particularly where common enforcement procedures or harmonisation of regulatory regimes will have the positive effect of reducing compliance costs to businesses operating across State and Territory borders.
NT	[The assessment of costs and benefits should] document any relevant national standards, and if the proposed regulation differs from them, identify the implications and justify the variations ...

Source: Jurisdictional guidance material (appendix B).

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Information relevant to national market considerations include: implications for inter-jurisdictional trade in goods and services — such as possible competition impacts; environmental spillovers; documenting how problems are addressed and managed in other jurisdictions; identifying any relevant national standards and how the proposed regulation differs; the potential for national schemes to reduce costs to business operating in more than one jurisdiction. Another issue raised in a number of jurisdictions was whether a nationally consistent or harmonised approach may be the most appropriate option, and the best means of achieving the objectives.

The OECD notes that RIA should:

Design appropriate co-ordination mechanisms to develop regulatory policies and practices for all levels of government, including where appropriate through the use of measures to achieve harmonisation, or through the use of mutual recognition agreements (OECD 2012a, p. 17).

Improving national coherence of regulations, can be achieved in a number of ways, including through jurisdictions: adopting uniform regulations; harmonising key elements of their regulatory frameworks; and mutually recognising other jurisdictions' regulations (PC 2009a).

All jurisdictions provide exceptions to RIA for regulatory proposals that involve national harmonisation where a national RIS has been completed. For the jurisdictions with subordinate legislation Acts that cover RIA — New South Wales, Victoria, Queensland, Tasmania and the ACT — regulatory proposals that are substantially uniform to or complementary with regulation in another Australian jurisdiction can be excepted from RIA. In addition, proposals that are for the 'adoption of international or Australian standards or codes of practice' are excepted from RIA in New South Wales, Queensland, Western Australia, Tasmania and the ACT in certain circumstances (these issues are discussed further below and RIA exceptions are discussed more broadly in chapter 5).

### *Treatment of costs and benefits falling on other jurisdictions in RIA*

It is generally accepted that business and individuals should not face additional regulatory costs in conducting their activities across jurisdictions unless the regulatory differences are in the interests of the wider community (PC 2011).

However, beyond the general requirements outlined above, jurisdictional guidance material generally does not provide much assistance on how 'national market implications' should be taken into account. An exception is the South Australian guidance material which provides a more extensive discussion on assessing national market implications (table 6.8).

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Clearly, the extent to which national market considerations should be included in a RIS will vary depending on the subject matter. For issues where there is no cross-jurisdictional intersection, national market implications do not arise, and hence do not need to be separately considered in a RIS. Western Australia's regulatory oversight body notes, for example:

The geography of Western Australia dictates much of the application of RIA to the State's regulation. While it has been agreed through COAG to place importance on such considerations as national markets, in practice this is not always appropriate. Given the sheer distances involved, markets such as energy are necessarily isolated from the Eastern states, so national market considerations around energy regulation may not be applicable. However, in areas such as industrial relations and occupational safety and health, there is a need to address interstate barriers for employers operating in Western Australia and other states. (WA State Government, sub. 24, p. 5)

Similarly, the New South Wales oversight body (BRO 2011) states that it does not see merit in an explicit requirement to assess national market implications for all proposals, since not all regulation has national market implications. However, the BOR notes:

[F]urther guidance on identifying national markets and identifying potential impacts for business would assist agencies ... and improve the information provided to decision makers. Guidance should cover identifying the effective market the regulation will impact, the activity being regulated, the number of businesses operating across jurisdictions, and the need to consider future market dynamics. This approach should ensure adequate consideration is given to national market implications. (BRO 2011, p. 23)

The Commission found that aspects of national market implications were discussed in just under 40 per cent of RISs prepared in all jurisdictions. For the states and territories, this most commonly involved an assessment of how other jurisdictions had approached a regulatory issue, including where they already had regulatory arrangements in place and how they compared. Few subnational jurisdictional RISs were found to include much substantive consideration of the implications of a regulatory proposal for cross border trade and labour mobility, including the likely magnitude of these impacts, or to explicitly consider the merits of adopting approaches that are consistent with those adopted in other jurisdictions.

Officers undertaking RIA in the Victorian transport portfolio noted while, in general, implications for national markets were *not* given adequate consideration when new or amended regulation was considered:

There are some limited examples of involving other states in state based reforms (eg VIC involved NSW in marine safety discussions given the obvious overlap at the Murray River). An option may be that when a RIA is prepared in one jurisdiction it should send a copy of the RIA to the relevant agencies and stakeholders in other



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jurisdictions. That may identify potential impacts. However the amount of time allowed for consultation may be a relevant consideration here also. (sub. 17, p. 10)

The Commission also found, unsurprisingly, that RISs with more robust and comprehensive overall impact assessments were more likely to include a more thorough consideration of national market impacts.

Evidence from responses to the Commission's survey of agencies also suggests that national market implications are not considered consistently as part of RIA. For example, only around half of all respondents agreed with the proposition that the effect of proposed regulatory options on national markets was considered during the RIA process, with the remainder either disagreeing or neutral (PC RIA Survey 2012).

Given this, there would be benefits in strengthening jurisdictional guidance on identifying national market implications.

#### LEADING PRACTICE 6.5

***Greater guidance would assist agencies to identify and consider the national market implications of regulatory decisions. South Australia's requirements and guidance material represent leading practice in setting out the types of national market implications that should be considered in a RIS.***

Clearly, the benefits of providing clearer guidance on identifying national market implications will ultimately depend on whether it leads to better analysis in RISs. As has been observed throughout this chapter, robust, clear and comprehensive RIS guidance, while beneficial, is not sufficient to guarantee better results in practice.

Further, national market implications can be more readily identified when comprehensive impact analysis is undertaken. Hence, the priority in promoting a more consistent and comprehensive consideration of national market implications in RISs should be to seek ways to improve the overall quality of impact analysis, including identification of impacts on key stakeholders, direct and indirect costs and benefits, in particular the potential flow-on impacts for competition and markets (both within, and between, jurisdictions).

### **COAG RIA processes for 'national reforms'**

The COAG RIA process provides the opportunity to examine regulatory impacts in multiple jurisdictions. This is particularly important where there is overlap in regulatory responsibilities or where businesses operate across borders. COAG best practice regulation requirements state:

Regulation impact analysis of the feasible policy options, should also include an assessment of whether a regulatory model is already in place in a participating jurisdiction that would efficiently address the issue in question and whether a uniform, harmonised or jurisdiction-specific model would achieve the least burdensome outcome (or generate the greatest net benefit for the community). A regulation impact assessment should also have regard to whether the issue is state-specific or national, and whether there are substantial differences that may require jurisdiction-specific responses. (COAG 2007a, p. 11)

When implementing agreed national reforms, states and territories differ on the content necessary in COAG RISs in order to waive their own jurisdictional requirements to prepare a state/territory-specific RIS (table 6.9). For example, the Northern Territory guidance material states that:

... preparation of a RIS may not be appropriate for particular types of regulatory proposals ... because a sufficient level of relevant analysis has already been undertaken through other fora. (NT Treasury 2007a, p. 16)

**Table 6.9 State and territory content requirements for COAG RISs**

	NSW <sup>a</sup>	Vic	Qld	WA	SA	Tas	ACT <sup>b</sup>	NT
Is a summary of the process and outcomes required?	✓	×	×	×	✓	×	×	✓
Do jurisdiction-specific impacts need to be identified and assessed?	×	✓	✓	✓	✓	×	✓	✓
Does the national or COAG RIS need to satisfy the jurisdiction-specific guidance material?	✓ <sup>c</sup>	✓	×	×	×	×	×	✓

<sup>a</sup> This may include Ministerial Council and COAG processes or other processes undertaken on behalf of government by independent bodies such as the Independent Pricing and Regulatory Tribunal or the Productivity Commission. <sup>b</sup> For subordinate legislation only. <sup>c</sup> The process must at a minimum include detailed regulatory impact assessment and public consultation.

Source: Jurisdictional guidance material (appendix B).

A key question that arises is how much detail should be included on individual jurisdiction impacts. This has implications for duplication of work and the overall costs of RIA processes. For example, the Northern Territory Department of Treasury and Finance submitted that:

... in practice an agency proposing development of legislation to implement a national reform must still prepare a Preliminary Regulation Impact Analysis ... A concern of the Northern Territory has been that national RISs frequently do not include a sufficiently adequate assessment of impacts at the regional or jurisdictional level. (sub. DR30, p. 6)

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### **Box 6.7      National health and safety reforms**

In February 2008 the Workplace Relations Ministers' Council agreed that model legislation was the most effective way to harmonise work health and safety laws across Australia. COAG subsequently committed to a harmonised system of laws, with the signing of an Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA). The IGA also included a national review into the existing occupational health and safety laws across the jurisdictions and required the formation of Safe Work Australia.

In December 2009 Ministers endorsed a revised model Workplace Health and Safety (WHS) Act, and a decision RIS was published recommending its adoption (a consultation RIS was approved by the OBPR in September 2009). In December 2010, the draft WHS Regulations and the first stage of model Codes of Practice were released. A consultation RIS was published in February 2011 and a decision RIS on WHS Regulations and Codes of Practice was published in November 2011.

Concerns were raised by a number of stakeholders about a range of aspects of the RIA process including pre-conceived outcomes, rushed timelines, inadequate consultation, limitations in the impact analysis — particularly the costs of implementation by jurisdiction. In a submission to this study, Business South Australia, for example, noted that in an attempt to achieve deadlines:

... the process has been rushed with stakeholders 'overwhelmed' by the volume of paperwork and totally unreasonable timeframes in which to respond to discussion papers and other documents. (sub. 18, p. 2)

The Premier of Victoria commissioned PricewaterhouseCoopers to undertake supplementary impact assessment of the proposed national work health and safety laws. The review (which was not a formal RIS) was released in April 2012 and found that only three of the twenty proposed changes would have a positive impact on Victorian businesses. The report concluded that the package of reforms, if implemented, would, in net terms, likely have a negative effect on the Victorian economy.

In August 2012 the Western Australian Government commissioned Marsden Jacob Associates to undertake an assessment of the benefits and costs of the model WHS regulations and obtain information on the impact of the proposed changes.

Notwithstanding concerns expressed about this COAG RIS process, the Business Regulation and Competition Working Group noted in its report card on progress of deregulation priorities:

The national [OHS] reform commenced in five jurisdictions – Queensland, New South Wales, the Australian Capital Territory, the Northern Territory and the Commonwealth – on 1 January 2012. In addition, Tasmania has passed the necessary legislation, with the reform to commence in Tasmania on 1 January 2013. Legislation is also currently before the Legislative Council in South Australia. The Victorian Government supports harmonisation of OHS laws in principle, but has advised that they will not implement the model OHS laws in their current form and will seek changes to them. Western Australia has advised that their decision on implementation is subject to finalisation of the mine safety component of the regulations, expected to be completed by December 2012, and to the conduct of a State-specific analysis of the potential costs and benefits from implementing the reform.

*Sources:* Access Economics (2009); Safework Australia (2011, 2012); COAG (2012); PWC (2012); Western Australian Government (2012).

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When adopting national reforms, RIA processes in New South Wales and South Australia require a summary of the COAG RIA process and its outcomes. Additionally, New South Wales and Victorian RIA processes require the COAG RIS to meet their respective state RIA requirements — in particular, that it identify and assess small business impacts. Where a COAG RIS does not meet state/territory content requirements, further state/territory-specific impact analysis is typically required (table 6.9). A recent example of a proposal where a COAG RIS was assessed as not meeting the Victorian RIA requirements — and therefore required supplementary analysis — was the harmonisation of occupational health and safety laws (box 6.7).

More generally, stakeholders — including state-territory governments — raised a number of issues with regard to COAG national reforms that related to RIA including:

- constraints on the *range of options* that can be considered in RISs, particularly where COAG and Ministerial Councils announce policy decisions before RIA has been undertaken
- the *timing* of COAG RISs, including lack of time to consider some RISs, and the fact that timetables and milestones for progressing reforms are sometimes agreed well before RIA has been undertaken
- the *quality of analysis*, including a lack of detail on the impacts by jurisdiction and the costs of implementation — which can affect the accuracy of estimated net benefits and can lead to delays in implementing reforms where jurisdictions conduct further RIA to determine the likely impacts for their jurisdiction.

In discussions with agencies in the states and territories, concerns about the lack of consideration of implementation costs for jurisdictions in COAG RIA processes were frequently raised. Western Australia's Department of Treasury, for example, noted that 'taking the costs and benefits for each jurisdiction into account in the Council of Australian Government's RIS would inform better decision-making and consequently result in better outcomes for all.' (sub. DR37, p. 5)

Some of the broader issues raised by stakeholders in regard to COAG RIA processes are outlined in box 6.8.

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**Box 6.8      Selected stakeholder comments on COAG RIA processes*****Construction Materials Processors Association***

The draft Model Work Health and Safety Regulations Mining and associated Draft Code of Practice for the Work Health and Safety Management Systems in Mining are a recent illustration of how the RIS process works in national regulation ... The draft Regulations and the Code were promulgated for comment without the required RIS. A RIS was, however, subsequently released but it failed to address the issues raised by industry and others. (sub. 9, p. 19)

***Government of Western Australia Department of Transport***

Often the states have minimal control or input over the Commonwealth or nationally led RIS processes and they can be undertaken at a fast pace. However, if the Commonwealth amends its practices to require a more thorough section on specific state and territory impacts (in consultation with the jurisdictions) this could create efficiencies for both the Commonwealth and states, as the implementation of national projects would be less likely to be delayed in jurisdictions that are required to undertake additional RIA by their own oversight agencies. (sub. 12, p. 5)

***Victorian Department of Premier and Cabinet***

There are flaws at each stage of the COAG RIA process, and this is leading to rushed and poorly-informed decision making, sub-optimal outcomes and delayed reforms ... COAG RIA are often of poor quality and do not contain all of the information required for jurisdictions to make informed decisions or meet legislative requirements. States and Territories are often asked to make decisions on major reforms within tight timelines based on RIA which are lacking in key details, such as State-specific impacts. (sub. DR32, p. 1)

The national Occupational Health & Safety (OHS) RIAs focus on the importance of harmonisation without considering the extent to which negative outcomes can arise in practice from harmonisation to the wrong model ... Consideration also needs to be given to the size of the sector that will be affected; for the National OHS laws it is estimated that only 1 per cent of businesses operate across borders. (sub. DR32, p. 3)

***Master Builders Australia***

There is ... a concern at present that the National Occupational Licensing policy process often appears quite closed and when a RIS is eventually released it will represent an agreement among governments that has little practical chance of being altered. (sub. 19, p. 10)

***Officers undertaking RIA in the Victorian transport portfolio***

RIA analysis undertaken for national regulation does not take into account the impacts in individual states and territories. In Victoria, the RIA process and other regulatory hurdles, such as compliance with the Transport Integration Act, are much more rigorous ... A separate issue is the national RIA processes not providing sufficient time for state agencies to prepare and sign off a submission. It is common for the relevant agency in a state to be given late notice of the RIA process and therefore that agency either has no resources, no permission to consult with stakeholders and no time to prepare a submission for the proposal. (sub. 17, pp. 10-11)

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A recent discussion paper prepared for the COAG Reform Council (CRC) on reform models and governance arrangements in the COAG SNE reforms identified a number of challenges in undertaking RIA for national reforms. In particular it highlighted that a lack of jurisdictional-specific impacts was a barrier to progressing reforms, and noted:

... SNE reforms have not always made the best possible use of the evidence base particularly where Regulatory Impact Statements and other evidence as to the benefits of reform broken down to the state and territory level have been lacking, or provided late in the reform process, leading the reform impetus to slip (Allens 2012, p. 8)

Undertaking national reforms places many stresses on RIA processes. These are understandable given the number of stakeholders involved and the magnitude and complexity of the task. This highlights the importance of effective prioritisation of the issues being pursued through COAG to allow thorough and timely RIA analysis.

#### LEADING PRACTICE 6.6

*National reform processes are more likely to work effectively when:*

- *detail on individual jurisdictional impacts is included in the RIS wherever possible, particularly where the costs and benefits vary across jurisdictions*
- *costs of implementation by jurisdictions are included in the RIS wherever possible*
- *announcements of COAG and Ministerial Councils on regulatory reforms do not close off options for consideration prior to RIA being undertaken, but rather, are informed by RIS analysis.*

## 6.8 Conclusion

Key analytical requirements for sound RIA are broadly similar across Australian jurisdictions and largely conform with internationally recognised leading practice.

In contrast, the Commission found that RIS quality varied substantially, both across and within jurisdictions. While some RISs stand out as being very comprehensive and rigorous there was often a clear gap between best practice requirements and what was observed in practice.

Common areas for improvement in RISs, include:

- clearer identification and assessment of the nature and magnitude of the problem and the rationale for government intervention.

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- more comprehensive consideration of wider range of alternative options, including the ‘do nothing’ option and non-regulatory alternatives
  - consideration of national market implications more consistently, as part of a more thorough overall assessment of impacts, including both direct and indirect impacts
  - greater use of quantification and monetisation of costs and benefits of alternatives to provide the basis for a more objective comparison of alternatives
  - where quantification is infeasible, more systematic qualitative consideration of all major impacts should be included
  - more clarity in stating key underlying assumptions and data sources, including greater use of sensitivity analysis
  - more explicit consideration of compliance and enforcement issues, including the potential for non-compliance and costs of enforcement.

Given the already large gap that exists between principle and practice, improving RIS quality is unlikely to be achieved by simply providing more detailed guidance material or further strengthening analytical requirements. Based on the evidence examined, such an approach would likely only further widen the gap between principle and practice. In view of this, other approaches are needed, and these are discussed in subsequent chapters.





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## 7 Transparency and consultation

### Key points

- Making government policy processes transparent to the public can motivate agencies, regulatory oversight bodies and ministers to comply with agreed regulatory impact analysis (RIA) processes.
- The transparency of RIA *consultation processes* in some jurisdictions could be improved by:
  - releasing a consultation regulation impact statement (RIS) well in advance of the consideration by decision makers of the final RIS, as in COAG, Queensland and Western Australia
  - reflecting the outcomes from consultation processes in a final RIS provided to decision makers, as in the Commonwealth, COAG, Queensland, Western Australia, South Australia, the ACT and the Northern Territory
  - providing advanced notice of consultation to interested parties, as in the Commonwealth and Queensland
  - specifying minimum time periods for consultation in guidance material, as in New South Wales, Victoria, Queensland, South Australia and Tasmania.
- The transparency of RIA *reporting processes* in many jurisdictions could be improved by:
  - developing a central RIS register that is easily accessible by the public on the internet, as in the Commonwealth, COAG, Victoria and the ACT
  - tabling final RIS documents in parliament with the enabling legislation, as in the Commonwealth and the ACT
  - removing any discretionary power to not publicly release a final RIS, as in South Australia
  - publishing final RIS documents at the time of the announcement of the regulatory decision, as in the Commonwealth and COAG.
- The transparency of regulatory oversight body RIS adequacy assessments in many jurisdictions could be improved by:
  - making RIS adequacy criteria explicit in guidance material, as in the Commonwealth, COAG, Western Australia and the Northern Territory
  - publishing final RIS adequacy assessments at the time of the announcement of the regulatory decision, as in the Commonwealth and COAG
  - including within the published adequacy assessment the reasons why the regulatory oversight body assessed the RIS as not adequate, or any qualifications where the RIS was assessed as adequate, as in Victoria.
- Where a government introduces regulation which has been assessed as non-compliant with RIA requirements, transparency would be improved by requiring the minister responsible to provide a statement to parliament outlining the reasons for the non-compliance and justifying why the proposed regulation is still proceeding.

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## 7.1 What is transparency and why is it important?

For RIA processes, transparency means the availability of, and ease of access to, information held by government on regulatory policy development and decision making. Transparency also means that government regulatory decisions are clearly articulated, the rationales for these decisions are fully explained, and the evidence on which the decisions are based is publicly accessible (Coglianese et al. 2009).

There are potentially strong incentives for those in government to resist transparency since less transparency provides more scope for action. At its extreme, government corruption is one manifestation of a lack of transparency:

If the people cannot adequately monitor their political agents, or if there is little recourse to punishment, then the agents' incentives can become misaligned with those of the people. Allowed to act in secret, officials will have a greater incentive for self-dealing at the expense of their principals, the people. (Brito and Perrault 2009, p. 4)

A less extreme, but still costly consequence of a lack of transparency is that governments might simply not perform to their highest potential at the expense of the community's interests. Transparency can encourage government agencies, regulatory oversight bodies and ministers to comply with government RIA processes. For example, subject to public scrutiny, governments may be more insistent on the need for proposals to be well-considered and analysed before making a decision.

Transparency can also be viewed as an effective means of reducing the 'information asymmetry' which is inherent in policy development, whereby stakeholders find it difficult to monitor the regulatory decisions of their governments. Transparency, especially through information provision, can lower the costs to stakeholders of monitoring the implications of individual decisions of governments.

Changes in the nature of society and the relationships between government and the community are also pushing governments towards greater transparency. Better educated and more informed citizens are demanding more information from government and more say in what governments do and how they do it. At the same time, advances in information technology are enhancing governments' abilities to meet these demands (OECD 2002).

### **Transparency as a means of achieving accountability and credibility — and its limitations**

Transparency is not an end in itself, but rather a means to achieving the end of accountability and also promoting community support for government policy

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decisions and credibility in government administration processes. Transparency is usually a precondition for accountability since a government agency, regulatory oversight body or minister cannot be held accountable until information is available on how they have met their respective responsibilities.

At the same time, there is a need to recognise the limits of transparency. Even though transparency allows communities to more easily hold their governments to account, this may still not result in poor regulatory proposals being avoided or withdrawn. Those benefiting from such proposals have every reason to argue and lobby for their implementation while those in the broader community may have little motivation to oppose them — especially where the costs of such proposals are dispersed widely among the community.

Furthermore, in limited circumstances, public transparency may prompt market or community behaviour that undermines the effectiveness of a proposed policy. It may also reduce the information available to facilitate high quality regulatory decision making. For example:

... a commitment to transparency could reduce the likelihood that private firms would voluntarily provide agencies with potentially helpful information, especially if doing so were to mean that agencies must disclose confidential business information obtained from such regulated firms. (Coglianese et al. 2009, p. 929)

In these situations, policy makers need to strike a balance between the primary objective of informing the community about the reasons for the agency's decision on the one hand, and the protection of confidential information on the other. Confidential consultation processes should only be used in limited circumstances where transparency would clearly compromise the public interest (PC 2010).

## **7.2 Transparency of regulatory impact analysis undertaken by agencies**

### **The importance of consultation in the policy development process**

The primary purpose of most RIA processes is to inform decision makers and stakeholders about the likely impacts of regulatory proposals. The assessment of these impacts requires timely, proportionate and effective consultation with the community prior to the regulatory decision being made. Such consultation makes an essential contribution towards achieving transparency.

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The OECD has long acknowledged that public consultation can be a key driver of regulatory quality. The 1995 Recommendation of the Council on improving the quality of government regulation stated:

Consultation and public participation in regulatory decision-making have been found to contribute to regulatory quality by (i) bringing into the discussion the expertise, perspectives, and ideas for alternative actions of those directly affected; (ii) helping regulators to balance opposing interests; (iii) identifying unintended effects and practical problems; (iv) providing a quality check on the administration's assessment of costs and benefits; and (v) identifying interactions between regulations from various parts of government. Consultation processes can also enhance voluntary compliance, reducing reliance on enforcement and sanctions.

Consultation can be a cost-effective means of responding to other regulatory principles ... such as identification of the problem, assessment of need for government action, and selection of the best type of action. (OECD 1995, p. 18)

More recently, on regulatory policy and governance, the OECD recommended that:

Regulatory Impact Analysis should as far as possible be made publicly available along with regulatory proposals. The analysis should be prepared in a suitable form and within adequate time to gain input from stakeholders and assist political decision making. Good practice would involve using the Regulatory Impact Analysis as part of the consultation process. (OECD 2012a, p. 10)

Consultation should occur throughout the policy development process, consistent with the Australian Government and COAG best practice principles (Australian Government 2010a; COAG 2007a). Consultation allows agencies to obtain information that may help them better understand how current regulations could be improved and also how the community or those regulated would respond to a change in policy. Consultation can therefore help policy makers better foresee and appreciate the impact of the decisions they are contemplating.

Still, it is important to recognise that public consultation processes do have some downsides. In particular, consultation can slow or delay policy development:

Increasing public participation requires an agency to expend more resources on filtering through and reading comments submitted. These resources may be well spent to the extent that the additional comments contribute to better policies, but many comments are likely to be duplicative of earlier submissions. (Coglianese et al. 2009, p. 928)

At the same time, consultation processes may not be sufficiently broad, with few small businesses, individuals or community groups having the capacity to devote significant resources to consultation processes (Queensland Consumers Association, sub. DR28; Consumers' Federation of Australia, sub. DR34). The Commission has also reported in the past, and has noted in studies since, evidence of consultation fatigue:

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... with businesses and industry groups stating that they simply couldn't keep up with the extensive and wide-ranging consultation processes they are requested to participate in. (PC 2009b, p. 221)

Some consumer groups also reported to the Commission that with some regulatory proposals taking many years to develop, stakeholders end up presenting their views on a number of occasions as agency staff change over time. This suggests that agencies need to improve their documentation of previous consultation and put strategies in place to ensure they cope better with staff turnover.

With regulated entities holding much of the data relevant to policy making, governments are increasingly looking to them as a cost-effective source of data. One risk is that data collection through such consultation processes could lead to biased outcomes. According to the officers undertaking RIA in the Victorian transport portfolio:

There is sometimes a poor capacity within an agency to measure/balance/analyse the consultation process where submissions are dominated by self-interested lobby groups resulting in a regulatory outcome that favours one particular stakeholder group. (sub. 17, p. 4)

This risk can be managed by diversifying information and data sources, taking a 'checks and balances' approach and by being completely transparent about the sources of data. The more open the consultation process is, the less likely it will lead to biased outcomes (OECD 2008).

Consultation with the wider community should be a key element of any RIA process. Consultation requirements should not be overly prescriptive but they should be sufficiently broad and robust to ensure that consultation informs consideration of a regulatory proposal and its viable alternatives. That is, the consultation needs to be genuine and meaningful, not just conducted for its own sake or used to simply justify or 'sell' a pre-determined regulatory proposal.

## **RIA consultation processes in jurisdictions**

All jurisdictions encourage government agencies to consult during the policy development process with those affected by regulatory proposals. Those jurisdictions with Subordinate Legislation Acts also mandate the form and timing of consultation. Many RIA guidelines also include general information on essential elements for sound consultation, such as:

- a statement of best practice consultation principles (box 7.1)

- a ‘proportionality statement’ — that consultation is commensurate with the potential magnitude of the problem being addressed and the size of the potential impacts of the proposed regulatory or non-regulatory solutions
- a statement that consultation should occur at all stages of the regulatory cycle
- a statement that RIS documents are to be made public (although this still does not occur in practice in some jurisdictions).

#### **Box 7.1 COAG best practice consultation principles**

**Continuity** — consultation should be a continuous process that starts early in the policy development process.

**Targeting** — consultation should be widely based to ensure it captures the diversity of stakeholders affected by proposed changes. This includes Commonwealth, State, Territory and local governments, as appropriate.

**Appropriate timeliness** — consultation should start when policy objectives and options are being identified. Throughout the consultation process, stakeholders should be given sufficient time to provide considered responses.

**Accessibility** — stakeholder groups should be informed of proposed consultation and be provided with information about proposals, via a range of means appropriate to those groups.

**Transparency** — Ministerial Councils need to explain clearly the objectives of the consultation process and the regulation policy framework within which consultations will take place and provide feedback on how they have taken consultation responses into consideration.

**Consistency and flexibility** — consistent consultation procedures can make it easier for stakeholders to participate. However, this must be balanced with the need for consultation arrangements to be designed to suit the circumstances of the particular proposal under consideration.

**Evaluation and review** — policy agencies should evaluate consultation processes and continue to examine ways of making them more effective.

*Source:* COAG (2007a).

Some jurisdictions go further in the quality of information they provide in their guidance (table 7.1) by:

- stipulating consultation RIS documents be released well in advance of the consideration by decision makers of final RIS documents
- specifying advance notice of upcoming consultation (such as through government websites or annual regulatory plans)
- indicating a minimum time period for public consultation
- providing transparent adequacy criteria for consultation.

**Table 7.1 Consultation information outlined in RIA guidelines**  
As at January 2012

<i>Jurisdiction</i>	<i>Cwlth</i>	<i>COAG</i>	<i>NSW<sup>a</sup></i>	<i>Vic<sup>b</sup></i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
Consultation RIS	✗	✓	✓ (✗)	✓ (✗)	✓	✓	✗	✓	✗	✗
Final RIS	✓	✓	✗ (✓)	✗ (✓)	✓	✓	✓	✗	✓	✓
Consultation and/or Final RIS public	✓	✓	✓ (✓)	✓ (✗)	✓ <sup>c</sup>	✓	✓	✓	✓	✗ <sup>d</sup>
Advance notice	✓	✗	✗ (✗)	✗ (✗)	✓	✓	✗	✗	✗	✗
Minimum time period	✗	✗	✓ (✓)	✓ (✗)	✓	✗	✓	✓	✗	✗
Transparent adequacy criteria	✓	✓	✗ (✗)	✗ (✗)	✗	✓	✗	✗	✗	✓
Best practice consultation principles	✓	✓	✓ (✓)	✗ (✗)	✓	✓	✗	✗	✗	✓
Proportionality statement	✓	✓	✓ (✓)	✗ (✓)	✗	✓	✓	✓	✗	✓
All stages of regulatory cycle	✓	✓	✓ (✗)	✓ (✗)	✓	✗	✓	✗	✗	✗

<sup>a</sup> The symbols in parentheses for New South Wales refer to Better Regulation Statements. <sup>b</sup> The symbols in parentheses for Victoria refer to Business Impact Assessments. <sup>c</sup> Even though Qld guidelines state consultation/final RAS documents should be published, in practice only consultation RAS documents have been made public. <sup>d</sup> Even though NT guidelines state RIS documents should be published, in practice none have ever been made public.

Sources: Jurisdictional guidance material (appendix B).

For example, in relation to the transparency of adequacy criteria for consultation, the Australian Government guidance material notes:

The RIS should:

- outline the consultation objective
- describe how consultation was conducted (including when consultation was undertaken, the timeframes given and the method of consultation)
- articulate the views of those consulted, including substantial disagreements
- outline how those views were taken into consideration, and
- if full consultation was not undertaken, provide a reasonable explanation as to why not.

The consultation process reported in the RIS should conform to the government's best practice principles and policy on consultation. (Australian Government 2010a, p. 18)

The guidance material for RIA processes in COAG, Western Australia and the Northern Territory also explicitly outline consultation criteria. Other jurisdictions are either not explicit on consultation requirements or silent. To improve transparency, adequacy criteria for consultation processes should be made explicit in all jurisdictional RIA guidelines. This issue will be discussed further in section

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7.3 in relation to all adequacy criteria, not just those relating to consultation processes.

It should be noted at the outset that there is sometimes a gap between requirements set out in official guidance documents and what happens in practice. These implementation gaps will be identified in the following discussion which compares all Australian jurisdictions and identifies leading practices. Some are drawn from leading practices internationally, where they do not currently exist in Australia.

### *RIS as a consultation document*

There appears to be some progress towards using a RIS as the main basis for consulting with interested parties, particularly in state jurisdictions. A consultation RIS can assist in:

- starting a RIA process early in a policy's development
- testing and refining estimates of impacts of particular options
- identifying and addressing unintended or unanticipated consequences of regulatory proposals
- increasing transparency throughout the RIA process — not just at the end of the process
- increasing acceptance and understanding by interested parties of the final regulatory option chosen.

Table 7.1 shows that six Australian jurisdictions (including COAG) now release a consultation RIS. In most of these jurisdictions the consultation RIS forms the centrepiece of the consultation process and is helpful in identifying further impacts and refining the existing estimates of impacts.

However, this is not the case in all of these jurisdictions. Under the Tasmanian Legislation Review Program (which applies to primary legislation), the consultation RIS is developed after the policy decision is taken by Cabinet. Under the *Subordinate Legislation Act 1992* (Tas), the consultation RIS is developed after the policy decision has been made by the relevant minister. Consequently, the RIS is seen more as a justification for the policy decision already taken, rather than as a tool to inform a policy decision — as the Tasmanian Department of Treasury and Finance commented:

... the formal RIS process may be viewed as a means of setting out the rationale for the proposed policy decision, against viable alternatives. (sub. 22, p. 2)



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The Commission understands that for some regulatory proposals, other informal consultation occurs before the preparation of the RIS. However, it is perhaps not surprising that there are typically few submissions received in response to a Tasmanian consultation RIS, or that the consultation RIS does not result in major changes in policy or to the supporting legislation (sub. 22) — since the outcome from the RIS appears to be *fait accompli*.

In Western Australia, the RIA guidelines advise that the Regulatory Gatekeeping Unit (RGU) requires consultation to be assessed as effective and appropriate, which requires agencies (at a minimum) to consult with those stakeholders directly affected by the regulatory proposal. Full public consultation is encouraged, but if the matter is sensitive or it is uneconomical to go out to full public consultation, a RIS may not be available for public consultation (RGU, pers. comm., 24 July 2012).

Depending on the extent to which this release from consultation requirements is taken up in practice, the Western Australian arrangements may be closer to those of the Australian Government RIA process, the Victorian Government business impact assessment (BIA) process, the New South Wales better regulation statement (BRS) process and the South Australian, ACT and Northern Territory RIS processes — which do not require a public consultation RIS.

Strengthening consultation requirements in the Australian Government RIA process via a two-stage RIS has been suggested in recent Commission annual reviews of regulatory burdens on business (PC 2009b, 2010) and initially by the Regulation Taskforce (2006). To reduce procedural length, complexity and potential costs of a two-stage RIS, the Commission suggested:

- removing the need for OBPR adequacy assessment for a consultation RIS (PC 2009b)
- a consultation RIS could initially be implemented only for those regulatory proposals with the largest potential impacts (PC 2010).

Commenting on the lack of a consultation RIS in the Australian Government RIA process the OECD said, ‘Consultation on RIA could be improved if a two-stage approach were taken that required the RIS to be published in a draft format as a consultation document ...’ (OECD 2010a, p. 114).

Recently, the European Court of Auditors (ECA), in recommending enhancements to the European Commission Impact Assessment (IA) process, stated that:

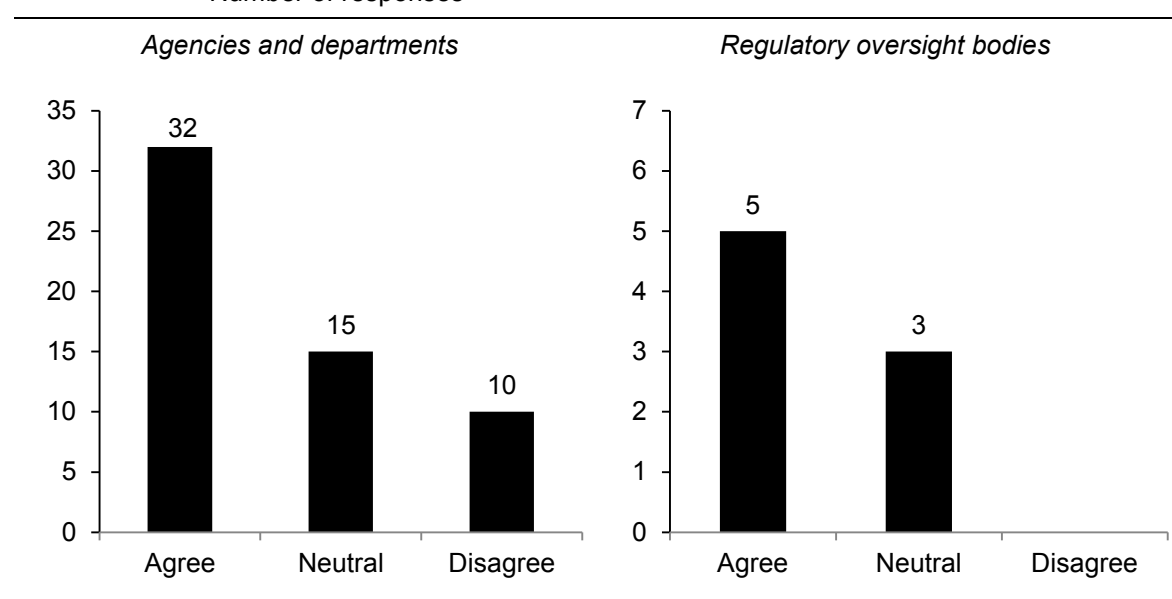
Consulting on draft IA reports is useful in ensuring that the analysis is complete, consistent and accurate. In particular, it provides a basis for identifying and quantifying potential costs and benefits, administrative burdens and problems with implementation and enforcement. (ECA 2010, p. 30)

However, the European Commission rejected this recommendation on the basis that it has a range of other documents for consulting with stakeholders (ECA 2010).

Most respondents to the Commission's RIA survey supported the public release of a draft RIS as a consultation document to improve the RIA process (figure 7.1).

**Figure 7.1 Would publishing a draft RIS as a consultation document improve the RIA process?**

Number of responses<sup>a</sup>



<sup>a</sup> Based on 60 survey responses by agencies and departments, of which 3 respondents chose 'do not know'. Responses to the survey of regulatory oversight bodies were received for 8 of the 10 jurisdictions. The OBPR, representing the Commonwealth and COAG jurisdictions, did not provide a response to this question. 'Agree' comprises both 'strongly agree' and 'agree'. Disagree comprises both 'strongly disagree' and 'disagree'.

Data source: PC RIA Survey (2012).

Support for a consultation RIS, or its incremental or staged release, was also conveyed in some submissions as a way of improving the quality of analysis provided to decision makers and the community (box 7.2).

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## Box 7.2      **Support for a consultation RIS or staged approach**

### *Australian Financial Markets Association:*

To address the risk that RIAs are sometimes done after the fact at a time when gaps in reasoning cannot be addressed by relevant industry stakeholders, and the process has progressed too far for fundamental re-thinks to be readily contemplated by agencies, we propose that the RIS publication process be restructured, such that defined stages in the RIS are released with interim departmental sign off incrementally throughout the process ...

Incremental release of the RIA would ... give assurance to industry that proper process was being followed during what can be a period of little information from the agency. It would allow timely response before the process had progressed too far down the wrong path. (sub. 11, pp. 3-4)

### *Chi-X Australia Pty Ltd:*

It is the view of Chi-X that an ex ante cost benefit analysis that is transparently part of the consultation process, should be legislatively mandated for all Australian rule making authorities. The inclusion of the cost benefit analysis at the consultation stage results in at least the following advantageous outcomes:

- the policy proposals consulted on are at a more considered and advanced stage than if no cost benefit analysis had been undertaken, resulting in a more effective use of industry resources and consultation processes generally
- there is greater transparency of the rationale for and benefits of the proposals
- there is a transparent mechanism of assessing the relative performance of the proposals once they are implemented. (sub. 13, p. 2)

### *The Centre for International Economics:*

The main problems the CIE encounters with RISs relates to timing and expectations. One problem is where the RIS is conducted prematurely before any substantive preliminary work has been done ... The other problem is when it is conducted too late after considerable policy design effort has been conducted but before any preliminary economic analysis [has been done] ... A staged RIA process could help ameliorate the sorts of problems discussed above. Were OBPR (or a state based equivalent) to require steps 1, 2 and 3 [of the RIA process] to be conducted as part of a preliminary RIS for initial review, the opportunity would exist to ensure the rest of the RIS is relevant and appropriate and, importantly, whether it is worth pursuing. (sub. 14, pp. 4-6)

### *Officers undertaking RIA in the Victorian transport portfolio:*

A different design of RIA as a consultation paper could be used to meet the community's expectations of effective consultation. For example:

Stage one: discussion paper with high level costs and benefits, assumptions for validation and confirmation

Stage two: development of regulations and final form RIA. (sub. 17, p. 15)

### *Queensland Consumers' Association:*

A draft RIS for early consultation would be very beneficial for ... consumer and community groups. We also believe that in many cases it could be beneficial to have consultation before the preparation of a draft RIS and that there should definitely be consultation if the proposals are changed significantly after consultation on the draft RIS. (sub. DR28, p. 2)

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More recently, Borthwick and Milliner (2012) recommended that in all but exceptional circumstances there should be a two-stage RIS for the Australian Government process. In the first stage, Ministers or decision-makers would consider an ‘options stage RIS’ which would set out the problem, objectives and options. In the second stage, following consultation with stakeholders, the ‘details stage RIS’ would include all seven stages, adding elements in relation to impacts, consultation, conclusion/recommendation and implementation/review. In their view:

The two-stage RIS would support best practice regulation in accordance with the spirit of the OECD Principles, but at the same time providing ministers with more flexibility. It would encourage early clarification of the policy problem, objectives/s and possible options. This would enable stakeholder consultation that is specific, but is conducted *ex ante* the regulatory decision. (p. 73)

While also supporting a two-stage RIS, in the Commission’s assessment a consultation RIS should focus on the first three steps of the RIS (that is, the problem, objectives and options) but *all* seven steps should be undertaken to the best of the agency’s ability (at the time). The latter steps of a consultation RIS would tend to have a lower level of analysis than the earlier steps, because of the nature of what is possible at that point in time. However, they can still provide a useful ‘road map’ for interested parties and provide some insight into the agency’s early thinking on particular options. Moreover, feedback by stakeholders on preliminary estimates of the impacts of particular options can assist the agency to refine the final regulatory proposal for decision makers.

As the Victorian Department of Premier and Cabinet makes clear, it is important that a consultation RIS is as informative as it can possibly be:

Many of the COAG RIA processes have employed a two-stage process with a consultation RIA, followed by a decision RIA. It is important that sufficient detail is provided in the consultation RIA to allow stakeholders to provide informed commentary on the options proposed. Consultation RIAs should also include detailed costing of a range of viable options, including less onerous options, not just the preferred option. (sub. DR32, p. 4)

However, it is recognised that for a minority of proposals a consultation RIS may not be appropriate. Confidentiality may be required in limited circumstances where transparency would clearly compromise the public interest. For example, where there is a need for Cabinet confidentiality, such as for national security or commercial-in-confidence matters, or for proposed tax legislation to deal with tax avoidance. As noted in chapter 5, the reasons for any exemptions from undertaking a consultation RIS should be made explicit.

Borthwick and Milliner (2012) came to similar conclusions when discussing the need for confidentiality in the Australian Government’s RIA process:

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The Review does not see that Cabinet deliberations or Budget deliberations are necessarily compromised because they are subject to a RIA Process, which may include consultation before Budget announcement. It is that very consultation that might lead to more informed decisions. It should only be if such consultations risk ‘gaming’ behaviour in the taxation or financial market arena that such processes should be kept confidential. Otherwise, the days of ‘pulling rabbits out of the hat’ through surprise and pre-judged announcements should be long gone. This approach, although often used, is incompatible with the OECD Principles and open government objectives. It does not result in good policy or program implementation and it generally leaves affected stakeholders very aggrieved. (pp. 58-59)

For the majority of proposals, greater transparency, via a mandatory consultation RIS, could improve the quality of analysis used to inform government decisions. At the very least, the regulatory proposal would go forward with a greater understanding and acceptance by stakeholders of its impacts.

*Consultation outcomes should be reflected in a final RIS as part of a two-stage approach*

After incorporating relevant community input, the consultation RIS in some jurisdictions (COAG, Queensland, Western Australia) is developed into a final RIS, and assessed by the relevant oversight body, before being provided to the decision maker. In this way stakeholders in these jurisdictions should be provided with tangible evidence of the extent to which their views were incorporated — if the final RIS is made public.

However, whilst Victoria, New South Wales and Tasmania all undertake a consultation RIS they do not update the RIS to reflect the outcomes from the consultation process. As a consequence, the RIS that is provided to the decision maker in these jurisdictions may contain analysis that is inconsistent with the final regulatory proposal.

To gain insight into why a final regulatory proposal may differ from that put forward in the consultation RIS, additional information must be sought by interested parties from other sources. For example, in Victoria’s case, the *Subordinate Legislation Act 1994* (Vic) requires the responsible Minister to consider all submissions and comments received about a statutory rule or legislative instrument where a RIS has been prepared. As a consequence, agencies must provide reasons for the direction taken in final regulations that broadly address any general issues raised in submissions. This statement of reasons must be published on a government website (Victorian Competition and Efficiency Commission’s (VCEC’s) or that of the responsible agency) and be made available in hard copy format (Victorian

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Department of Treasury and Finance 2011a). However, in practice such publication does not occur systematically in Victoria (VCEC 2011b).

In the case of New South Wales, the views from interested parties elicited through the RIS consultation process are not made public. Under the *Subordinate Legislation Act 1989* (NSW), in the event that the statutory rule is made, a copy of the RIS and all written comments and submissions received are forwarded to the Legislation Review Committee after the rule is published. There is no set format with respect to how the Committee receives these documents and they are not made public (NSW Legislation Review Committee, pers. comm., 24 May 2012).

The Tasmanian RIS process also suffers from a lack of transparency in consultation outcomes for both primary and subordinate legislation. Unless the agency (at its discretion) decides to publish the submissions, or a document reporting consultation outcomes or reasons setting out changes to the Bill or regulation following consultation, it is difficult for an interested party to gain an understanding of why a policy change has been made (Tasmanian Department of Treasury and Finance, pers. comm., 10 May 2012).

Compared to other jurisdictions (such as COAG and Western Australia) the Victorian, New South Wales and Tasmanian RIS processes lack transparency in reporting consultation outcomes.

The consultation process, articulating the views of those consulted and how those views were taken into consideration should be reported in a final RIS provided to the decision maker (and made public). This would aid transparency because the analysis in the final RIS would be closer to the point when the regulatory decision is made by government. Further, it would better highlight instances where there is a divergence between what was recommended in the final RIS and what the decision maker decided.<sup>1</sup>

A final RIS also eliminates the need for the consultation RIS to be reconciled with supplementary information arising from consultation with interested parties, where such consultation outcomes are made public (as occurs irregularly in Victoria). This enables the final RIS to effectively be a ‘one stop shop’ for understanding how a government made a particular decision.

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<sup>1</sup> This may not occur in the Commonwealth as there is scope for RISs to be modified after the decision maker’s consideration, but prior to publication, to include analysis of the option adopted where that option was not considered in the original RIS (Australian Government 2010a).

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## LEADING PRACTICE 7.1

***Developing a two-stage RIS — an initial consultation RIS and a final RIS — greatly improves the transparency of RIA consultation processes and is regarded as an essential practice to follow.***

### *Publication of RIS documents*

Nearly all jurisdictions publish at least some RIS documents, although ease of public accessibility differs markedly. In addition, the public release of an individual RIS is subject to agency/ministerial/Cabinet discretion in some jurisdictions and the timing of the release also varies across jurisdictions (table 7.2). Despite governments improving the public availability of RIS documents across jurisdictions in recent years, there continue to be complaints from industry about their accessibility (see for example, Australian Food and Grocery Council, sub. 5).

### *Where are RIS documents published?*

The Commonwealth, COAG, Victoria (but only in respect of a consultation RIS for subordinate legislation) and the ACT lead the way in terms of the public release of RIS documents. They each have a central register of RIS documents available for access by the public. For example, in response to a Commission review of regulatory burdens (PC 2009b), in July 2010 the Office of Best Practice Regulation (OBPR) established an online RIS register. It now publishes both Australian Government and COAG RIS documents on the site as soon as practicable after public announcement of the relevant decision. Such arrangements accord with leading international practice (box 7.3).

The South Australian RIS process also has a central point of access with RISs now published on the Department of the Premier and Cabinet website (SA Cabinet Office, pers. comm., 30 July 2012). However, the site has only recently become operational, hence few RIS documents have been posted. The New South Wales and Western Australian processes are less direct and more haphazard in their publication approach. Although they also have a central point of access, publication is via links to agency websites — that is, they rely on agencies releasing their RIS documents in a timely manner and maintaining links to these documents. In both jurisdictions the Commission found evidence of links to individual RIS documents being broken. Moreover, in both jurisdictions some RIS documents have not been publicly released.

**Table 7.2 Location and timing of RIS release in practice**

As at January 2012

<i>Jurisdiction</i>	<i>Where are RISs published?</i>	<i>Is there discretion over publishing?</i>	<i>What is the timing of publishing?</i>
Cwlth	OBPR central online public register and tabled in parliament with the enabling legislation	The OBPR obtains the agency's approval before publishing the RIS	Decision RIS is published on the register as soon as practicable from the date of the regulatory announcement
COAG	OBPR central online public register	The OBPR obtains the Ministerial Council's approval before publishing the RIS	Decision RIS is published on the register as soon as practicable from the date of compliance assessment
NSW <sup>a</sup>	BRO website with links to agency websites	No discretion — consultation RIS must be made public (The BRS must be made public, except in limited cases determined by Cabinet)	Consultation RIS must be made public before a principal statutory rule is made. (A BRS is published after a Bill is introduced into parliament)
Vic <sup>b</sup>	VCEC and agency websites	No discretion — consultation RIS must be made public (The BIA is not made public unless agreed between the Premier, Treasurer and responsible Minister — but release has never occurred)	Consultation RIS must be made public before statutory rule or legislative instrument is made. (No public release of BIAs)
Qld	Queensland Government's <i>Get Involved</i> website published draft RAS only	Final RAS must be approved for release by Cabinet — but release has never occurred in practice	No public release of final RAS in practice — in future some may be published by QOBPR subject to Cabinet approval
WA	Treasury RGU website with links to agency websites	The RGU will approve the non-publication in circumstances of sensitivity	Decision RIS must be made available at the time the decision has been made public in its final form — when a Bill is introduced into parliament or regulation is gazetted
SA	Economic Development Board's website or agency website — but now published on the Department of Premier and Cabinet website	There is no discretion over public release	Decision RIS must be published as soon as practicable after the announcement of the regulatory decision
Tas	Agency websites	No discretion — consultation RIS must be made public	Whenever agency commences the public consultation process
ACT	Online Legislation Register and tabled in parliament for subordinate law or disallowable instrument. No requirement for new or amending legislation	There is no discretion over public release for subordinate law or disallowable instrument. There is discretion for new or amending legislation	RIS presented to the Legislative Assembly with the subordinate law or disallowable instrument
NT	Agencies are encouraged to make RISs publicly available — but does not occur in practice	Publication is subject to ministerial approval	No public release of RIS in practice, but if it were to occur it would be once associated regulation has been implemented and commenced

<sup>a</sup> The comment in parentheses for New South Wales refers to Better Regulation Statements (BRSs). <sup>b</sup> The comment in parentheses for Victoria refers to Business Impact Assessments (BIAs).

Sources: Jurisdictional guidance material (appendix B).



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### Box 7.3      **Central RIS registers are leading international practice**

#### **United Kingdom**

The Department for Business Innovation and Skills has an Impact Assessment Library website to provide easy access to the regulatory impact analysis that the United Kingdom Government has undertaken when introducing new regulations. It enables full access to the evidence base used to justify the need to regulate, including details of the options that were considered and discarded.

#### **European Union**

All impact assessments and all opinions of the European Commission's Impact Assessment Board on their quality are published online once the Commission has adopted the relevant proposal.

#### **New Zealand**

The full text of all RIS documents is required to be published, in order to foster openness and transparency around the decision making process. RIS documents must be published by:

- including the URLs to the location of the RIS on the lead agency and Treasury websites, in the press statement announcing any new policy for which a RIS is required
- being lodged on the lead agency's website and the Treasury website
- including the URLs to the location of the RIS on the agency and Treasury websites, in the Explanatory Note to Bills that are introduced into the House.

*Sources:* UK Government IA Library website; EC Impact Assessment website; NZ Treasury (2009).

Whilst Queensland guidance states 'all final RAS [Regulation Assessment Statement] documents, approved for release, will be published on the Queensland Government's *Get Involved* website', only consultation RAS documents have been posted on the website (Queensland Treasury, pers. comm., 14 March 2012). Despite the newly established QOBPR having the authority to publish final RAS documents on its website, it is expected that only those approved for release by Cabinet will in fact be published.

Under the Victorian RIA process for primary legislation, no BIA documents have been publicly released — although VCEC recently recommended that ministers publicly release BIAs (VCEC 2011b) and the Victorian Government is currently considering this request (Victorian Government 2012). Similarly, in the Northern Territory no RIS documents have been publicly released.

Leading practice would suggest that a central RIS register that is easily accessible by the public on the internet be developed within each jurisdiction. While some

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jurisdictions are making RIS documents more accessible, all RIA websites could be made more user-friendly to encourage greater public participation. For example, jurisdictions could focus on improving their websites by focusing on:

- ease of access and usability (search engines should allow for easy identification and have sufficient data mining capability)
- the quality of data being uploaded
- the timeliness of data entry.

This would allow scope for increased scrutiny of agencies producing regulatory impact analysis and provide them with a greater incentive to undertake better quality analysis. It would also allow regulatory impact analysis to be more easily compared both within and between agencies. This would in turn encourage knowledge transfer, greater consistency in approach to identifying and measuring specific impacts, promoting a more informed understanding of the quality of analysis applied to regulatory proposals across Australian jurisdictions. It would also provide evidence of the value of RIA in policy development and thereby engender support for the process (chapter 10). Most importantly, the transparency derived from improving the general capability and functionality of RIA websites would be more likely to improve regulatory quality.

In the Commonwealth and the ACT (only for subordinate law or disallowable instruments), final RIS documents are also tabled in parliament and can be accessed on parliamentary websites. For example, the Commonwealth final RIS must be attached to the explanatory memorandum for primary legislation and the explanatory statement for tabled subordinate legislation.

It would be beneficial for all jurisdictions that produce a final RIS to table it in parliament with the relevant legislation. This would be more likely to ensure that the RIS associated with the proposed legislation becomes a permanent record. There would be less to gain — and risk of confusion for stakeholders — from tabling a consultation RIS (in isolation) in those jurisdictions that currently do not produce a final RIS (such as Victoria and Tasmania).

#### *Is there discretion over public release?*

Some jurisdictional RIA requirements allow discretion over whether a RIS is released publicly. The discretionary power can be exercised by government agencies, oversight bodies, Ministerial Councils, Ministers or Cabinets (table 7.2).

Public transparency of jurisdictional RIA processes may be enhanced if discretionary power to not publish a final RIS document were removed. Any

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information in a final RIS that is commercial-in-confidence or has national security implications could be modified (in consultation with the regulatory oversight body) after the decision maker's consideration, but prior to publication.

*What is the timing of public release?*

Timing of the public release of the final (or decision) RIS provided to decision makers is important. The sooner the release of the final RIS the greater the level of transparency about RIA quality and the more time the community (and the parliament) has to suggest improvements to the regulatory design that may increase benefits or reduce costs of the final regulation that is made. The Australian Food and Grocery Council submitted that the 'publication of the final RIS must be required before the regulation is passed' (sub. 5, p. 17).

If the release of the final RIS occurs at the time of regulatory announcement, or as soon as practicable from the date of regulatory announcement, this would allow the community to be informed about the regulatory impact analysis *before* the legislation is introduced into parliament. If the legislation introduced into parliament differed from that recommended in the final RIS, interested parties would be able to question the government over the reasons for the differences. The government's explanations for any differences would enhance transparency of the decision making process.<sup>2</sup>

If the release occurs when the legislation is *introduced* into parliament, this would allow members of parliament to be informed by the analysis at the time of parliamentary debate. However, there would be less opportunity for community input and little time for parliamentarians to familiarise themselves with any RIA issues associated with the legislation.

If the release occurs after the legislation has been *passed* through parliament, or later still, been implemented and commenced, community scrutiny of decision making would be further delayed and the ability to improve the final legislation in parliament would be removed altogether. However, even this approach is preferable to the situation where the final RIS is not made public at all — which eliminates all scrutiny of decision making after the fact.

Timing on the public release of the RIS varies significantly between jurisdictions (table 7.2). The Commonwealth, COAG and South Australia (but it has only

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<sup>2</sup> May not occur in the Commonwealth as there is scope for RISs to be modified after the decision maker's consideration, but prior to publication, to include analysis of the option adopted where that option was not considered in the original RIS (Australian Government 2010a).

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published two RISs since December 2011) are the jurisdictions which release final RIS documents in the most timely manner, being as soon practicable after the announcement of the regulatory decision. In other jurisdictions, the RIS is released:

- before a regulation is made (NSW RIS, Vic RIS)
- at the time a Bill (WA RIS) or regulation (ACT RIS) is introduced into parliament
- when a regulation is gazetted (WA RIS)
- as soon as practicable after a Bill is introduced into parliament (NSW BRS)
- not at all (Vic BIA, NT RIS, Qld RAS — but some may soon be published by QOBPR on its website, subject to Cabinet approval, as soon as practicable after a final assessment).

All jurisdictions should publish RIS documents in a timely manner. Leading practice would suggest that all final RIS documents should be published at the time of (or as soon as practicable after) the announcement of the regulatory decision.

#### LEADING PRACTICE 7.2

***Measures that promote the transparency of RIA reporting processes include:***

- ***absence of discretionary power as to the public release of a final RIS***
- ***an electronic central RIS register that is easily accessible by the public, with publication of final RIS documents at the time of the announcement of the regulatory decision***
- ***the tabling of final RIS documents in parliament with the enabling legislation.***

#### ***Advance notice of consultation***

A minority of jurisdictional guidelines encourage agencies to provide advance notice to the community for upcoming consultation activities. However, even where these guidelines are in place, there is little or no monitoring of agency compliance.

The Queensland guidelines advise, ‘where feasible, advance notice is provided to business and community for all upcoming consultation activities via the Queensland Government’s *Get Involved* website ...’ (Queensland Treasury 2010, p. 47). At least three months’ notice is recommended prior to consultation taking place and it is the responsibility of individual agencies to fulfil this whole-of-government commitment.

Australian Government RIA guidelines require agencies to publish and maintain an Annual Regulatory Plan (ARP) which includes details about recent and expected

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changes to regulations affecting business and the wider community. The ARP is required to include a timetable, contact details of a responsible officer and planned consultation opportunities. ARPs are published each July on the agency and OBPR websites, in OBPR's annual report and linked to the Australian Government Business Consultation website. This website allows users to register to receive notification of new public consultations on government policies and regulations that are posted to the site by government agencies.

Agency updates to ARPs within the financial year are discretionary, with no requirement to include information on whether a RIS is required for a new regulatory proposal (OBPR 2008b). On the other hand, agencies are required to list upcoming post implementation reviews (PIRs) in their ARPs (OBPR 2012b). The Commission has, in the past, suggested that Australian Government ARPs could be improved by making it mandatory for agencies to update their plans to reflect whether or not a RIS will be undertaken for regulatory proposals (PC 2009b).

Commenting on compliance with the Australian Government ARP process, the OECD has noted:

All Commonwealth Departments have complied with the requirements for an ARP however a detailed audit of the extent to which the plans are comprehensive, including feedback on user satisfaction would be beneficial to verify how complete and useful the information contained in the plans is to business and the public. (OECD 2010a, p. 108)

More recently, Borthwick and Milliner (2012) concluded that Australian Government ARPs were not serving their intended purpose of providing business and the community with information about planned regulatory changes and were not making it easier for business to take part in the development of regulation that is likely to affect them. As a consequence, they recommended:

Agencies should ensure that ARPs are timely, complete and informative so that they can be a genuine mechanism for stakeholder awareness and consultation on upcoming regulatory proposals. They should be updated on an as needs basis. OBPR should report annually on compliance with the requirement to prepare adequate ARPs. (Borthwick and Milliner 2012, p. 75)

In Western Australia, a similar approach is taken to the Australian Government. Agencies provide a Biannual Agency Regulatory Report to the RGU to determine agency compliance with RIA for regulatory proposals in the previous six months and also a regulatory plan for the coming six months. The publication of regulatory plans is encouraged by the RGU, but unlike the Australian Government process, it is not mandatory (WA Treasury 2010a). The Small Business Development Corporation (SBDC) indicated that it is yet to see any agencies publish a regulatory plan:

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To the best of the SBDC's knowledge, there has been no take-up by agencies or enforcement by the RGU of this RIA requirement. (sub. 25, p. 9)

The SBDC also supported the establishment of a centralised consultation website in Western Australia to improve transparency of government processes:

... a centralised community consultation website could facilitate greater stakeholder engagement and increase the transparency of Government decision-making. Such a website could provide a list of regulatory proposals that the Government was considering and enable interested parties to input their views. (sub. 25, p. 11)

An innovation on advance notice recently introduced in the European Union is an alert service for upcoming initiatives. Organisations that sign up for the 'transparency register' can receive early information on the 'roadmaps' for new regulatory initiatives in their fields of interest about one year before their adoption. The European Commission hopes that the new alert service will increase participation in its consultations, from a very early stage of policy development, especially from those groups who up until now have been under-represented, such as small business (EC IAB 2012).

Advance notice of consultation should be encouraged in all jurisdictions. Where annual regulatory plans are undertaken they should be made public and provide useful information to business and the wider community. It should be mandatory for all government agencies to update their annual regulatory plans to reflect whether (or not) a RIS will be undertaken for listed regulatory proposals. As recommended by Borthwick and Milliner (2012), regulatory oversight bodies could report annually on compliance with the requirement to prepare and publish adequate annual regulatory plans.

### *Minimum time period for consultation*

Five jurisdictions have minimum time periods for consultation during RIA processes — these range from 21 to 30 days (table 7.3). With the exception of South Australia (and New South Wales for BRSs), jurisdictions that specify minimum time periods consult on a draft RIS document. Having a minimum time period does not prevent longer consultation periods being employed for more significant or complex proposals. For example, in Victoria, a consultation period of at least 60 days is recommended for more complex subordinate legislation proposals (Victorian Department of Treasury and Finance 2011a).

**Table 7.3 Minimum time period for consultation**  
As at January 2012

<i>Jurisdiction</i>	<i>Is there a minimum time period for consultation?</i>	<i>If so, how long is the time period?</i>
Cwlth	No	
COAG	No	
NSW	Yes	28 days
Vic <sup>a</sup>	Yes	28 days
Qld	Yes	28 days
WA	No	
SA	Yes	30 days
Tas	Yes	21 days
ACT	No	
NT	No	

<sup>a</sup> Minimum time period only applies to Victorian RISs not BIAs.

Sources: Jurisdictional guidance material (appendix B).

Other jurisdictions, such as the Commonwealth and COAG, do not prescribe the minimum duration of consultation. In the Commonwealth's case, RIS documents are required to demonstrate that consultation is commensurate with the magnitude of the problem and the size of the potential impacts of the proposal. COAG consultation requirements have a similar 'proportionality principle'.

In responding to the draft report, the Department of Treasury in Western Australia stated that:

[It] recommends as best practice that agencies conduct a three-month consultation. However, it concedes the prescription of a minimum time period may be insufficient or excessive depending on the nature of the regulatory proposal. (sub. DR37, p. 5)

The Western Australian Local Government Association (sub. 6) recommended that mandatory time periods for consultation be introduced for the Western Australian RIA process. In a similar vein, the Construction Material Processors Association (sub. 9) and officers undertaking RIA in the Victorian transport portfolio (sub. 17) noted that consultation periods in Victoria were too short for stakeholders to respond:

Policy developers must recognise that the required level of analysis takes considerable time and needs substantial input from industry and community affected by the policy. It is unrealistic to require this detailed data to be provided in a response to a RIS within a 4-6 week consultation period. (sub. 9, p. 18)

The process of reading and writing submissions on a large document may exclude community and industry groups. As a result, only some voices are heard through the RIA process. (sub. 17, p. 15)

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In international jurisdictions consultation periods are generally longer than those recommended in most Australian jurisdictions. For example, in the United States at least 60 days is provided for significant rules reviewed by the regulatory oversight body, the Office of Information and Regulatory Affairs (OIRA) (Copeland 2009). In the European Union at least 12 weeks is provided for consultation on new European Commission (EC) policies and legislation and the EC's regulatory oversight body monitors compliance with this requirement (EC IAB 2012). In the United Kingdom, 12-week formal written consultations are encouraged where appropriate, but there is flexibility to have shorter consultations or a more informal approach, particularly where extensive engagement has occurred previously (UK Cabinet Office 2012).

Where governments have decided that a regulatory proposal is of a level of significance that triggers the RIS requirements, it seems reasonable that a minimum time period for consultation — sufficient for interested parties to provide a considered response — should be specified in guidance material.

### **What is the evidence on consultation quality?**

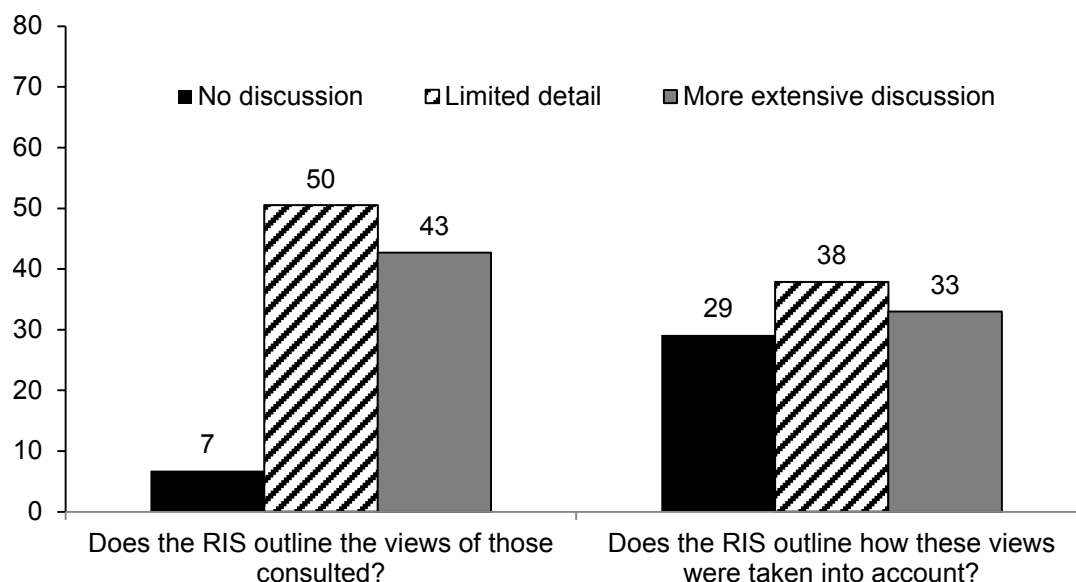
For most jurisdictions the final RIS document is expected to summarise stakeholder views. From the Commission's examination of final RIS documents from all jurisdictions the overwhelming majority (93 per cent) outlined the views of those consulted, however in most cases the RIS documents only provided limited detail on consultation comments such as very brief descriptions, selected or highly aggregated views. Further, only one-third of all RIS documents contained an extensive discussion of how views received during consultation were taken into account (figure 7.2). The Commission also received submissions criticising some RIA consultation processes from stakeholders participating in these processes (box 7.4).

Borthwick and Milliner (2012) received similar stakeholder feedback on the Australian Government's RIA consultation processes:

In short, the Review heard of many instances where consultation practices failed to observe the Consultation Principles and there were inconsistent consultation practices across Government. These failings severely detract from the usefulness of the RIA process and underscore the perception of business and the not-for-profit sector that too often agencies are 'going through the motions'. (p. 52)



**Figure 7.2 Consultation findings in final RISs**  
Per cent of RISs



*Data source:* PC RIS analysis (appendix E).

To improve the quality of consultation, Borthwick and Milliner suggested the oversight body should have a role in assessing the adequacy of stakeholder consultation processes — not just RIS documents:

The Review is of the view that OBPR should seek to inform itself on the veracity of consultative processes and, if the best practice guidelines have not been followed comment to that effect to the relevant decision maker and, especially in egregious circumstances, outline the shortcomings in its Best Practice Regulation Report and online. This may be viewed as putting OBPR in a difficult position, but reasonable judgements should be able to be made and reported to both increase transparency around the integrity of the consultation process and also to encourage higher conformity. (Borthwick and Milliner 2012, p. 53)

The Commission, has previously called for a similar extension of the OBPR's monitoring and reporting role, by publicly reporting on compliance by departments and agencies with the best practice consultation principles (PC 2010). Reporting of such information would provide the community with an indicator of the government's threshold for quality consultation and also reflect the government's commitment to its consultation principles.

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#### **Box 7.4 Criticisms of RIA consultation processes**

##### *Association of Mining and Exploration Companies*

AMEC is ... concerned with the processes surrounding apparent 'consultation', as in many cases governments appear to be only going through the 'process', where the decision has clearly already been made. It is also extremely rare to receive any form of feedback from submissions, or clarifications on input or constructive recommendations, until the final exposure draft/explanatory memorandum or policy determinations are publicly released. (sub. DR29, p. 2)

##### *Construction Material Processors Association:*

Often it appears the 'consultation' process is undertaken to merely 'tick the box' rather than to gather informed input. This is a dilemma for industry as it on the one hand cannot afford to invest time or resources in responding to the issue while on the other hand it cannot afford to not respond. ... often the consultation process is a 'de facto' education process for the new regulations rather than seeking meaningful input from industry. In this sense it is used to prepare industry for change. (sub. 9, p. 23)

##### *Australian Financial Markets Association:*

... some regulatory outcomes ... are not consistent with good regulatory practice and are poorly supported by the relevant agency. In these cases the RIA, and in some cases the accompanying consultation processes, show signs of being pro-forma exercises. (sub. 11, p. 2)

##### *Western Australian Local Government Association:*

The consultation process ... of the RIS was limited to two workshops in the eastern states, and while comments were provided by those stakeholders who were able to attend, it was not made clear how these comments were incorporated into the assessment of the problem. Stakeholders were also not provided the opportunity to comment on this aspect of the assessment after this date. (sub. 6, p. 3)

### **7.3 Transparency of regulatory oversight body adequacy assessments**

One of the core functions of all regulatory oversight bodies in Australia is to examine RIS documents and advise agencies and decision makers (and sometimes the community) whether they meet the government's RIA requirements (chapter 3). There is a high degree of variability in the transparency of oversight body adequacy assessments. Most jurisdictions do not publish these adequacy assessments or even the criteria which the oversight body draws on for its assessments (table 7.4). However, even where adequacy assessments are published, usually the only information provided is a statement of whether the RIS associated with the regulatory proposal is adequate or not adequate — but no specific reasons or

justifications for why the RIS was assessed as not adequate or, where the RIS was assessed as adequate, whether there were any qualifications.

**Table 7.4 Transparency of individual RIS adequacy assessments**  
As at January 2012

	<i>Are there transparent adequacy criteria?</i>	<i>Who makes individual adequacy assessments?</i>	<i>Are individual adequacy assessments made public? If so, where and when?</i>
Cwlth	Yes	OBPR, Department of Finance and Deregulation	Yes. Central online public register as soon as practicable after regulatory announcement and in the OBPR annual report.
COAG	Yes	OBPR, Department of Finance and Deregulation	Yes. Central online public register as soon as practicable after regulatory announcement and in the OBPR annual report.
NSW	No	BRO, Department of Premier and Cabinet	No
Vic	No	VCEC, Department of Treasury and Finance Portfolio	Yes. On VCEC website (and agency website) when Minister releases RIS for consultation and in the VCEC annual report. Adequacy assessments of individual BIAs are not made public.
Qld <sup>a</sup>	No	Regulatory Review Branch (in consultation with the relevant Business Branch), Department of Treasury	No — but some may soon be published by QOBPR on its website subject to Cabinet approval as soon as practicable after a final assessment.
WA	Yes	RGU, Department of Treasury	Yes. On RGU website (as a Compliance Assessment Notice) and agency website at the time the decision is made public in its final form — when a Bill is introduced into Parliament or regulation is gazetted.
SA	No	Cabinet Office, Department of Premier and Cabinet	No
Tas	No	Economic Reform Unit, Department of Treasury and Finance	No
ACT	No	Regulation Policy Unit, Department of Treasury	No
NT	Yes	Regulation Impact Unit, Department of Treasury and Finance and Regulation Impact Committee	No

<sup>a</sup> Individual RIS adequacy assessments in Queensland are now undertaken by the QOBPR in the QCA.

Sources: Jurisdictional guidance material (appendix B).

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Only a minority of jurisdictions explicitly identify the adequacy criteria used by regulatory oversight bodies to assess RIS documents. These jurisdictions include the Commonwealth, COAG, Western Australia and the Northern Territory.

It is difficult for interested parties to know whether adequacy assessments made by oversight bodies are rigorous or to attach much weight to them (where they are made public) if they do not know what criteria such bodies use to make their assessments.

## **Reporting on agency compliance with RIA processes**

### *Publication of adequacy assessments*

Only four out of the ten jurisdictions publish their regulatory oversight body's adequacy assessments (Commonwealth, COAG, Western Australia and Victoria). Although following the establishment of the QOBPR within the QCA in July 2012, some final adequacy assessments in Queensland — for those RISs approved by Cabinet for public release — may in the future be publicly available on the QCA's website (QCA 2012).

For the Commonwealth, COAG and Victoria, publication of RIS adequacy is both online and in an annual report; for Western Australia, publication is online only.

The RGU does include RIA compliance information in its annual report to the Western Australian Government, but this is an internal government document and is not for public release (WA Government, sub. 24). The SBDC was critical of this lack of public transparency in compliance reporting:

Without an effective and openly transparent process of reviewing (and ultimately improving) agencies' adequacy of RIA, it is doubtful that better regulatory outcomes and more meaningfully engaged stakeholders will occur. The SBDC believes that these developments do little to improve RIA at the agency level and further shrouds the Government's decision-making processes. (sub. 25, p. 9)

VCEC releases its adequacy assessments of RIS documents ('assessment letters') on its website (but not its assessments of BIA documents because these are cabinet-in-confidence) at the time the RIS documents are released by the responsible minister for consultation. Up until recently, VCEC's assessment letters were required to be published only when it assessed that a RIS was not adequate and the minister decided to release the RIS for consultation. For adequate RISs, it was at the discretion of agencies whether the assessment letter was published or not. Two assessment letters were not published in 2010-11 and 2011-12. However, as of March 2012, the Victorian Government agreed that all VCEC assessment letters be

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published when the RIS is released, in the interests of transparency (Victorian Government 2012). VCEC also reports annually on RIS adequacy in its Annual Report. In addition, the Scrutiny of Acts and Regulations Committee (SARC) reports on compliance of the RIS process with the requirements of the *Subordinate Legislation Act 1994* (Vic).

The Victorian Government is still considering its response to VCEC's recommendations relating to BIAs, including whether BIAs (and associated VCEC assessment letters) should be published (Victorian Government 2012). Currently, VCEC reports annually on the number of specific Bills introduced into Parliament that were subject to BIAs. This list includes all Bills where a BIA was prepared (irrespective of whether the BIA was assessed as adequate/inadequate), but does not report the BIA assessment for each individual Bill.

In a similar manner to the release of the RIS, the timing of the public reporting of compliance with RIA processes is important. The sooner the release of the regulatory oversight body's adequacy assessment, at the time of (or closely following) the regulatory announcement, the greater the level of transparency about RIS quality and the more time interested parties (and the parliament) have to suggest refinements to the regulatory design that may increase benefits or reduce costs of the final regulation. In relation to final regulatory proposals, the Commonwealth and COAG currently provide the most timely release of adequacy assessments.

#### *Information reported in adequacy assessments and annual compliance reports*

The OBPR adequacy assessments for individual Commonwealth and COAG RIS documents state whether a RIS is adequate or non-compliant but they do not extend to the reasons why a RIS is assessed as not adequate or any qualifications where a RIS is assessed as adequate. Where a RIS should have been prepared for a regulatory proposal, but was not, the OBPR reports the proposal as 'non-compliant'. Compliance information is published by individual agency/ministerial council and by individual proposal in the OBPR's annual report (OBPR 2011a).

Annual compliance reports produced by the Office of Regulation Review (ORR) (OBPR's predecessor), on occasion, provided more detailed information on the reasons for non-compliant RIS assessments for individual proposals. For example, in relation to the Aviation Transport Security Amendment Bill 2006, in its 2005-06 annual report, the ORR stated:

The RIS did not provide a convincing case that increased air cargo security on international passenger aircraft provided a net benefit to the community. The RIS did not define the problem adequately, did not provide a rigorous risk analysis, and did not

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provide sufficient information on costs (including compliance costs) and benefits of the various regulatory options. (PC 2006b, p. 38)

It also appears that the depth of compliance information provided in more recent OBPR annual reports has reduced over time. For example, OBPR annual reports previously presented RIS compliance information by relative significance of regulatory proposal — this no longer occurs. In the foreword to its 2010-11 annual report, the OBPR flagged its intention to reduce even further the depth of information included in its annual reports (OBPR 2011a).

In Western Australia, the RGU's Compliance Assessment Notice (CAN) generally provides a formulaic set of words that 'the RGU advises that the RIA Guidelines have been followed, and the Government's adequacy criteria have been met'. However, in contrast to the OBPR, the RGU has, on occasion, outlined specific reservations with (consultation) RIS documents when releasing its assessments of adequacy.

Victoria is currently the leader amongst Australian jurisdictions in transparently conveying information about RIS adequacy because it is the only jurisdiction that regularly goes beyond a mere statement of adequacy. As set out in its *Commission Conventions*, VCEC uses three broad categories for final letters of advice:

- adequate (a letter with no substantive comments)
- adequate with the letter raising specific issues and/or qualifications about the adequacy of the analysis
- inadequate with the letter raising specific issues about the inadequacies of the analysis.

These categories enable VCEC to adopt an intermediate public position between the two extremes of rating a RIS as adequate or inadequate. The more detailed public commentary on the middle option (by identifying particular issues that need to be clarified) increases the pressure on agencies to respond to specific reservations VCEC has about the RIS, and thereby encourages richer consultation (VCEC 2011b).

In a similar manner to the Victorian approach, following the establishment of the QOBPR within the QCA in July 2012, Queensland is expected to provide four broad categories of formal adequacy advice in the future. Three of the categories are similar to those discussed above. The fourth category of advice will be for those circumstances where the QOBPR concludes that insufficient information has been provided in the RIS for it to form a reasoned view of adequacy (QCA 2012).

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Some international regulatory oversight bodies also raise specific issues and/or qualifications with their RIS adequacy assessments. For example, in the European Union, the Impact Assessment Board (IAB) of the European Commission (EC) issues opinions on the quality of all individual draft impact assessments prepared by Commission departments. All EC impact assessments and all IAB opinions are published once the Commission has adopted the relevant proposal (EC IAB 2012).

The United Kingdom's Regulatory Policy Committee (UK RPC) is also seeking to go further than most Australian jurisdictions in this area (box 7.5), by releasing its opinions on all impact assessments irrespective of adequacy, following final decisions by ministers. Implementing such a proposal would result in the UK RPC undertaking its assessment work in the most transparent manner possible.

In the United States, public transparency of the oversight body's initial assessment of an agency's RIS can occur prior to final rulemaking, where it has significant concerns about adequacy. The Office of Information and Regulatory Affairs (OIRA), during the course of its review of a draft regulation, may decide to send a public letter to the agency that returns the rule for reconsideration (known as a 'return letter'). This may occur if the quality of the agency's analysis is not adequate, if the regulation is not justified by the analysis, or if the rule is inconsistent with the RIA principles in the Executive Order. The return letter explains why OIRA believes that the draft rule would benefit from further consideration and review by the proponent agency (US Reginfo.gov website). Between 2007 and 2011 OIRA wrote five 'return letters' to US federal agencies.

### *Support for publication of compliance information*

A number of submissions expressed strong support for publication of the oversight body's adequacy assessment for each RIS associated with regulatory proposals (Tasmanian Parliamentary Standing Committee on Subordinate Legislation, sub. 3; Attorney-General's Department, sub. 4; Master Builders Australia, sub. 19; WA Government, sub. 24, attach. 3). The Australian Government Attorney-General's Department supported publication of adequacy assessment, with caveats:

Publication of the oversight body's assessment would be likely to foster a stronger incentive for agencies to undertake RIA of an appropriate standard. However, to avoid factual inaccuracies being published, the oversight body should consult with the agency on the terms of the assessment of inadequacy before it is published. This could reduce the need for agencies to pursue unnecessary, costly public responses to assessments of adequacy. (Attorney-General's Department, sub. 4, p. 7)

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### Box 7.5 United Kingdom Regulatory Policy Committee

The Regulatory Policy Committee (UK RPC) was established in 2009 to provide external and independent challenge to the evidence and analysis presented in Impact Assessments (IAs) supporting the development of new regulatory measures proposed by the UK Government. By the end of 2011, the UK RPC had examined in detail and issued opinions on 767 IAs.

The UK RPC's primary role is to consider for each individual IA whether the costs and benefits have been correctly identified and accurately assessed. From the beginning of 2011, each of the UK RPC's opinions has been prefaced with a Red ('not fit for purpose') or Amber or Green ('fit for purpose') rating in order to ensure its views are made clear.

If the UK RPC 'Red' flag an IA as 'not fit for purpose' it explains why and suggests how to improve the IA. These issues must be addressed before a 'fit for purpose' rating can be obtained. If the UK RPC 'Amber' flag an IA, this means it has some concerns with the quality of analysis and evidence presented and these issues should be addressed prior to the IA being finalised. On this understanding, it judges the IA to be 'fit for purpose'. If the UK RPC 'Green' flag an IA, this means it has no significant concerns with the quality of analysis and evidence presented and it judges the IA to be 'fit for purpose'.

The UK RPC reviews all IAs accompanying regulatory proposals submitted to the Reducing Regulation Committee (RRC), which is a Cabinet sub-committee established to take strategic oversight of the UK Government's regulatory framework. The RRC does not receive new regulatory proposals from departments where the UK RPC has considered the IA is 'not fit for purpose'; typically such proposals are re-submitted to the UK RPC.

At present, the UK RPC's opinions are made public only when ministers decide to proceed with a regulatory proposal with an accompanying IA that has been judged 'not fit for purpose'. The Committee has recently made a recommendation to the UK Government that *all* UK RPC opinions be made public at the same time as the IA, following final decisions by ministers.

*Source:* UK Regulatory Policy Committee (2012).

Similarly, many agency respondents to the Commission's RIA survey were supportive of publicly reporting the reasons for the oversight body's assessment of a RIS — to make the RIA process more efficient and effective. Oversight bodies were also not averse to public reporting of the reasons/qualifications for their adequacy assessments (figure 7.3).

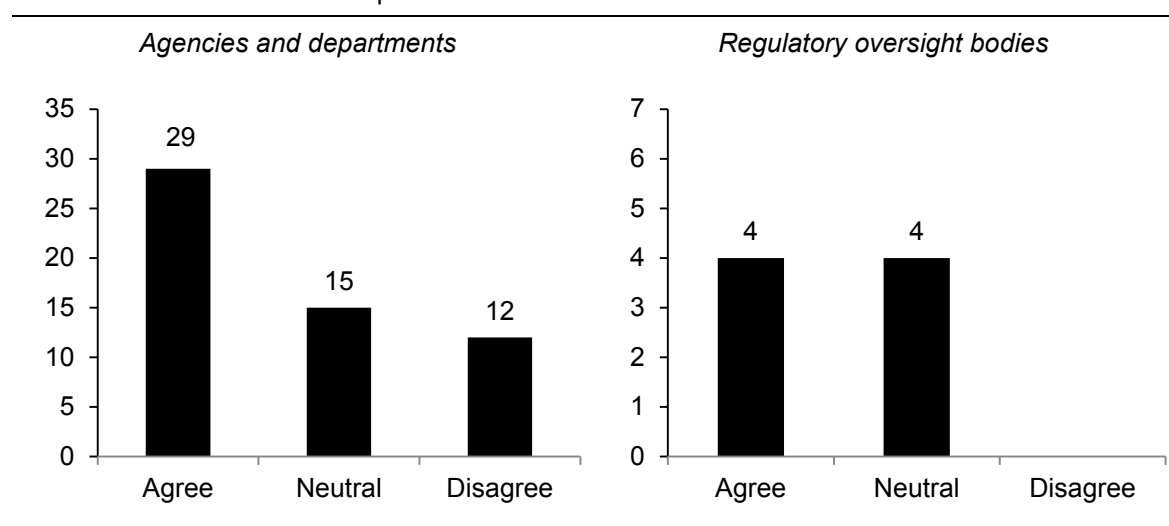
More recently, in relation to the Australian Government's RIA process, Borthwick and Milliner (2012) suggested that oversight body RIS adequacy assessments be made public:



... if OBPR judges that the RIS is inadequate or that [consultation] processes were deficient, the reasons for it judging that the RIS is non-compliant should be drawn to the attention of the decision-maker and published. (p. 63)

**Figure 7.3 Would publishing the reasons for regulatory oversight body RIS adequacy assessments improve the RIA process?**

Number of responses<sup>a</sup>



<sup>a</sup> Based on 60 survey responses by agencies and departments, of which 4 respondents chose 'do not know'. Responses to the survey of regulatory oversight bodies were received for 8 of the 10 jurisdictions. The OBPR, representing the Commonwealth and COAG jurisdictions, did not provide a response to this question. 'Agree' comprises both 'strongly agree' and 'agree'. Disagree comprises both 'strongly disagree' and 'disagree'.

Data source: PC RIA Survey (2012).

In its recent issues paper for the *Review of the NSW Government's Regulatory Impact Assessment Arrangements*, the Better Regulation Office (BRO) discussed the value of reporting on compliance:

... it is considered worthwhile to publish additional information about the Better Regulation Office's assessment of compliance with RIA requirements. It would be inexpensive to expand the information provided in the Office's Annual Update and the views of stakeholders could then be sought to judge whether publication is useful. The circumstances in which the reasons for approving non-compliant proposals might also be published would need detailed consideration. (BRO 2011, p. 34)

As the BRO highlights, the additional cost of publishing compliance information is likely to be low. This applies to most oversight bodies since they already monitor this information and some already produce annual reports that are internal to government.

With the exception of Victoria, all Australian jurisdictions appear to be falling behind leading practice overseas in the transparency and information content of their adequacy assessments. Regulatory oversight bodies in all jurisdictions should make *all* their RIS adequacy assessments publicly available at the time of the

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regulatory announcement by decision makers, or closely following such an announcement. Each adequacy assessment should provide an explanation of the reasons why the regulatory oversight body assessed the RIS as not adequate, or any qualifications where the RIS was assessed as adequate.

To enable analysis of compliance within and between agencies on a consistent basis, oversight bodies in all jurisdictions should publicly report on compliance at least annually. These reports should include overall compliance information, compliance by agency and by individual proposal (including reasons why proposals are deemed not adequate or any qualifications where proposals are deemed adequate).

Together, these transparency measures would not only make agencies more accountable for the quality of their RIS documents but it would also make oversight bodies more accountable for the quality of their adequacy assessments.

#### LEADING PRACTICE 7.3

***Measures that promote the transparency of regulatory oversight body adequacy assessments and annual compliance reporting include:***

- ***making RIS adequacy criteria explicit in jurisdictional guidance material***
- ***publishing RIS adequacy assessments at the time of the announcement of the regulatory decision, including the reasons why the RIS was assessed as not adequate, or any qualifications where the RIS was assessed as adequate***
- ***publicly reporting on RIS compliance annually, including overall compliance results for the jurisdiction, compliance by agency and by proposal.***

## 7.4 Transparency of ministers' regulatory decisions

### **Should ministers explain why proposed regulation departs from RIA requirements?**

There appears to be no obligation on ministers in any jurisdiction to explain in a transparent manner why regulatory proposals that depart from RIA requirements — that is, proposals assessed as non-compliant by the oversight body because an adequate RIS was not completed — are continuing to proceed through the regulatory process.

Victoria requires transparency of the reasons why a minister believes the oversight body has made an incorrect adequacy assessment. Specifically, the responsible

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minister needs to explain to parliament and SARC why they believe the RIA requirements have been met despite the RIS being assessed as not adequate by the oversight body:

Following VCEC's assessment of the RIS, the responsible minister must issue a certificate under section 10(4) or 12H(4) of the Subordinate Legislation Act certifying that the RIS complies with the requirements of the Act and adequately addresses the likely impacts of the statutory rule or legislative instrument. Where VCEC assessed the RIS as inadequate, the certificate should explain why the minister believes the requirements have been met, notwithstanding VCEC's assessment of inadequacy. (Victorian Department of Treasury and Finance 2011b, p. 69)

However, this situation has only occurred once in the last five years, and it is unclear in this case whether a certificate was prepared and tabled or how the Victorian Parliament responded.

An approach that potentially provides even more transparency than that of Victoria is under consideration by the New Zealand Government (box 7.6). Under the New Zealand proposal, the responsible minister would be required to explain in a statement to parliament the reasons for the non-compliance and justify why it was nevertheless decided to proceed with the regulatory proposal. The New Zealand Government is yet to make any decisions on how to proceed with this proposed legislation.

In a recent submission to the Committee of Legal Affairs of the European Parliament, the Committee on Industry, Research and Energy called for the European Commission to also adopt a similar process:

[The Committee] considers that the IAB should check all Commission IAs and issue opinions on them; considers that if the Commission, following a critical opinion from the IAB, decides not to make any changes to its proposal, a statement from the Commission explaining this decision should be published with the proposal, as should the IAB's opinion. (European Parliament 2011, p. 23)

Requiring ministers in Australian jurisdictions to transparently state whether the regulatory proposal they are introducing in parliament was assessed in accordance with RIA requirements (and if not, explaining why it is still proceeding) may be an effective means of increasing transparency and parliamentary scrutiny in the final stages of the policy development process. A number of other benefits of the approach, including the demonstration of political commitment to the RIA process, are raised in chapter 10.

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#### **Box 7.6      New Zealand revised Regulatory Standards Bill**

Several attempts have been made in New Zealand since the late 1990s to develop a 'Regulatory Responsibility Bill' or 'Regulatory Standards Bill'. Following the signing of the National Party-ACT New Zealand Confidence and Supply Agreement (New Zealand Government 2011) in December 2011, the New Zealand Treasury is currently developing a revised Regulatory Standards Bill.

The revised Regulatory Standards Bill aims to improve the quality of regulation in New Zealand by increasing the transparency of regulation making and the accountability of regulation makers. The key element is a requirement for the responsible minister to enhance disclosure in explanatory notes for Government Bills, Supplementary Order Papers and certain delegated legislation. The revised Bill requires explanatory notes to disclose:

- whether any RISs were prepared to inform the government's policy decisions that led to the proposed regulation, and, if any statements were prepared, where they may be accessed
- whether an independent assessment was made of the quality of analysis and presentation for any of these RISs and, if so, give a brief description of the assessment
- whether consultation external to government has occurred and, if so, a description of the form it took.

The rationale for enhanced disclosure in the explanatory notes is that the matters disclosed will increase the attention paid to those matters by legislative decision makers and other interested parties. In turn, this is expected to increase the likelihood that those matters will be addressed in a way consistent with the attributes of good regulation. Under the revised Bill, Ministers would be required to give more explicit consideration to the reasons for the choices made in developing the regulation, since the disclosure of certain choices would require an explanation.

*Source:* NZ Treasury, pers. comm., August and October 2012.

The requirement for, and content of, a ministerial statement could be set out in Standing Orders<sup>3</sup> (or by voluntary Cabinet agreement) rather than using legislation to require disclosure from the executive. More specifically, the minister responsible for a Bill or subordinate legislation could be required to provide a brief disclosure on:

- the function, expected effects, and need for the proposed regulation
- the public consultation that occurred on the proposed regulation
- whether a RIS was required for the proposed regulation

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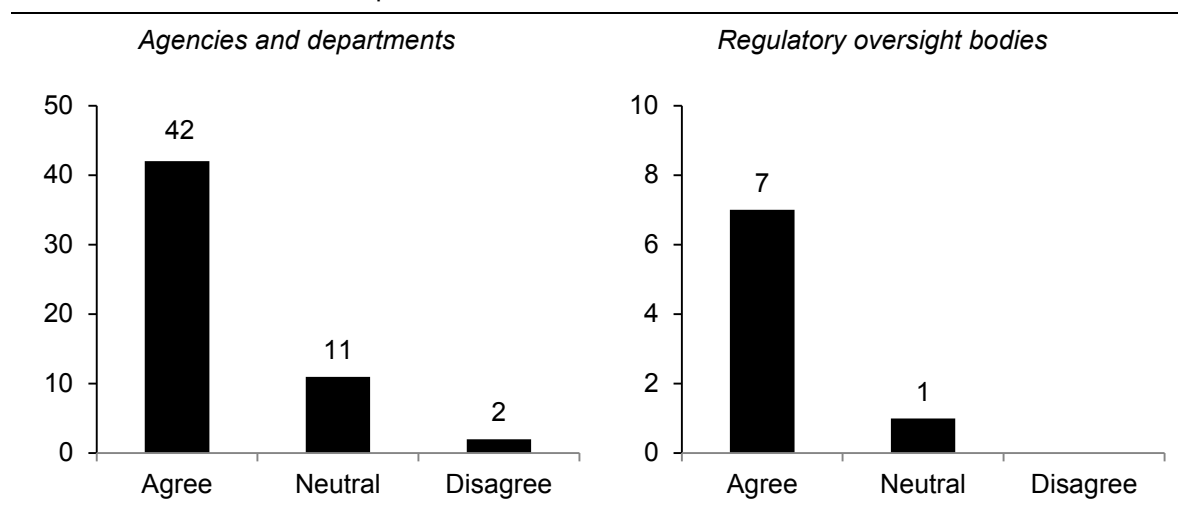
<sup>3</sup> Standing Orders are the rules of procedure for the house of parliament and its committees.

- whether the proposed regulation was assessed as compliant/ non-compliant with RIA requirements by the regulatory oversight body
- where the proposed regulation departs from RIA requirements (as identified by the regulatory oversight body), the reasons for those departures and justification for why it is proceeding.

In responding to the Commission’s RIA survey, most government agencies and oversight bodies strongly supported the responsible minister being required to provide reasons for proposing regulations that are inconsistent with RIA requirements (figure 7.4).

**Figure 7.4 Would requiring ministers to provide reasons for proposing regulations that are inconsistent with RIA principles improve the RIA process?**

Number of responses<sup>a</sup>



<sup>a</sup> Based on 60 survey responses by agencies and departments, of which 5 respondents chose ‘do not know’. Responses to the survey of regulatory oversight bodies were received for 8 of the 10 jurisdictions. The OBPR, representing the Commonwealth and COAG jurisdictions, did not provide a response to this question. ‘Agree’ comprises both ‘strongly agree’ and ‘agree’. Disagree comprises both ‘strongly disagree’ and ‘disagree’.

Data source: PC RIA Survey (2012).

When commenting on the Australian Government’s RIA process, Borthwick and Milliner (2012) also suggested that ministers needed to take more ownership of the process by publicly explaining their regulatory decisions:

... the Review is of the opinion it is highly desirable that ministers endorse the RIA process is completed and accept that on occasions they may need to fully explain the basis for their regulatory decision, whether it conforms with or is different to what was proposed in the RIS. If this seemingly low hurdle is an obstacle, it begs the question whether there is, in fact, a ‘real’ Government commitment to take ownership of RIA. (p. 50)

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... governments should be capable of explaining the reasons for their decisions and why other options were not pursued. There will hardly ever be unanimity when it comes to difficult or on balance decisions, but the RIS and any subsequent commentary should help put matters in context. (p. 58)

The importance of political commitment to the RIA process was evident from discussions with regulatory oversight bodies and government agencies. Many of those consulted perceived that government commitment was weak and this had contributed to an avoidance of ‘due process’ in certain circumstances, with adverse consequences for RIA’s overall effectiveness. Based on the evidence available of RIA’s influence on regulatory decisions and outcomes (chapter 2), this perception would appear to be well founded.

Whilst acknowledging the overriding prerogative of the parliament to shape the final form of legislation, the Australian Financial Markets Association (AFMA) also indicated that greater pre-vetting of the quality of a RIA process, via a ministerial statement to parliament, would be a good governance measure:

In the event that it is deemed appropriate to proceed with a flawed or qualified RIS, as judged by the oversight authority, the exemption should be taken by the responsible Minister in a formal and standardised process with an explanation to the Parliament accompanying the regulation on why it has been necessary to curtail the process ... This requirement would, while recognising the proper relation of Ministerial authority to the regulatory process, impose an additional self-discipline on governments and their Ministers that would raise the importance of full engagement with the RIA process for agencies. (AFMA, sub. 11, p. 3)

Australian jurisdictions could do more to extend the influence of RIA into parliaments. Setting out what RIA information needs to be disclosed and explained by ministers in a statement to parliament would raise the profile of RIA and make ministers more accountable to parliament (and the community) for the regulatory decisions taken by the government. It also means the RIS documents associated with regulatory proposals are likely to get more attention, at least in the drafting process and in scrutiny by parliament. As a further transparency mechanism, parliament scrutiny committees could report on individual ministerial compliance with the parliamentary statement obligations.<sup>4</sup>

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<sup>4</sup> For example, in the Federal Parliament the scrutiny committees could be the Senate Scrutiny of Bills Committee and the Senate Regulations and Ordinances Committee (chapter 8).

*Where a government introduces regulation which has been assessed as non-compliant with RIA requirements, transparency entails that the minister responsible provide a statement to parliament outlining the reasons for the non-compliance and why the proposed regulation is still proceeding.*

## 7.5 Conclusion

Transparency is essential to high quality regulation making, not only for agencies to make informed decisions, but also for the community to understand and participate in the regulation making process. Effective consultation processes are the first step in facilitating transparent decision making.

Consultation processes are often inadequate, with government agencies failing to use consultation as an opportunity to genuinely inform regulatory development. This chapter identifies a number of improvements that could be implemented in all jurisdictions to improve the quality of consultation, including:

- releasing a consultation RIS well in advance of the consideration by decision makers of the final RIS
- reflecting the outcomes from consultation processes in a final RIS provided to decision makers
- providing advanced notice of consultation to interested parties
- specifying minimum time periods for consultation in guidance material.

Transparency is not only required before a regulatory decision is announced (consultation) but also at the time it is announced (reporting). When regulatory decisions are announced by governments, appropriate information needs to be reported to the community.

By ensuring the release of the right information in an accessible manner, the government takes important steps towards realising the benefits of transparency in the rulemaking process. (Coglianese et al. 2009, p. 935)

Transparency of RIA processes in many jurisdictions could be improved by governments adopting the following leading practices:

- developing a central RIS register that is easily accessible by the public on the internet
- tabling final RIS documents in parliament with the enabling legislation
- removing any discretionary power to not publicly release a RIS

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- publishing RIS documents at the time of the announcement of the regulatory decision.

Transparent reporting is required not only by agencies, but also by regulatory oversight bodies. In many ways, oversight bodies are the linchpin of the RIA process. Making their decisions transparent is critical if cultural change is to occur for agencies, oversight bodies and decision makers. Stakeholders need to be informed in a timely manner about the adequacy of analysis undertaken for a government's regulatory proposals.

The transparency of regulatory oversight body assessments of RIS adequacy could be improved in many jurisdictions by implementing the following leading practices:

- making RIS adequacy criteria explicit in guidance material
- publishing RIS adequacy assessments at the time of the announcement of the regulatory decision
- by including within the published adequacy assessment the reasons why the regulatory oversight body assessed the RIS as not adequate, or any qualifications where the RIS was assessed as adequate.

Having RIA processes in place that are focused predominantly on the executive branch of government does not achieve all the potential benefits of such processes. Parliaments need to become more engaged. Parliamentarians should be told explicitly whether regulatory decisions are consistent with RIA requirements when legislation is introduced into parliament. Where regulation has been assessed as non-compliant with RIA requirements, the minister responsible should provide a statement to parliament outlining the reasons for the non-compliance and justifying why the proposed regulation is still proceeding.

RIS documents should not be delivered to the door of executive government to inform decisions and then disappear. RIA processes are less about giving a single answer, and more about framing problems, scoping solutions and uncovering unintended consequences of proposed regulatory measures. A RIS should not fade from the scene once a regulatory decision enters parliament, but should remain an important reference point in political negotiations in the parliament before final decisions are taken. In short, RIA processes should not only better inform executive government decisions; they should also better inform the decisions of Australian parliaments.



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## 8 Accountability and quality control

### Key points

- Accountability mechanisms in regulatory impact analysis (RIA) processes for government agencies, regulatory oversight bodies and governments do not appear to be functioning effectively or, in some cases, they do not exist.
- Accountability requires effective consequences or sanctions. The sanctions for government agencies of not complying with RIA processes are non-existent, weak or ineffective:
  - where post implementation reviews (PIRs) exist in the Commonwealth and Queensland, in their current design they are a weak sanction for RIA non-compliance
  - where parliamentary scrutiny committees are tasked with ensuring RIA requirements for subordinate legislation have been met, they appear to be unsuccessful in changing regulation.
- Accountability for RIA processes would be improved if Cabinet offices were focused on the provision of RIA information to Cabinets irrespective of whether RIA requirements have been met for regulatory proposals, as in Victoria, Queensland, Tasmania and the ACT.
- Implementation of PIRs as a more powerful sanction would encourage agencies to comply with RIA processes. This could be achieved by removing the responsibility (but not the financial obligation) for undertaking the PIR from the agency and placing it with an independent third party.
- Concerns have been raised that at times oversight bodies have made incorrect adequacy assessments. Regulatory oversight bodies should be made more accountable for their regulation impact statement (RIS) and PIR adequacy assessments. While the publication of oversight body adequacy assessments (and their reasons/qualifications) would help, greater accountability is required.
  - A valuable accountability mechanism for regulatory oversight bodies is the periodic evaluation of their performance by an independent third party such as an audit office, as has been recommended by the OECD.
- Regulatory oversight bodies that are more independent are likely to operate with greater objectivity and transparency in implementing RIA requirements. If oversight bodies continue to report to executive government, ideally they should be located within an independent statutory agency. Where they continue to be located in a central department their autonomy should be strengthened.
- To increase the accountability of government in the medium term, consideration should be given to making regulatory oversight bodies report directly to parliament rather than to the executive branch of government.

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## 8.1 What is accountability?

Accountability is the obligation to inform, explain and justify conduct and to face consequences associated with that conduct. Accountability is very important to developing an effective RIA process. All parties involved in the process need to be held accountable for their respective roles. That is:

- government agencies should be held accountable for the quality of their policy development processes and the RIS documents they produce
- regulatory oversight bodies should be held accountable for the quality of the RIS adequacy assessments they deliver and the other functions they perform
- government ministers should be held accountable for the quality of the regulatory decisions they make.

There are three main reasons for requiring accountability in government: to provide communities with the means to monitor and control government conduct and policy development; to prevent the development of concentrations of power and influence; and, importantly for the RIA process, to enhance the learning capacity and effectiveness of public administration (Aucoin and Heintzman 2000).

While elections are a key accountability mechanism in representative democracies and should not be underestimated, only a small minority of voters base their decisions on carefully informed judgements about either the future or the past performance of governments and politicians (Mulgan 2003). Hence, elections on their own are generally not sufficient to meet the needs of public accountability. They need to be supported by other ‘checks and balances’ or more direct accountability measures capable of extracting reliable government information and separately identifying individual policy issues and decisions. For example, public institutions, such as the Australian National Audit Office (ANAO), act as a complement to the scrutiny of government behaviour by voters and parliaments.

Such accountability measures can also stimulate public sector agencies to focus consistently on achieving desirable social outcomes and delivering on their obligations and responsibilities:

The possibility of sanctions ... motivates them to search for more intelligent ways of organizing their business. Moreover, the public nature of the accountability process teaches others in similar positions what is expected of them, what works, and what doesn't. Public performance reviews, for example, can induce many more administrators than those under scrutiny to rethink and adjust their policies. Accountability mechanisms might induce openness and reflexivity in political and administrative systems that might otherwise be primarily inward-looking. (Bovens et al. 2008, p. 232)

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The processes put in place to hold governments and officials accountable are not without their shortcomings. The recent Hawke Review of the ACT Public Sector noted the following drawbacks with accountability processes:

... cost and complexity, reduced incentives and scope for independent action or innovation in response to new challenges, creation of delays to decision making, and the fact that while greater transparency can help to prevent foreseeable and preventable errors ... it can also encourage risk avoidance and conservative decision making. (ACT Government 2011, p. 225)

The challenge for governments is to develop a system of holding government agencies, regulatory oversight bodies and ministers accountable for their performance in RIA processes that meets the needs of the community to scrutinise government action in a cost effective manner, but which also encourages innovation and improvements to policy design, implementation and review. A balance needs to be struck between external accountability and trust in voluntary compliance when designing accountability mechanisms. In situations where weak, ineffective (or no) accountability mechanisms exist, the RIA process must rely heavily (or solely) on individuals being motivated to ‘do the right thing’.

## **8.2 Are government agencies accountable for the quality of their regulatory impact analysis?**

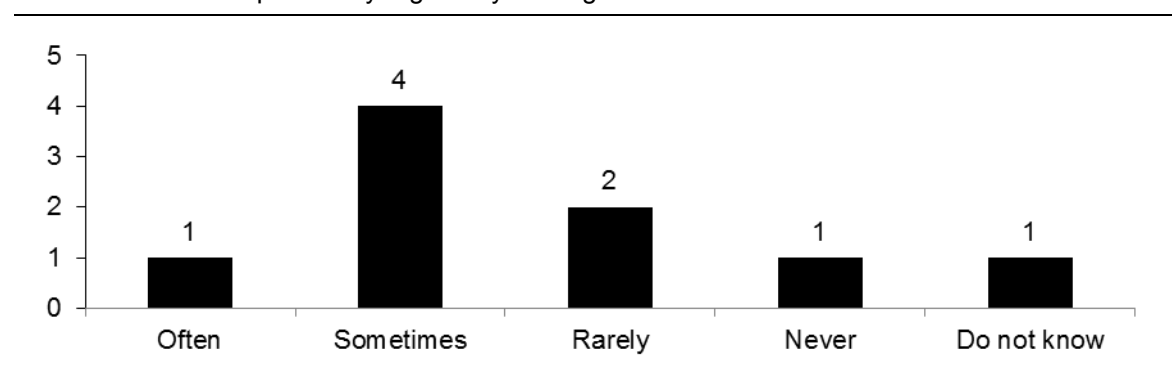
Regulatory oversight bodies have a variety of functions, but perhaps their most important function is challenging the quality of RIS documents put forward by government agencies in their respective jurisdictions (chapter 3). These scrutinising functions of seeking information, explanation and justification when assessing RIS adequacy, help to make agencies accountable — but only where the regulatory oversight body actually publishes its adequacy assessments of individual proposals and/or annual compliance reports.

However, as discussed in section 8.1, accountability implies more than the pursuit of transparency. Government agencies must not only be ‘called’ to account; they must also be ‘held’ to account. Accountability is incomplete without effective consequences or sanctions. And they are necessary; according to survey responses from regulatory oversight bodies, in the majority of jurisdictions some regulatory proposals are not meeting RIA requirements and are still proceeding to decision makers (figure 8.1). This has led to calls for increased sanctions for non-compliance with RIA processes from some interested stakeholders (Plastics and Chemicals Industries Association, sub. 8; and Small Business Development Corporation, sub. 25). Where decision makers then introduce regulation that is inconsistent with

their own government's RIA requirements, they (either directly or through their portfolio agencies) should be held accountable.

As discussed in chapter 3, some jurisdictions make ministers or senior public servants personally responsible for the quality of RIS documents in their agencies. The OECD was supportive of this approach in its recent review of regulatory reform in Australia (OECD 2010b). The underlying motivation for this accountability mechanism is that if the minister/public servant is personally responsible, they would ensure the quality of a RIS before it is assessed by the oversight body. On its own, this mechanism is likely to be little more than a bureaucratic red tape exercise. However, as part of a suite of transparency and accountability measures, it may have some value.

**Figure 8.1 How often do non-compliant regulatory proposals proceed to decision makers?**  
Responses by regulatory oversight bodies<sup>a</sup>



<sup>a</sup> Responses were received from 9 regulatory oversight bodies. One oversight body (NSW Better Regulation Office) did not respond to this question.

*Data source:* PC RIA Survey (2012).

## **What are the consequences for agencies of non-compliance with RIA processes?**

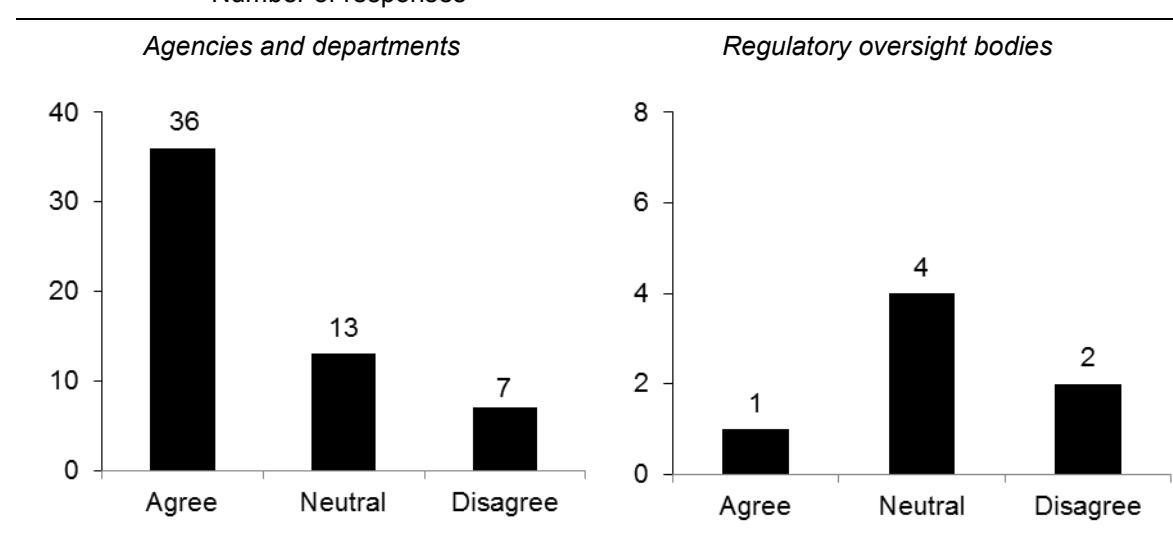
Current consequences or sanctions for non-compliance with RIA processes are weak, ineffective or non-existent in Australia. Only four jurisdictions publish their regulatory oversight body's RIS adequacy assessments — Commonwealth, COAG, Victoria and Western Australia — although Queensland is expected to do so in the future (at least for some regulatory proposals) following the establishment of the Queensland Office of Best Practice Regulation (QOBPR) in July 2012 (section 7.3). Hence, most government agencies in Australia are not 'called' to account for RIA non-compliance — nor do many jurisdictions 'hold' their agencies to account for non-compliance.

Table 8.1 shows the jurisdictions that have some consequences or sanctions for non-compliance with RIA processes — the Commonwealth, New South Wales, Victoria (partial), Queensland (partial), South Australia and Tasmania (partial). Where there are sanctions, they mostly relate to RIA processes associated with subordinate legislation rather than primary legislation (Bills of Parliament) — a curious focus, given primary legislation is generally perceived to have more significant impacts on consumers, business and the community. This focus for sanctions possibly reflects the history of the development of RIA processes in many jurisdictions, where they were initially implemented for subordinate legislation. The Commission was advised in several jurisdictions that the scrutiny process associated with primary legislation was considered (at the time) to be more open and rigorous (than that of subordinate legislation) and therefore did not need sanction mechanisms for non-compliance with these RIA processes.

But irrespective of the type of legislative instrument that the sanctions for non-compliance currently apply to, some sanctions can be bypassed and others appear to be rarely used in practice. Nevertheless, agency respondents to the Commission's RIA survey indicated that the current sanctions for non-compliance with RIA requirements are strong enough to encourage compliance. Oversight bodies were less supportive of this view (figure 8.2).

**Figure 8.2 Are sanctions for non-compliance with RIA requirements strong enough to encourage compliance?**

Number of responses<sup>a</sup>



<sup>a</sup> Based on 60 survey responses by agencies and departments, including 4 respondents who chose 'do not know'. Responses to the survey of regulatory oversight bodies were received for 7 of the 10 jurisdictions. The OBPR, representing the Commonwealth and COAG jurisdictions, and VCEC (Victoria) did not provide responses to this question. 'Agree' comprises both 'strongly agree' and 'agree'. Disagree comprises both 'strongly disagree' and 'disagree'.

Data source: PC RIA Survey (2012).

**Table 8.1 How do jurisdictions hold their agencies to account for non-compliance with RIA processes?**

As at January 2012

<i>Sanctions (or lack of) for non-compliance</i>	
Cwth	The Cabinet Secretariat will not circulate final Cabinet submissions without adequate RISs unless the Prime Minister has deemed that exceptional circumstances apply. However, where a proposal proceeds (either through Cabinet or another decision maker) without an adequate RIS, the resulting regulation must be the subject of a post implementation review.
COAG	<b>No sanctions.</b>
NSW	Where regulations have not conformed with the processes for regulation making specified in the Subordinate Legislation Act (including RIS process), the Legislation Review Committee may make recommendations to Parliament, including disallowance of the regulation — but power to recommend disallowance is rarely used in practice. For regulatory proposals that require a BRS, the Better Regulation Office provides advice to the Premier on Cabinet and Executive Council Minutes after submission to the Cabinet Secretariat and prior to approval. Unless the Premier approves otherwise, a Minute is not listed for consideration until issues raised by the Better Regulation Office have been addressed.
Vic	Where regulations have not conformed with the processes for regulation making specified in the Subordinate Legislation Act (including RIS process), the Scrutiny of Acts and Regulations Committee may make recommendations to Parliament, including the disallowance of the regulation — but power to recommend disallowance is rarely used in practice. <b>No sanctions</b> for regulatory proposals that require a BIA, where the Victorian Competition and Efficiency Commission is not satisfied with the adequacy of the BIA, the responsible minister can still submit the proposal to Cabinet.
Qld	If a proposal with likely significant impacts progresses to the decision maker <i>without a RAS</i> and is subsequently implemented then a post implementation review is required. There are <b>no sanctions</b> for preventing proposals <i>with a RAS that is not adequate</i> from progressing to the decision maker and there is no requirement to undertake a PIR.
WA	For proposals seeking Cabinet consideration there are <b>no sanctions</b> on agencies where a proposal proceeds to Cabinet without an adequate RIS.
SA	Where an agency does not get Cabinet Office's sign-off on a RIS, but seeks and obtains the approval of Cabinet for their proposal, the Office of the Economic Development Board will assess any business costs imposed by the submission as an increase in costs under the agency's red tape reduction assessment, requiring the agency to find offsetting savings to meet its red tape reduction target (unless Cabinet makes an explicit decision to the contrary).
Tas	If the Economic Reform Unit considers that a RIS does not meet the requirements of the Legislation Review Program or Subordinate Legislation Act there are <b>no sanctions</b> — the agency can still release its RIS for public consultation. In relation to subordinate legislation, the Secretary will not issue a certificate, which allows the regulations to be made by the Governor, until such time as the Secretary is satisfied that the RIS requirements have been complied with — in practice a certificate has never been withheld.
ACT	<b>No sanctions.</b> Failure to comply with the Legislation Act RIS requirements for subordinate law or a disallowable instrument does not affect the law's validity or create rights or impose legally enforceable obligations on the Territory, a minister or anyone else. For regulatory proposals seeking Cabinet consideration there are <b>no sanctions</b> on agencies where a proposal proceeds to Cabinet without an adequate RIS.
NT	<b>No sanctions.</b> The Cabinet Office will not proceed with regulatory proposals in the absence of certification from the Regulatory Impact Committee. However, with the Chief Minister's approval a regulatory proposal can still proceed to Cabinet or Executive Council in the absence of RIS certification or with certification indicating that the regulation does not comply with regulation-making principles.

Sources: Jurisdictional guidance material (appendix B) and sub. DR30.

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### *How effective are Cabinet offices where they act as RIA gatekeepers?*

Cabinet offices in five jurisdictions have a gatekeeping role as part of the RIA process — Commonwealth, New South Wales, Western Australia, South Australia and the Northern Territory (chapter 3).

For example, under the Northern Territory RIA process, the Regulation Impact Committee (RIC) assesses the adequacy of a RIS against formal best practice regulation principles, and advises Cabinet through the issuing of relevant certificates. The Northern Territory Cabinet Office will not proceed with regulatory proposals in the absence of certification from the RIC, but it does not have a ‘veto power’. With the Chief Minister’s approval a regulatory proposal can still proceed to Cabinet or Executive Council in the absence of RIS certification or with certification indicating that the proposal does not comply with regulation making principles (NT Department of Treasury and Finance, sub. DR30).

Where a regulatory proposal proceeds to the Cabinet without an adequate RIS, the Northern Territory Cabinet may provide approval subject to completion of a RIS — either before or after the introduction of the regulation (Northern Territory Government, pers. comm., 4 April 2012).

In the Australian Government RIA process the Cabinet Secretariat is tasked to serve as the RIA ‘gatekeeper’:

The Cabinet Secretariat provides a gate-keeping role to ensure that regulatory proposals coming to the Cabinet and sub-committees of Cabinet meet the RIS requirements. The Cabinet Secretariat will not circulate final Cabinet Submissions or memoranda, or other Cabinet Papers, without adequate RISs unless the Prime Minister has deemed that exceptional circumstances apply. (Australian Government 2010a, p. 19)

This RIA gatekeeping role was one of a number of regulatory reforms introduced by the Australian Government in 2006 following recommendations made by the Regulation Taskforce. The Taskforce had high expectations that this proposed reform would improve compliance with the requirements:

In the Taskforce’s view, the single most important way of strengthening compliance with the principles of good process would be for the government to adhere to a rule that regulatory proposals that fail to meet the RIS requirements will not be permitted to proceed for consideration by Cabinet or other decision-maker, except in specially defined circumstances. (Regulation Taskforce 2006, p. 156)

If this RIA gatekeeping role worked as intended, then the OBPR — through the Cabinet Secretariat — would have an indirect veto power over proposals without an adequate RIS attached to the relevant cabinet submission (or decision document). In other words, where the OBPR found that a regulatory proposal did not meet the RIA

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requirements then Cabinet Secretariat would stop the proposal from proceeding to the decision maker.

However, in practice the Cabinet Secretariat has not stopped all proposals that do not meet RIA requirements from proceeding to Cabinet. Cases can be found of proposals not meeting RIA requirements, as assessed and reported by the OBPR (OBPR 2011a), that have still proceeded to Cabinet (or other decision makers) without a Prime Minister's exemption. There is no public record identifying how each non-compliant submission has proceeded for decision but there is evidence that such a practice is occurring. For example, the Commission was informed that five Future of Financial Advice reforms were not assessed as adequate by the OBPR but nevertheless proceeded to Cabinet in 2010-11.

For Better Regulation Statements in New South Wales, the Cabinet Secretariat has a RIA 'gatekeeping role' for regulatory proposals intended for Cabinet. However, this role can be overridden at the behest of the Premier (table 8.1). The Cabinet Services Branch in Western Australia also has a RIA gatekeeping role since it 'may' return the Cabinet submission to the responsible Minister if the RIA requirements have not been satisfied (WA Treasury 2010a). It is unclear the extent to which this practice occurs in Western Australia. South Australia's Cabinet Office also can prevent proposals that do not meet RIA requirements from proceeding, unless the Cabinet Office assessment is overridden on appeal to the Minister for Industry and Trade from the proponent Minister (SA Department of the Premier and Cabinet and Department of Treasury and Finance 2011). However, the South Australian RIA gatekeeping process is relatively new and there have not yet been any appeals of Cabinet Office decisions (SA Cabinet Office, pers. comm., 1 August 2012).

In consultations with the Commission, some jurisdictions indicated that RIA gatekeeping has been circumvented where Cabinet offices have been unable to 'pull' submissions that do not have adequate RIS documents attached, or where Ministers have 'walked in' submissions directly to Cabinet, without formally lodging them with the Cabinet office. Given these circumstances, calling some Cabinet offices in Australia RIA 'gatekeepers' seems somewhat of a misnomer — it is difficult to envisage how Cabinet offices would (ever) be able to fulfil a genuine RIA gatekeeper role.

While there may be a perception of a power of veto, in reality no Cabinet office has the power to consistently prevent proposals that do not meet RIA requirements from proceeding to decision makers. Where Cabinet offices notionally have a RIA 'gatekeeping' role, they are creating a perception of rigour and stringency in RIA processes which does not necessarily exist in practice. This breeds cynicism



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amongst stakeholders about the integrity of RIA processes and over time weakens engagement with the process by agencies, oversight bodies and governments.

This lack of a veto power accords with leading international RIA processes, in that unelected officials generally do not have the power to block regulatory proposals from proceeding (box 8.1). According to a recent OECD working paper on public sector governance:

... most long-lasting oversight bodies have avoided trying to control the flow of information to the Cabinet and, thus, appearing to exert a real ‘veto’. Such power would be beyond oversight and transform the body into the final substantive regulator, with the risk of significant backlash. (Cordova-Novion and Jacobzone 2011, p. 31)

**Box 8.1      Veto powers are not prevalent in leading international RIA processes**

The United Kingdom’s Regulatory Policy Committee (UK RPC) provides independent advice on the quality of evidence and analysis supporting the regulatory proposal but does not have the power to block or approve a regulatory proposal. The Cabinet sub-Committee on Reducing Regulation vets all proposals from government departments and makes a final decision, having seen the UK RPC’s advice.

The European Union’s Impact Assessment Board (IAB) examines and issues non-binding opinions on the quality of individual draft impact assessments prepared by European Commission departments. The opinion accompanies the draft initiative together with the impact assessment report throughout the Commission’s political decision making process. The Commission’s impact assessment is an aid — not a substitute — for political judgement. Ultimately, it is the Commission which decides whether or not to adopt an initiative, taking into account the impact assessment provided by the relevant Commission department and the Board’s issued opinion.

In the United States, the Office of Information and Regulatory Affairs (OIRA) reviews draft proposed and final regulations under Executive Order 12866. The OIRA review process seeks to ensure that agencies comply with the regulatory principles stated in the Executive Order. The OIRA either offers suggestions for improving the regulatory proposal or accepts the proposal as is — but even here there is no veto power. As discussed in chapter 7, OIRA has sought to inhibit the adoption of poorly justified policies using ‘return letters’ to federal agencies. But under the Executive Order, the agency can appeal to a more senior administration official (the President’s Chief of Staff).

*Sources:* UK RPC (2012); EC IAB (2012); US Reginfo.gov website.

The RIA process should be an aid to, not a substitute for, the political judgement of what is in the community’s interest. But where governments make regulatory decisions that are inconsistent with their own RIA principles, these decisions should

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be made transparent to the community so governments can be held accountable (chapter 7).

A number of submissions supported this view (Australian Government Attorney-General's Department, sub. 4; Australian Financial Markets Association (AFMA), sub. 11; Officers undertaking RIA in the Victorian transport portfolio, sub. 17). For example, Officers undertaking RIA in the Victorian transport portfolio commented:

Australia has a democratic system of government and those appointed by the people must have the capacity to make judgements about what should be done irrespective of whether these judgements are informed by [adequate] RIA or otherwise. The critical issue is transparency. The question is whether an option for change being proposed is based on a thorough examination of the problem and options or is it being proposed because the popular view is that the option will provide a solution. (sub. 17, p. 13)

If there was greater transparency in jurisdictional RIA processes — via the publishing of RIS documents and oversight body adequacy assessments in a timely manner (as suggested in section 7.3) — then the success of the RIA gatekeeper role becomes less important. Timely publication can be a powerful incentive for governments to undertake robust regulatory impact analysis. Cabinet offices can facilitate the provision of RIA information to Cabinets irrespective of whether RIA requirements have been met for regulatory proposals — as currently occurs in Victoria, Queensland, Tasmania and the ACT.

Borthwick and Milliner (2012), when reviewing the Australian Government's RIA process, came to the view that the RIA gatekeeper role was unhelpful and unnecessary and that the OBPR should simply become a 'watch-dog' rather than being party to a 'gatekeeping' process:

In the Review's opinion, it is not a proper role for OBPR to in effect — through the Cabinet Secretariat — prevent a submission going forward. Rather, their role should be to inform Cabinet (or other decision makers) and the public of their assessment of the veracity of the RIA Process. In this way, the integrity of the process can be better guarded with the OBPR in effect being able to act as a counterbalance when the occasion demands it. (p. 67)

In the absence of the ability for Cabinet offices to have a genuine RIA gatekeeper role, where proposals that do not meet RIA requirements continue to go to decision makers, the public scrutiny that results from a more transparent and timely RIA process should help ensure that such proposals are the exception rather than the rule. In these circumstances, it would be clear that the oversight body role is purely advisory (that is, part of an oversighting process) and that only Cabinet (or other decision makers) has the power to block proposals from proceeding further in the regulatory process.

***The accountability of RIA processes is enhanced where, irrespective of whether RIA requirements have been met, Cabinet offices facilitate the provision of the following RIA information to Cabinets:***

- ***the RIS for the regulatory proposal (where one was required and was submitted by the agency)***
- ***the regulatory oversight body's adequacy assessment of the submitted RIS (or its advice that the RIS was not completed).***

*How often do scrutiny committees recommend disallowance?*

Scrutiny committees of parliament exist in all Australian jurisdictions (except COAG) and examine proposed primary legislation and/or regulations made by the executive branch of government (chapter 3). As part of their role, scrutiny committees in five jurisdictions can examine whether regulations that have recently been made comply with RIA requirements — New South Wales, Victoria, Queensland, Tasmania and the ACT. This assessment by parliamentary scrutiny committees typically occurs very late in the process and follows the adequacy assessment of the RIS by the oversight body (where this is formally undertaken).

In Victoria, after statutory rules or subordinate legislative instruments are made, the Scrutiny of Acts and Regulations Committee (SARC) must be supplied with copies of the RIS, the Victorian Competition and Efficiency Commission's (VCEC's) assessment letter for the RIS, the regulations, all public comments received during the consultation period, and the relevant agency's response to the main issues raised in the public comments. The *Subordinate Legislation Act 1994* (Vic) provides that, if the SARC believes that RIA processes have not been met, it may make recommendations to Parliament, including the disallowance or suspension of the regulation. As a regulation has already commenced operation by the time it comes before the SARC, the power to recommend disallowance is only used in exceptional circumstances (SARC 2011).

In practice, the SARC has indicated that, where it is considered that a regulation can be rectified by amendment, it will usually approach the Minister privately to seek amendment rather than report to Parliament. The last information paper (which is not a formal report to Parliament) to Members of Parliament and to the public from the SARC on a RIA issue was in 1996 — in relation to Fisheries (Abalone) Regulations. While the SARC did not move a motion of disallowance in that case, it was critical of some aspects of the RIS analysis (SARC 1996).

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Box 8.2 provides some further examples of how the SARC has carried out its RIA scrutiny role and the outcomes that resulted from its interventions. Despite its efforts in identifying and exposing problems with RIA compliance, the SARC has had little impact on the form of the final regulations.

In a similar fashion to the Victorian Parliament's SARC, the New South Wales Legislation Review Committee examines and reports on compliance with *Subordinate Legislation Act 1989* (NSW) requirements. As in Victoria, the power to recommend disallowance is rarely used in practice in New South Wales:

The Committee is constrained in its ability to consider regulatory impacts due to its size and expertise and does not assess compliance with ... RIS requirements in any detail. The Committee provides advice to Parliament on these matters infrequently and Parliament has not disallowed a Regulation on these grounds in recent years. (Better Regulation Office (BRO) 2011, p. 33)

In Tasmania, the *Subordinate Legislation Act 1992* (Tas) requires that where a RIS is required for new regulation, a copy is sent to the Subordinate Legislation Committee. However, the Subordinate Legislation Committee indicated that it 'is not able to assess whether agencies meet all the [RIA] requirements under the template' (sub. 3, p. 4). The Committee usually accepts the view of the Tasmanian oversight body (Economic Reform Unit) in relation to RIS adequacy unless particular issues have arisen through the public consultation process. In any event, the Committee has not recommended disallowance for a failure to comply with RIA requirements, at least since 2007 (Subordinate Legislation Committee, pers. comm., 21 May 2012).

In Queensland, the former Scrutiny of Legislation Committee appears to have never recommended disallowance where there were RIS compliance issues or where it considered that a RIS should have been prepared for a regulation (but was not). However, the Committee regularly commented in its annual reports on the small number of RISs prepared in Queensland and the narrow interpretation of the threshold requirement for conducting a RIS. In addition, the Committee completed a number of individual reports on subordinate legislation where compliance with RIS requirements had been raised by other parliamentarians (not members of the Committee). As outlined in chapter 3, the Committee ceased on 30 June 2011, as part of reforms to Queensland's Parliamentary committee system.

It appears that where parliamentary scrutiny committees have been tasked with ensuring RIA requirements for legislation have been met, they may play a useful information role in identifying and exposing RIA problems, but are largely unsuccessful in changing regulation.

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**Box 8.2      Victoria's Scrutiny of Acts and Regulations Committee:  
Case Studies**

*Country Fire Authority Regulations 2004*

The Regulation Review Subcommittee (which is a subcommittee of the SARC) were critical that the RIS failed to address alternatives and wrote to the Minister for Police and Emergency Services seeking rectification. The Minister agreed to prepare a further document to be incorporated in the RIS which considered alternatives. Following receipt of this document the Subcommittee approved the regulations.

*Firearms (Search Powers) Regulations 2003*

The Regulation Review Subcommittee voiced concerns that the RIS contained no cost-benefit analysis and no statement of alternative means of achieving the objectives of the regulations and wrote to the Minister for Police and Emergency Services seeking rectification. The Minister advised that because the objectives of the regulation and the manner in which they were to be achieved had already been determined by Parliament through primary legislation it was not considered appropriate to perform a cost-benefit analysis or examine alternatives in the RIS. The Subcommittee was satisfied with the Minister's response.

*Water (Groundwater) Regulations 2002*

The RIS did not contain any discussion of regulatory or non-regulatory options for achieving the objectives. The Regulation Review Subcommittee wrote to the Minister indicating its concerns and highlighting examples of possible alternatives which could have been considered. It also sought advice as to whether there had been any consultation with the Victorian Farmers Federation.

The Minister indicated that the Subcommittee's comments concerning the discussion of regulatory and non-regulatory alternatives had been noted. The Minister also confirmed that consultation had taken place with the Victorian Farmers Federation and that it had agreed that the impacts of the regulations on farmers were minimal. The Subcommittee was satisfied with the Minister's response.

*Minerals Resource Development Regulations 2002*

The Regulation Review Subcommittee found the RIS which accompanied these regulations was unnecessarily complex and confusing, making it difficult to understand the changes introduced and the impact of those changes. The Subcommittee wrote to the Minister highlighting its concerns.

The Minister indicated that all issues raised by the Subcommittee had been drawn to the attention of appropriate officers within the Department and assured the Subcommittee that future RISs prepared by his Department would be clear and easy to understand so that members of the public can 'understand and comment on regulatory proposals'. The Subcommittee was satisfied with the Minister's response.

*Sources:* SARC (2003, 2004, 2005).

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## **Effectiveness of post implementation reviews as a consequence for non-compliance**

A number of jurisdictions have a further consequence in place, in the form of a post implementation review (PIR) in the case of the Commonwealth, Queensland and Western Australia and a 'late' RIS, in the case of COAG, New South Wales, Victoria and South Australia. The circumstances for triggering PIRs/late RISs differ between jurisdictions and are discussed in chapter 9.

An Australian Government PIR is a consequence of not completing an adequate RIS irrespective of whether a proposal is non-compliant or compliant (that is, where a Prime Minister's exemption is granted) with the Australian Government's best practice regulation framework. Similarly, Queensland PIRs relate to both non-compliant (no regulatory assessment statement (RAS)) and compliant proposals (where a Treasurer's exemption was granted) (Queensland Treasury 2010). However, there is no requirement that a PIR be conducted where a RAS is assessed as not adequate (another type of non-compliant proposal). PIRs in Western Australia are required for Treasurer's Exemptions (chapter 9), but not for those proposals that do not comply with RIA requirements (WA Treasury 2010a).

For COAG, a late RIS may occur in emergency situations where there is no time to prepare a RIS before the regulation comes into effect. The Chair of the Ministerial Council must write to the Prime Minister to obtain agreement to waive the need for a RIS before making the regulation. In Victoria, a late RIS is required for Premier's exemptions in relation to subordinate legislation. However, a late business impact assessment (BIA) is not required for a Premier's exemption in relation to primary legislation (Victorian Department of Treasury and Finance 2011a, 2011b). In South Australia, the requirement to prepare a RIS in advance of Cabinet approval may be waived for proposals which require urgent implementation. In these cases a late RIS is prepared:

... agencies must prepare a RIS within 12 months of making the regulation and Cabinet should be asked to formally note the emergency nature of the proposal and the timeframe for the preparation of a RIS. (SA Department of the Premier and Cabinet and Department of Treasury and Finance 2011, p. 7)

New Zealand also has a PIR in its RIA process for non-compliant proposals. If a regulatory proposal with significant impacts does not meet RIA requirements but is ultimately agreed to by Cabinet, then it will be subject to a PIR. The nature and timing of this review are agreed by the lead agency in consultation with Treasury and signed off by the responsible minister, in consultation with the Minister of Finance and the Minister for Regulatory Reform (NZ Treasury 2009).

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*Do PIRs encourage compliance with the RIA process?*

When PIRs were introduced by the Australian Government in 2006 it was anticipated that there would be few required (PC 2006). However, the number of non-compliant regulations has increased since the introduction of the PIR from 4 in 2007-08, peaking at 16 in 2010-11, before edging down to 9 in 2011-12 (chapter 9). This calls into question the usefulness of PIRs, in their current format, as a consequence of non-compliance with RIA processes.

The Australian Government Attorney General's Department is of the view that the consequences for non-compliance in the Australian Government are appropriate for those agencies that are supportive of the RIA process:

The potential to undertake a post implementation review is undesirable and the potential to be 'named and shamed' on the OBPR [Office of Best Practice Regulation] website is effective where the agency is one that appropriately embraces the RIA process. (sub. 4, p. 6)

But given the growth of PIRs required for non-compliant regulatory proposals since 2007-08, and the significance of the issues to which they relate, it appears that the consequences for Australian Government agencies of not following RIA processes — that is, undertaking a PIR and being publicly reported as non-compliant by the OBPR — have not been a sufficient incentive to encourage full compliance with the RIA process.

Moreover, the consequences of non-compliance for an agency do not escalate but rather taper off as the agency continues to disregard the best practice regulation requirements for a proposal. Specifically, if an agency fails to complete an adequate RIS then the agency must undertake a PIR and its regulatory proposal will also be publicly reported by the OBPR as non-compliant with the RIA process. Subsequently, if the agency fails to complete an adequate PIR, its regulation will only be publicly reported by the OBPR as non-compliant with the PIR process — there is no further consequence. This could have the perverse effect of encouraging agencies to increase their level of non-compliance with the requirements.

In the case of Queensland there is no public reporting of non-compliance with PIR requirements.<sup>1</sup> In contrast, in Western Australia the RIA guidelines suggest that there will be public reporting (WA Treasury 2010a) — although this is yet to be implemented (WA Treasury, sub. DR37).

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<sup>1</sup> The newly created QOBPR is expected to report annually on RIS and PIR compliance.

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To realign incentives for agencies so that they are encouraged to comply with the RIA process, the PIR needs to be implemented in all jurisdictions and become a more powerful sanction for non-compliance.

Where a regulatory proposal is non-compliant with the RIA process, in all jurisdictions a PIR should commence within two years of the regulation coming into effect and be of a similar level of rigour as a RIS. The PIR should be undertaken by an independent third party using a public consultation process, because it may be difficult for an agency that has been implementing a particular regulatory option to provide a ‘neutral’ assessment of the regulation one to two years later in a PIR. As an additional incentive to adhere to RIA requirements, the PIR should also be required to be paid for by the agency responsible for the non-compliant regulation.

To increase the accountability of the PIR process, the PIR report and the regulatory oversight body’s PIR adequacy assessment should be made publicly available in a timely manner. The PIR adequacy assessment should detail any qualifications where the PIR was assessed as adequate or provide a clear explanation of the reasons why the regulatory oversight body assessed the PIR as not adequate (in a similar manner to what should occur for RIS adequacy assessments as described in chapter 7). Chapter 9 discusses some of these issues further, and incorporates them in a leading practice for PIRs intended for both non-compliant proposals and proposals granted an exemption.

## **8.3 Regulatory oversight body accountability**

### **Does it matter where regulatory oversight bodies are located within government?**

Most Australian oversight bodies reside at the centre of executive government, typically in a unit, with some degree of autonomy, located within the Department of Treasury or the Department of Premier and Cabinet (chapter 3).

Until recently, no Australian oversight body had strict statutory independence — VCEC came closest, as an independent advisory body established under the Victorian *State Owned Enterprises Act 1992* (SOE Act).<sup>2</sup> In Queensland, in July 2012, the responsibility for RIA oversight was moved from Queensland Treasury to

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<sup>2</sup> The Australian Government OBPR was, until late 2007, part of the Productivity Commission, which has statutory independence. The SOE Act under which VCEC is established, can be amended by the Victorian Government through the Governor in Council without going through the Victorian Parliament.



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the Queensland Competition Authority (QCA), an independent statutory authority.<sup>3</sup> Similar to all other jurisdictional oversight bodies, in both the Victorian and the new Queensland models, the oversight bodies report to ministers in the relevant government.

The OECD, in its recent recommendation on regulatory governance, considered appropriate institutional arrangements for fostering regulatory quality to include:

A standing body charged with regulatory oversight should be established close to the centre of government, to ensure that regulation serves whole-of-government policy.

The authority of the regulatory oversight body should be set forth in mandate, such as statute or executive order. In the performance of its technical functions of assessing and advising on the quality of impact assessments, the oversight body should be independent from political influence. (OECD 2012a, p. 9)

The OECD has not been prescriptive in recommending a particular location for such a body. The recommendation appears to support a regulatory oversight body that resides either within:

- a central government agency, if it has sufficient autonomy in its decision making on individual RIA processes
- an independent statutory authority, if it is close to the centre of government.

The recommendation recognises the desire for a regulatory oversight body to have both:

... a need for independence from political micro-management, to assure its neutrality and technocratic objectivity, and simultaneously a need to be close to power in order to have authority over other ministries ... (Weiner and Alemanno 2010, p. 312).

On the one hand, locating the oversight body close to the centre of government may: give it greater authority and credibility; enhance its ability to more easily bring concerns to the attention of Cabinet or other key decision makers; and reduce the risk that the body will be ‘out of the loop’ and not receive timely notification of regulatory proposals. On the other hand, a more independent body may have greater objectivity, transparency and autonomy in carrying out its functions. It may be better able to resist government attempts to push through poorly justified regulatory proposals and more readily provide critical feedback on the quality of RIA processes. In reality, a trade-off has to be made between being closer to the centre of government and being more independent.

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<sup>3</sup> Because the QCA has statutory independence, amendments to the *Queensland Competition Authority Act 1997* (Qld) were required to be passed by the Queensland Parliament to expand its functions to include the reviewing and reporting of RIA processes.

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It could be argued that those oversight bodies with a formal mandate, such as VCEC and the newly established QOBPR, are consistent with the OECD recommendation. It is less clear whether other jurisdictional oversight bodies within Australia are consistent with the OECD recommendation.

The Australian Government OBPR, for example, resides within the Department of Finance and Deregulation but is afforded some independence from the Department and portfolio ministers in its administration of the Australian Government RIA requirements. This ‘independence’ is not laid down in statute but is instead periodically reaffirmed in ministerial statements by the Minister for Finance and Deregulation:

To perform its watchdog role effectively, the OBPR needs to exercise its decision-making functions in an independent manner. The government has put in place procedures to ensure that neither ministers nor their staff can seek to intervene in or influence the OBPR’s deliberations. Decisions on the adequacy of a regulatory impact analysis and compliance with the best practice regulation requirements will be made independently by the Executive Director of the OBPR. (Tanner 2008, p. 1890)

The Government will ensure that Ministers do not influence the OBPR’s decisions in determining the adequacy of Regulation Impact Statement or agency compliance with the Best Practice Regulation Guidelines. Decisions on the adequacy of a regulatory impact analysis and compliance with the best practice regulation requirements will continue to be made independently by the Executive Director of the OBPR. (Wong 2010, pp. 1069-70)

The Business Council of Australia (BCA) considers that statements by Finance Ministers about the OBPR’s independence are not sufficient to guarantee independent decision making by the OBPR:

The BCA does not consider that a statement by the Minister alone will improve the independence or the effectiveness of the OBPR ... However, little more has been done to reinforce the independence arrangements.

We would expect further information about the independence arrangements to be made publicly available. The appropriate information would include, for example, staffing arrangements and structures, reporting requirements, performance review arrangements and budgeting arrangements. (BCA 2010, p. 19)

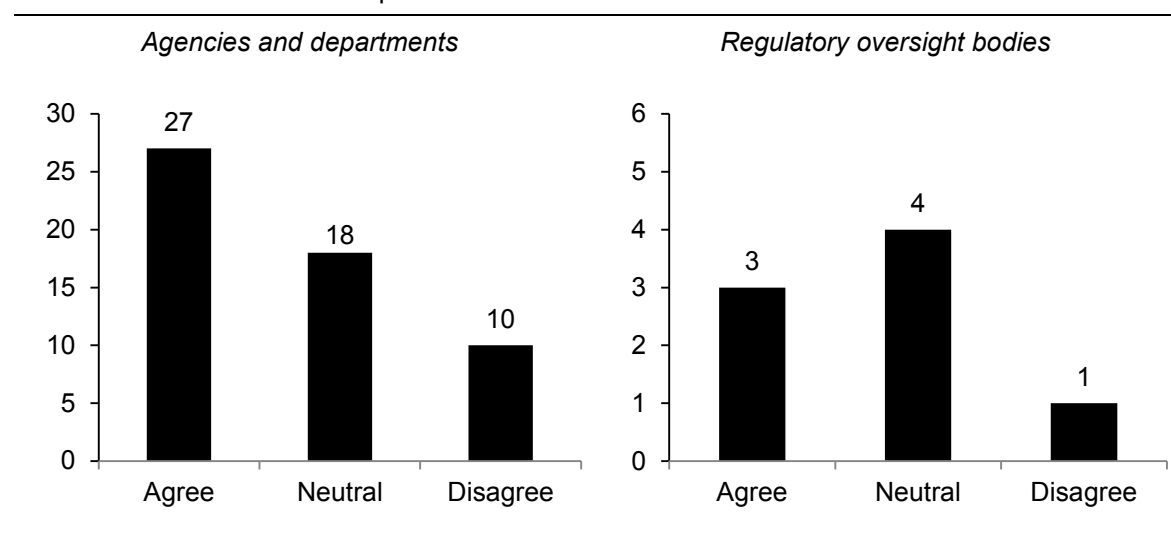
From a COAG perspective, the Victorian Department of Premier and Cabinet was also critical of the location of the OBPR because of a perceived conflict of interest with the Department of Finance and Deregulation and suggested a more independent oversight model:

The COAG RIA oversight body, the OBPR, sits within the same Group of the Commonwealth Department of Finance and Deregulation as that which is tasked to drive the implementation of the COAG Seamless National Economy Reforms. This results in a situation where the Department is both the proponent of a reform and the

review body for analysis of reform options. This is a clear conflict of interest and does not meet good governance principles. The only way to ensure that RIA assessment is rigorous and balanced is to establish a separate and independent statutory body ... A new COAG RIA oversight model should adopt the OECD's recommendations for independence and authority of the RIA oversight institutions. This would significantly reduce the risk of the gatekeeping review body being perceived as 'captured' when assessing proposed reforms. (sub. DR32, p. 6)

This sentiment reflects a need for oversight bodies to be seen as independent in order to maintain public confidence. A number of submissions called for more independent oversight as a means of improving the integrity of the RIA process (Australian Chamber of Commerce and Industry (ACCI), sub. 3; Australian Food and Grocery Council (AFGC), sub. 5; CropLife Australia, sub. 7; Construction Material Processors' Association, sub. 9; Chi-X Australia, sub. 13). In addition, only 10 of the 60 agency respondents to the Commission's RIA survey and one of the oversight body responses (South Australia) disagreed with the proposition that the RIA process is, or could be, more efficient and effective when a regulatory oversight body has statutory independence (figure 8.3).

**Figure 8.3 Would statutory independence of the regulatory oversight body improve the RIA process?**  
Number of responses<sup>a</sup>



<sup>a</sup> Based on 60 survey responses by agencies and departments, including 5 respondents who chose 'do not know'. Responses to the survey of regulatory oversight bodies were received for 8 of the 10 jurisdictions. The OBPR, representing the Commonwealth and COAG jurisdictions did not provide responses to this question. 'Agree' comprises both 'strongly agree' and 'agree'. Disagree comprises both 'strongly disagree' and 'disagree'.

Data source: PC RIA Survey (2012).

The Australian RIA experience, as evidenced throughout this report, suggests that regulatory oversight by units within central government agencies has not been very influential in improving regulatory decisions or the quality of outcomes, particularly

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where it matters most — for highly significant proposals. This conclusion is informed, in part, by the following RIA survey results:

- most central agency oversight bodies stated that regulatory proposals that do not meet RIA requirements are still proceeding to decision makers (figure 8.1) — indicating a lack of influence over agencies and/or ministers
- nearly all central agency oversight bodies agreed that ministers should provide reasons for proposing regulations that are inconsistent with RIA principles (figure 7.4) — perhaps indicating a lack of influence over ministers.

It appears that the perceived benefits of having the oversight body at the centre of government — so that it can exert influence over both agencies and decision makers and be closer to Cabinet processes and the development of policy proposals — could possibly be overstated. Furthermore, some stakeholders have suggested that being close to the centre of government has at times undermined the credibility of oversight bodies as these bodies have been seen as not being sufficiently insulated from political pressure emanating from government (BCA 2010; ACCI 2011; PCA 2011). Lack of transparency of RIA documentation and oversight body compliance reporting reinforces these perceptions (chapter 7).

More independent oversight arrangements are likely to be less susceptible (but not immune) to external political influence. The creation of an independent statutory agency would provide the greatest level of independence (while still reporting to executive government). However, this institutional model would impose some additional obligations and constraints, including:

- legislation to establish the body would need to be passed through Parliament
- some reduced flexibility in the government’s capacity to modify RIA operating practices and procedures
- some accountability obligations to the Parliament
- requirement for the publication of an annual report.

To increase independence further, some statutory agencies in other areas of government also establish an advisory committee to assist and advise the head of the agency in matters relating to the performance of their functions. For example, the recent *Australian Information Commissioner Act 2010* establishes an Information Advisory Committee to assist the Information Commissioner.

The Uhrig Review (2003) emphasised the importance of ensuring that ‘the benefits of establishing functions separate from government are significant enough to warrant the creation of statutory bodies’ (p. 58) and further stated:

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The powers and functions ... are generally specified in significant detail in the enabling legislation. ... [it] has the effect of limiting the flexibility in responding to changing government and community priorities. Legislation may become dated and can be difficult to change.

Consideration should be given to whether functions can be accommodated successfully within a departmental structure or an executive agency, reducing the need for the creation of a separate authority and the associated costs and demands placed on the public sector. (Uhrig 2003, p. 58)

In smaller jurisdictions, the low volume of RIS activity may mean establishing an oversight body with statutory independence is not cost-effective. However, costs may be significantly reduced if the oversight body is located within an existing statutory agency, as has recently occurred in Queensland. In such cases it is important to ensure that any conflicts of interest are appropriately managed. For example, the QCA is a significant regulator itself, with potential for its RISs to be subject to QOBPR adequacy assessment — therefore appropriate ‘Chinese Walls’ would need to be in place to ensure the existing agency’s objectives do not conflict with the oversight function.

Jurisdictions could also consider alternative measures for achieving some independence without necessarily establishing an independent statutory agency, these include:

- formalising a Memorandum of Understanding (MOU) with the central department — a current example of such an arrangement (albeit for an oversight body that has some degree of independence) is the Framework Agreement in Victoria, which outlines the protocols for the working relationship between the Department of Treasury and Finance and the VCEC (Victorian Government 2005)
- supporting the oversight body with an advisory board, similar to the arrangements for the Australian Government Bureau of Resource and Energy Economics, which was formed in July 2011 and is comprised of persons with relevant skills and experience from both the private and public sectors
  - Borthwick and Milliner (2012), when reviewing the Australian Government’s RIA process, considered that the Executive Director of the OBPR should be supported by a small independent advisory board to oversight the integrity of the process and be used as a sounding board on issues
- creating an ‘executive agency’— the concept is described in box 8.3 for the Australian Government, but the Commission understands that some states have the flexibility to implement similar governance arrangements

- establishing oversight functions within the departmental structure, headed by an independent statutory office holder who reports directly to a minister, similar to the arrangements for the Infrastructure Coordinator who assists Infrastructure Australia in the performance of its functions.

### Box 8.3      **Executive agencies in the Australian Government**

Executive agencies in the Australian Government are non-statutory bodies established by the Governor-General, acting on the advice of the Prime Minister, under Part 9 of the *Public Service Act 1999*. The purpose of the executive agency structure is to provide a degree of separation from departmental management where that is appropriate to the functions of the agency and something less than a statutory agency is warranted.

An executive agency's functions are specified in its establishing instrument, although they may be amended subsequently by the Governor-General as circumstances require. The provisions of the Public Service Act do not go into detail about the structure of an executive government agency, so there is considerable flexibility.

The head of an executive agency is appointed by, and is directly accountable to, the Minister responsible for the agency. He or she need not be a public servant but other staff of executive agencies are generally public servants.

The head of an executive agency will have the management and accountability responsibilities of an agency head under the Public Service Act. Full separation of accounting and financial reporting can be achieved where the body is made a prescribed agency under the *Financial Management and Accountability Act 1997*.

Examples of Australian Government executive agencies include:

- Australian Agency for International Development
- Bureau of Meteorology
- CrimTrac Agency
- Insolvency and Trustee Service Australia
- National Mental Health Commission.

*Sources:* PC (2004); Department of Finance and Deregulation (2012).

Each of these measures would maintain the attachment of the oversight body to a central department but at the same time may provide a degree of autonomy. For comparison purposes, the key features of these measures and the independent statutory agency alternative are set out in table 8.2.

Many of the concerns about the autonomy of central department oversight bodies might be addressed through the establishment of an independent statutory office holder. Such governance arrangements would provide a reasonable degree of organisational independence in a cost effective manner.

**Table 8.2 Alternative governance arrangements for oversight bodies**  
Reporting to executive government

	<i>MOU</i>	<i>Advisory board</i>	<i>Executive agency</i>	<i>Statutory office holder</i>	<i>Statutory agency</i>
Degree of organisational independence relative to a unit in dept	Minor	Minor/medium	Medium	Medium/Major	Major
Degree of financial management autonomy from dept	Minor	Minor	Major	Medium	Major
Separate accountability and reporting from dept	No	No	Yes	Possible	Yes
Employment arrangements for head of oversight body	Public servant	Public servant	Ministerial appointment	Determined by statute	Determined by statute
Increased admin cost relative to a unit in dept	Minor	Minor/medium	Major	Minor/Medium	Major

Sources: Department of Finance and Administration (2005); PC assessment.

While increased independence of oversight bodies is supported by the Commission, statutory independence, of itself, will not necessarily ensure the oversight body is immune to political pressure. The reporting arrangements of the oversight body — be it to the executive or directly to the legislature — may have a more important impact in practice than the body's underlying statutory independence (this is discussed further in section 8.4).

#### LEADING PRACTICE 8.2

***Regulatory oversight bodies that have a greater degree of independence are likely to operate with more objectivity and transparency in implementing RIA requirements.***

- ***Ideally, the oversight body should be located within an independent statutory agency.***
- ***Where the oversight body remains located in a central department, its autonomy can be strengthened through the appointment of a statutory office holder with direct ministerial reporting and appropriate safeguards to ensure independence and objectivity.***

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## **Are regulatory oversight bodies accountable for their assessments?**

All regulatory oversight bodies examine RIS documents and advise decision makers whether they meet the government's regulation requirements by providing an adequate level of analysis (chapter 3). But there is no government agency in any jurisdiction which periodically assesses the performance of the regulatory oversight body in carrying out this 'challenge function'. This lack of accountability has been raised by Harrison (2009) in relation to the Australian Government:

An issue that has been ignored by ... various inquiries is the incentives for the OBPR to perform its role and enforce a RIA process that improves regulation ... The lack of focus on the OBPR's performance has meant the RIA process has often provided it with poor incentives. For example, its main indicator of best practice regulation is the rate at which regulatory bodies comply with the RIA process. Although a low compliance rate from a failure to conduct RIAs indicates the process is being evaded, a high compliance rate tells us little about the quality of regulatory outcomes ... High compliance rates can be produced through low standards of adequacy ... (p. 44)

For RIA processes to be credible and legitimate they need to be seen by stakeholders to be working effectively. Currently, stakeholder perceptions of oversight bodies are clouded in all jurisdictions by a lack of evidence of oversight body activity and performance coupled with ample evidence of regulatory proposals which fail to meet RIA requirements, yet are still implemented.

It would be unfair to suggest that if poor regulatory outcomes have arisen then responsibility necessarily lies with the regulatory oversight body. As discussed earlier, regulatory proposals which do not meet RIA requirements can still be implemented in all jurisdictions (for example, through agency bypass of the RIA process, a breakdown in the Cabinet office 'gatekeeping' role (where it exists) or through an exemption from RIA processes).

Regulatory oversight bodies can only be held accountable for the actions and decisions they take. Once it has been decided that a regulatory proposal will require a RIS, all oversight bodies make one key decision that has the potential to influence regulatory outcomes: is the RIS undertaken by the agency adequate?

Concerns have been raised in submissions that at times oversight bodies have made incorrect adequacy assessments. Some submissions suggest oversight bodies narrowly confine themselves to assessing whether 'due process' has been followed, rather than the adequacy of the RIS, because they often do not have the resources and skills necessary to undertake this task effectively (AFGC, sub. 5). Similarly, Crop Life Australia commented that a lack of technical expertise in the regulatory oversight body has resulted in some poor proposals being assessed as adequate:



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Some impact statements that have identified regulatory impacts as being small and net positive for governments, community and industry have, on closer examination, been reliant on overly optimistic and inaccurate assumptions that undermine the validity of the conclusion. ... 'quality checks' by independent agencies such as the Office of Best Practice Regulation are often insufficient to identify key failings in impact analyses. Indeed, while they can provide assurance that government guidelines are strictly followed, they are not able to identify or challenge many of the key assumptions contained within the analysis. (sub. 7, p. 3)

If this were a common occurrence across jurisdictions it would be of concern because an important facet of the oversight body challenge function in most jurisdictions is to examine the quality of evidence provided in the RIS in support of key assumptions. For example, the Victorian *RIS/BIA Initial Assessment Checklist* requires the VCEC officer assessing the RIS/BIA to check the extent to which 'all assumptions are explicitly stated and supported' (VCEC 2007, p. 4).

Similarly in the Australian Government, the OBPR is supposed to assess whether a RIS contains an adequate analysis of the costs and benefits of the feasible options, whether it provides evidence in support of key assumptions and clearly identifies any gaps in data (Australian Government 2010a). At the same time, it should be recognised that even with the best efforts of oversight bodies assessing the adequacy of RIS documents, there will always be some shortcomings in the analysis that will be difficult for oversight body staff to detect.

Business groups such as the Australian Chamber of Commerce and Industry (ACCI) are also critical of the quality of some RIA processes that are being assessed as adequate:

... Australian businesses continue to express concern and disappointment with RIA processes. They are often less than adequate and comprehensive, even for major policy proposals, do not allow adequate consultation with stakeholders, and RIA documents are neither readily available nor easily accessible. (sub. 2, p. 1)

Similarly, when reviewing the Australian Government's RIA process, Borthwick and Milliner (2012) concluded that:

... many more RISs should be judged as non-compliant because, for example, alternative options were not thoroughly explored, consultations were inadequate, or a decision had effectively been taken before finalisation of the RIS. (p. 51)

Given the high RIS compliance rates (for those few jurisdictions that record compliance) discussed in chapter 3, it would appear that adequate RIS assessments may indeed occur more often than perhaps they should. That is, regulatory oversight bodies may have a greater tendency to assess a RIS as adequate when it is not, than to assess an adequate RIS as not adequate (box 8.4).

#### Box 8.4      **Type I and Type II errors in RIS adequacy assessments**

If a regulatory oversight body is fully effective it should only be passing adequate RISs and failing not adequate RISs. Of course, assessing RIS adequacy relies heavily on the judgement of the individual assessor and there is a degree of subjectivity around the assessment. While adequacy criteria may be transparent it may not always be clear to what extent a particular RIS meets the adequacy criteria — judgement is required. And where judgement is required mistakes can be made.

A regulatory oversight body can make two types of errors:

- it can pass a RIS as adequate when it is actually not adequate, which is known as a ‘false positive’ or Type I error
- it can fail a RIS as not adequate when it is actually adequate, which is known as a ‘false negative’ or Type II error.

The set of correct and incorrect assessments that are possible for an oversight body are outlined in the matrix below:

	<b>RIS adequate</b>	<b>RIS not adequate</b>
<b>‘Pass’</b>	Correct assessment	Type I error (‘false positive’)
<b>‘Fail’</b>	Type II error (‘false negative’)	Correct assessment

Source: Bogaards (2011).

One reason for this possible bias is the political, public and media pressure on governments to regulate as a solution to current problems or risks. This pressure can be transferred from ministers’ offices to departments and subsequently flow through to regulatory oversight bodies. Regulatory oversight bodies, particularly those located close to the centre of their government, may be under pressure to give an agency the benefit of the doubt and ‘pass’ rather than ‘fail’ a RIS. This pressure to pass may be even more acute for those oversight bodies that are part of a RIA ‘gatekeeping’ process (section 8.2) — where the consequences for government agencies of non-compliance are more costly (at least in principle) — because, in principle, the proposal cannot proceed to decision makers.

Making RIS documents and the oversight body’s adequacy assessments with reasons publicly available at the time of a regulatory announcement (as suggested in chapter 7) may improve both the quality of RIA processes and the accountability of oversight body assessments. Such public transparency would provide a much needed counterbalance to the pressure on governments to regulate.

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## Is periodic assessment of the oversight body's performance required?

Putting in place an accountability mechanism for regulatory oversight bodies, such as the periodic evaluation of their performance by an independent third party, would be an added motivation — beyond public transparency — for consistency in oversight body adequacy assessments.

While the first line of protection is to depend on the oversight body's own professionalism and ethics, there may be value in supplementing and reinforcing these by external controls. Some overseas jurisdictions have engaged audit offices to provide periodic oversight of their RIA processes, including aspects of the oversight body's performance (box 8.5).

### **Box 8.5 Auditor reports on RIA process performance in some overseas jurisdictions**

In the United Kingdom, the National Audit Office (NAO) views the quality of regulation and its implementation as a key value-for-money issue in public policy. The NAO has reported annually on the RIA process and the quality and thoroughness of impact assessments since 2004.

In the European Union, an audit report on the European Commission's Impact Assessment system was published in September 2010 by the European Court of Auditors (ECA). The ECA audit analysed whether impact assessments supported decision making in the EU institutions. In particular, it examined the extent to which:

- impact assessments were prepared by the Commission when formulating its proposals and the European Parliament and the Council consulted these assessments during the legislative process
- the Commission's procedures for impact assessment appropriately supported the Commission's development of its initiatives
- the content of the Commission's impact assessment reports was appropriate and the presentation of findings was conducive to being taken into account for decision making.

In the United States, the Government Accountability Office (GAO) has published seven reports since 2003 on Federal Government rulemaking. In its latest report, published in 2009, the GAO discussed how broadly applicable rulemaking requirements cumulatively have affected:

- agencies' rulemaking processes, in particular including effects of requirements added to the process since 2003
- transparency of the Office of Information and Regulatory Affairs' (OIRA, the US regulatory oversight body) regulatory review processes — advocating for more transparency at OIRA to better allow the public to understand the influence of OIRA on agency rulemaking.

*Sources:* NAO (2010b); ECA (2010); GAO (2009).

Moreover, the OECD has recently called for the periodic assessment of the performance of regulatory oversight bodies. The OECD (2012a) recommendation of the Council on Regulatory Policy and Governance explicitly states:

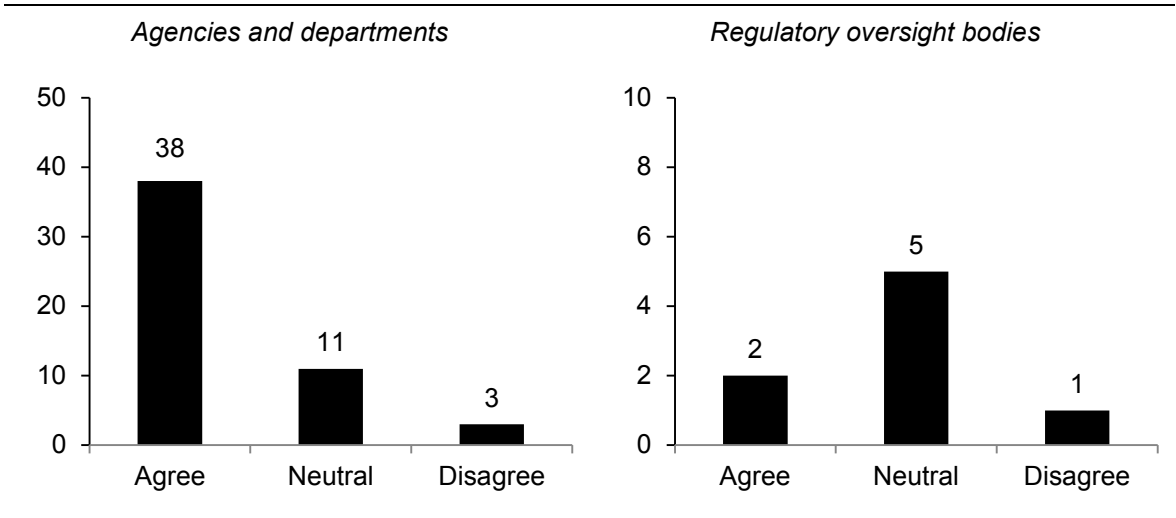
The performance of the oversight body, including its review of impact assessments should be periodically assessed. (p. 9)

The assessment of RIA by the regulatory oversight body should be periodically evaluated by an independent third party, such as, for example, the National Audit Authority. (p. 13)

Most government agencies responding to the Commission’s RIA survey were supportive of subjecting the decisions of the oversight body to a periodic audit to improve the RIA process. In comparison, oversight bodies were generally neutral (figure 8.4).

Figure 8.4 **To improve the RIA process, should the decisions of the regulatory oversight body be audited?**

Number of responses<sup>a</sup>



<sup>a</sup> Based on 60 survey responses by agencies and departments, including 8 respondents who chose ‘do not know’. Responses to the survey of regulatory oversight bodies were received for 8 of the 10 jurisdictions. The OBPR, representing the Commonwealth and COAG jurisdictions did not provide a response to this question. ‘Agree’ comprises both ‘strongly agree’ and ‘agree’. Disagree comprises both ‘strongly disagree’ and ‘disagree’.

Data source: PC RIA Survey (2012).

As discussed in chapter 1, many governments in Australia have subjected their RIA processes to external review in recent years. But most reviews have tended to focus on the performance of the overall RIA process in a jurisdiction, rather than how well the oversight body has performed its particular compliance assessment role.

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### *Who will watch the watchmen?*

Audit offices in Australia appear well placed to provide some retrospective scrutiny and verification of the adequacy assessment decisions of regulatory oversight bodies — both for RIA and PIR processes. All Australian jurisdictions have an audit office that could, if requested, periodically undertake a ‘performance audit’ of such bodies (box 8.6). However, other independent third parties with relevant skills could also undertake this work.

#### **Box 8.6      What do government auditors do?**

The government auditor (Auditor-General) is a statutory officer who is legally guaranteed a degree of independence from the executive government, operating more as an agent of the legislature. The legislature is usually involved to some extent in the choice of subjects for audit investigation. Audit reports are normally presented to the legislature rather than the executive.

Government audits are generally one of two types, financial or performance. Financial audits are aimed at verifying whether government expenditure has been conducted in accordance with legislative authorisations. Performance audits, audit the performance of government in terms of economy (minimising cost), efficiency (maximising the ratio of outputs to inputs) and effectiveness (the extent to which intended government objectives were achieved).

While financial audits must be conducted on all agencies regularly, performance audits are discretionary, being applied to areas or issues of particular concern, either at the initiative of the auditors themselves or at the request of legislators or even of the government. While requests from parliament and/or ministers are accorded high priority, the government auditor usually has ultimate discretion over the areas subject to performance audit.

While auditors conduct inquiries and publish reports (that may contain recommendations) they do not exercise formal powers of rectification, leaving the imposition of remedies to other agencies, such as the police and the courts in cases of fraud or embezzlement or the government on matters of policy.

*Source:* Mulgan (2003).

The periodic assessment of the performance of regulatory oversight bodies by an independent third party, such as an audit office, would make a valuable contribution to the accountability of RIA processes across Australia — it would introduce some accountability where currently there is little or none.

*Stakeholder confidence in regulatory oversight bodies is enhanced where their performance, including their adequacy assessments of RIA and PIR processes, is periodically evaluated by an independent body, such as the audit office.*

### **Could audit offices also provide a broader performance monitoring role of a government's RIA performance?**

Following the experience of the United Kingdom, it may also be useful to consider if the audit office should regularly assess how RIA is being implemented within government more generally — not just the performance of the oversight body.

Borthwick and Milliner (2012), when reviewing the Australian Government's RIA process, suggested that the ANAO could be called on to influence agency behaviour by emphasising RIA process compliance and appropriate regulatory practice as part of good public administration.

Engaging the assistance of the audit office may be helpful since it is usually the case that the oversight body inevitably becomes the sole champion of compliance with what is in fact broad government policy. Being the sole champion can make the oversight body somewhat isolated and vulnerable to criticism (both within and outside government). Having the 'third party perspective' of an audit office may be effective at broadening ownership of, and increasing support for RIA and is naturally linked to its concerns for effective programs and policies. For example, the audit office could consider the use of consultation practices by agencies, as well as the quality of individual impact assessments, through monitoring the application of quantification to costs and benefits.

## **8.4 Executive government accountability**

### **What mechanisms are available to make governments accountable?**

There are two major mechanisms for holding Australian governments accountable for the regulatory decisions they make during their time in office: ministerial responsibility; and parliamentary committee investigation.

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### *Ministerial responsibility*

Ministerial responsibility (or accountability) to the House or Chamber of parliament of which the minister is a member, is a core principle of Westminster-based systems of government. Ministers are also accountable to the community via parliament. Part of this accountability to parliament is an obligation on ministers to respond to questions about their portfolios put to them by their parliamentary colleagues. However, ministers have the right to refuse to answer questions, and will not usually discuss matters that: impinge on national security; are before a court of law; or are part of confidential discussions with cabinet colleagues.

In some jurisdictions, such as the Commonwealth, there is a dedicated cabinet minister with overarching responsibility for the RIA process and more specifically the oversight body adequacy assessments that are attached to cabinet submissions (or other decision documents). Having a RIA ‘champion’ inside the Cabinet may help reduce the frequency of ministers not complying with the RIA process. The New South Wales Government had a dedicated Minister for Regulatory Reform in Cabinet that supported the RIA process. However, this position ceased in 2010, with responsibilities for RIA being transferred to the Premier.

### *Parliamentary committee investigation*

Ministers (and senior bureaucrats) can also be subject to investigation and scrutiny by legislative committees. In many respects, legislative committees are where much of the ‘heavy lifting’ by parliaments is carried out. Committees are involved in a number of legislative functions, including: reviewing proposed legislation; and investigating particular policy problems.

Of most relevance for accountability is their role in the oversight of the government bureaucracy. In such committee processes, government bureaucrats are excused from giving opinions on matters of policy but they are not prevented from giving information about the factual and technical background to policy, including aspects of RIA processes. While committee recommendations from their investigations are made public they are not binding on the parliament (Mulgan 2003).

### *How effective are these mechanisms in holding governments accountable?*

If working effectively, information and discussion of government policy and implementation, both in parliament and in committee investigation, should add to public accountability. It is not clear, however, that these mechanisms have achieved their full accountability potential:

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... legislatures in parliamentary systems often appear weak and irrelevant, excluded by the executive from discussion of the major government decisions and unable, or unwilling, to examine the great bulk of bureaucratic decision-making. (Mulgan 2003, p. 57)

The opposition party's desire to expose a government's mistakes and criticise its unpopular actions does much to hold the government accountable. However, such motivations may not always result in sufficient scrutiny of those regulatory proposals that may require it and the quality of information available to the opposition can hinder debate on regulatory proposals.

As a consequence, sanctions on government for poor regulatory proposals usually rely on public transparency (via the media). For this reason, efforts to improve the accountability of government should be focused on making it more open to legislative investigation by parliament and increasing the transparency of decision making.

### **Are there other options to improve scrutiny of government?**

Requiring ministers to be transparent when introducing legislation that has been exempted from undertaking a RIS or that has been assessed as not in accordance with RIA requirements — for example, by requiring them to provide the reasons in a statement to parliament (as recommended in chapters 5 and 7) — is one option that could be employed to increase the accountability of government regulatory processes.

Two other options that could be employed to increase the accountability of decision makers focus on strengthening parliament's ability to scrutinise the regulatory decisions made by government. Specifically: providing greater institutional support within parliament on regulatory issues; and/or making the regulatory oversight body report directly to parliament rather than to executive government — which reflects even more independence than the statutory agency model discussed in section 8.3.

#### ***Would greater institutional support within parliament improve government accountability?***

In its recent research report, *Identifying and Evaluating Regulation Reforms*, the Commission questioned whether the Australian Parliament could benefit from greater institutional support from its own system of committees:

The Senate Standing Committee on Regulations and Ordinances plays an important role in providing technical scrutiny of all delegated legislation to ensure their compliance with principles of parliamentary propriety. Whether there may be a role for



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a Committee with a wider focus on ‘good regulation’ is worthy of further consideration. Such a forum could strengthen political leadership in this area and help promote a better understanding of regulatory effectiveness. (PC 2011, p. 131)

The Senate also has a Scrutiny of Bills Committee that assesses legislative proposals with a focus on the effect of the proposed legislation on individual rights, liberties and obligations and parliamentary propriety.

In some jurisdictions where parliamentary scrutiny committees are tasked with ensuring RIA requirements for (mainly subordinate) legislation have been met, they have played a useful role in airing RIA problems, but have been largely unsuccessful in changing regulatory outcomes (section 8.2). To make scrutiny committees more effective in focusing on RIA requirements and improving regulatory outcomes they need:

- an explicit mandate to examine RIA issues — which those jurisdictions (New South Wales, Victoria, Queensland, Tasmania and the ACT) with legislated RIA processes for subordinate legislation already have
- the analytical expertise, resources and time to examine these issues effectively
- the confidence to use their existing powers (such as recommend disallowance) when all other efforts to resolve RIA issues have failed.

Such arrangements could assist in increasing the amount of attention given to RIA issues and in turn lead regulation makers within executive government to give more thought to RIA quality during the policy and legislation drafting processes.

It is also important for parliamentary committees generally (not just scrutiny committees) to develop a closer working relationship with the regulatory oversight bodies in their respective jurisdictions — particularly as the administrative task of assessing compliance of government regulatory proposals falls within the scope of parliamentary committee investigation. To preserve the confidentiality of the government’s regulatory decisions, discussions between parliamentary committees and the oversight body (on its RIS adequacy assessment) would need to commence only after the announcement of the regulatory decision by the government and the oversight body’s adequacy assessment had been made public.

There are growing pressures overseas for stronger ties between parliament and the executive government in relation to RIA. For example, a recent report by the Committee on Legal Affairs of the European Parliament called for improvements in engaging with the RIA process at the European Parliament level. In particular, it called for greater dialogue between the Parliament and the European Commission (which includes the Commission’s oversight body, the Impact Assessment Board):

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[The Committee] takes the view that a standard citation should systematically be included by Parliament in its legislative resolutions, by which a reference is made to consideration of all impact assessments conducted by EU institutions in the areas relevant to the legislation in question ... Notes that Parliament and its committees already possess the machinery with which to scrutinise the Commission's impact assessments; considers that a presentation of the impact assessment by the Commission to the relevant committee would be a valuable addition to the scrutiny undertaken in the Parliament ... Calls for Commission impact assessments to be examined systematically and as early as possible at parliamentary, and in particular at committee, level ... Encourages all its committees, before considering a legislative proposal, to hold an in-depth discussion with the Commission on the impact assessment. (European Parliament 2011, p. 10)

Better engagement of the regulatory oversight body with the parliament and parliamentary committees would improve the scrutiny of RIA issues in Australian parliaments and increase the likelihood that such issues will be given greater prominence by regulation makers. In effect, parliaments would be a more effective 'backstop' for legislative proposals, particularly for those proposals that have been assessed as departing from RIA requirements.

*Would oversight body reporting to parliament improve executive government accountability?*

Improving institutional support within parliaments may improve some individual regulatory proposals — those that particularly attract the attention of parliaments — but it may not necessarily result in a general lifting of regulatory quality. A more significant strengthening in the design of RIA systems may be required to increase the likelihood of system-wide improvements.

As seen in many jurisdictions, the coupling of executive government agencies undertaking the RIA process with executive government oversight from central agencies has at times limited the scope of RIA to influence policy decisions, particularly where the results of RIA (or likely results) conflict with political priorities. In many cases, the RIA process has been undertaken with the underlying motivation of protecting the regulatory decision (already made), rather than exposing it to constructive criticism. As the ACCI comments:

Politically sensitive regulations that have a significant impact on [the] business community are more likely not to have their RIA adequately completed. (sub. 2, p. 1)

A further, medium term option, when considering how RIA can play a more influential role in guiding regulatory decisions, is to remove responsibility for RIA oversight from the executive branch of government. In principle, the regulatory oversight function could alternatively be located within a parliamentary committee

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or as a separate body reporting directly to parliament (Wiener and Alemanno 2010). For example, a regulatory oversight body could be established as an independent statutory authority (like the Australian National Audit Office) in each jurisdiction reporting to the jurisdiction's parliament (rather than reporting to a minister). To minimise duplication, such an entity could subsume the role of the current regulatory oversight body — in the Australian Government's case, for example, the OBPR would report directly to the Parliament of Australia.

One option for reporting to parliament could be via the establishment of a 'Parliamentary Regulation Office' in each jurisdiction. This would be akin to the recently established Parliamentary Budget Office (PBO) in the Australian Government (Parliamentary Library 2011). In addition to improving their independence, such a change in reporting arrangements for the regulatory oversight body would enable them to become a source of high-quality, independent analysis and advice to the Parliament on regulatory matters — improving the quality of parliamentary debate and enhancing decision making.

Transparency and accountability were key reasons for establishing the Commonwealth PBO (Joint Select Committee on the Parliamentary Budget Office 2011). There is, arguably, a greater need for transparency and accountability in the making of regulatory decisions by governments given they are not subjected to the sharper disciplines that budgetary measures face through the Expenditure Review Committee process (Australian Government 2012c).

There do not appear to be similar cabinet committees *for regulatory proposals* in Australian jurisdictions, although they do exist in some overseas jurisdictions. For example, in the United Kingdom the Reducing Regulation Committee of Cabinet examines regulatory proposals making sure that only those of suitably high quality (that is, meeting good regulation principles) proceed to Cabinet.

Enabling the oversight body to report directly to parliament rather than being subject to direction by a minister (as now occurs in every jurisdiction) would appear to offer several distinct advantages for the accountability of RIA processes —

- It would better insulate the oversight body from government political pressure, as discussed in section 8.3, which could assist in improving the quality of RIS/PIR adequacy assessments.
- It would improve capacity for parliament to assess the merit of regulatory proposals because it would have greater access to the analysis/assessment of the oversight body.
- It would motivate all participants in the RIA process (agencies, oversight bodies and ministers) to exercise their RIA responsibilities in a rigorous manner.

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On the other hand, agency officials may be more guarded dealing with the staff of an oversight body that reports directly to parliament than they would with the staff of an oversight body within executive government. As a consequence, any move of the oversight body away from the executive may require commensurate information gathering powers and confidentiality requirements.

Such a change in reporting structures for the oversight body would also require legislative change for the establishment of the body and it may also require the RIA process to be legally mandated (as opposed to administratively mandated). As discussed in chapter 1, some states and territories have already given RIA legal status — but only in relation to subordinate legislation.

Changing the reporting requirements would appear to be an option to consider if the suite of transparency and accountability measures suggested in this report do not realise the necessary improvement in regulatory decisions and outcomes over the medium term. Even then, such a change would be appropriate only for those jurisdictions that have an established regulatory oversight body with the relevant functions and a ‘critical mass’ of RIS activity. Such a change in governance is more likely to be possible in larger jurisdictions such as the Commonwealth, New South Wales and Victoria.

While the creation of an oversight body reporting directly to parliament may be one way to enhance government RIA accountability, by itself it may not be enough. It may also require parliaments to want better regulatory impact analysis and embrace the responsibility to improve regulatory outcomes. Without this underlying acceptance it is unlikely that any profound shift in outcomes would result.

## **8.5 Conclusion**

If the objective of RIA is to enhance the empirical basis of government decisions and to make the regulatory process more transparent and accountable, then Australian jurisdictions still have a considerable way to go. As a consequence, most of the discussion on leading practices in this chapter refers to overseas rather than Australian experience. The current weaknesses in RIA practice are affecting stakeholder confidence in RIA’s effectiveness in promoting good regulatory decisions and policy outcomes. A degree of cynicism is pervading the regulatory landscape in response to the perceived lack of integrity in regulation making.

There is a large gap between RIA requirements set out in guidance material and what happens in practice. In most jurisdictions, there are examples of both good and bad practice — but too often, RIA processes lack sufficient accountability (and

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transparency) mechanisms to ensure that the incentives of participants in the process (agencies, oversight bodies and governments) are aligned with those of the community. To encourage greater ‘buy in’ from participants, it is less about changing the ‘nuts and bolts’ of RIA requirements and more about improving overarching RIA system design. Improving accountability mechanisms provides one of the greatest opportunities for RIA processes to better inform and influence regulatory decisions and outcomes. In particular, there is a need for more effective sanctions for non-compliant proposals, the establishment of accountability mechanisms for oversight bodies, greater engagement with parliaments through more useful scrutiny and legislative committee processes and perhaps, in the medium term, a change in reporting and governance arrangements for oversight bodies.

Accountability is incomplete without effective consequences. The sanctions for government agencies of not complying with RIA processes are currently weak, ineffective or non-existent. To encourage agencies to comply with RIA processes, PIRs need to be implemented in all jurisdictions and become a more powerful sanction for non-compliance.

Regulatory oversight bodies are not sufficiently accountable for the RIS (and PIR) adequacy assessments they make. Currently, many interested stakeholders do not have access to sufficient information to determine:

- whether an oversight body determined a RIS met RIA adequacy requirements
- whether an oversight body assessment was rigorous and appropriate.

It is therefore not surprising that concerns have been raised in submissions that at times oversight bodies have made incorrect adequacy assessments. While the publication of oversight body adequacy assessments (and their reasons or qualifications) would help, greater accountability for their performance is required. Putting in place an accountability mechanism for regulatory oversight bodies, such as the periodic evaluation of their performance by an independent third party, for example an audit office, would be an added motivation — beyond public transparency.

Regulatory oversight bodies that have a greater degree of independence are likely to operate with more objectivity and transparency in implementing RIA requirements. If oversight bodies continue to report to executive government, ideally they should be located within an independent statutory agency. Where they remain in a central department their autonomy could be strengthened through some form of statutory office holder arrangement with direct ministerial reporting and appropriate safeguards to ensure independence and objectivity.

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To increase the accountability of Australian governments, parliaments' engagement with RIA processes could be strengthened. In the short term, this could be done by providing greater institutional support within parliaments for RIA requirements. In the medium term, consideration should also be given to making the regulatory oversight body report directly to parliament rather than to the executive branch of government. While there are no 'silver bullet' solutions to generating better regulatory outcomes, increased accountability is likely to be one of the most effective mechanisms for achieving this objective.

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## 9 Regulatory reviews

### Key points

- Consistent with leading practice, all Australian jurisdictions with the exception of Tasmania require that regulation impact statements (RISs) include a discussion of how proposed regulations will be evaluated following implementation.
- There would be benefits in strengthening review requirements, particularly for proposals with highly significant or uncertain impacts, by requiring the inclusion in RISs of information on review timing, governance arrangements and data requirements.
- Provision for a mandatory review should be included in all future primary legislation where the associated proposal triggers RIS requirements.
- No Australian jurisdiction has provisions for systematic monitoring of reviews foreshadowed in RISs, or indeed, whether the reviews even take place. There is very limited comparison of whether the estimated costs and benefits identified in regulatory impact analysis (RIA) are borne out by subsequent experience.
  - Oversight body monitoring and reporting on regulatory reviews flagged or required as part of RIA would improve the integrity of RIA processes. Annual regulatory plans could be utilised for this, with oversight bodies checking them for adequacy.
- Post implementation reviews (PIRs) — included in jurisdictional processes for the Commonwealth, Queensland and Western Australia — can be an important mechanism to ensure that any regulatory proposal that would have required a RIS, but for which an adequate RIS was not prepared, will be examined early in its life.
  - PIRs for proposals with highly significant impacts should be undertaken by an independent third party, paid for by the proponent agency, with the terms of reference approved by the regulatory oversight body.
  - PIRs should be undertaken to the same level of rigour as a RIS. However, even where this is the case, PIRs should not be viewed as a substitute for ex ante RIA.
- Broad based sunseting or ‘staged repeal’ requirements have helped eliminate some redundant regulation and improved some existing regulation. However, resource costs can be large relative to the benefits achieved.
- Regulatory outcomes and RIA resource efficiency are likely to benefit from:
  - prioritising sunseting regulations against agreed criteria to identify the appropriate level of review effort and stakeholder consultation
  - allowing sufficient flexibility for grouping related sunseting regulations for thematic or package review, as the recent Commonwealth reforms are designed to achieve
  - where appropriate, reviewing subordinate regulation in conjunction with its overarching primary legislation.

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While RIA processes were designed initially to deal with ex ante assessments for the flow of new regulation, in most jurisdictions they are now also required, under certain circumstances, to be used for reviews of existing regulation. Those reviews that are flagged in RISs to occur within a specified period or are triggered as a result of non-compliance with, or avoidance of, some aspects of RIA processes, are considered by the Commission to be an integral part of RIA processes. In contrast, other reviews — such as those associated with sunset regulation — are not themselves a part of the RIA framework, but nevertheless are required to draw on RIA principles and processes.

The terms of reference for this study indicated that the Commission should have regard to whether RIA requires consideration of the evaluation and review arrangements following the implementation of proposals, including whether or not policy objectives remain appropriate. The Commission was also asked to examine whether requirements for regulation that includes sunset clauses should also include guidelines for evaluation of the case for maintaining that regulation.

Before examining these issues, a point of clarification on terminology is needed. A number of participants to the study, including in submissions, have used the term ‘post implementation review’ in its broadest sense, to relate to any review that takes place after a regulation has been made or implemented (that is, reviews that occur ‘ex post’). However, to avoid confusion, the term ‘post implementation review’ is used here only for those processes specifically identified as such by jurisdictions.

## **9.1 RIA’s role in promoting integrated regulatory policy**

OECD guiding principles emphasise the need for ‘joined up’ regulatory systems, with examination of regulation occurring not only during its development, but also after it has been made and implemented. The OECD (2010d) notes:

Closing the loop is essential if regulatory policy is to be performance-driven and politically accountable. This requires ensuring that ex ante impact assessment foresees the need of future ex post consideration of regulatory impacts. A fully integrated approach to regulatory policy therefore needs to include consideration for ex post evaluation at an early stage, with a full approach of [assessing] regulations “from cradle to grave”. (p. 6)

The ‘regulatory cycle’ can be segmented into four stages or phases. These involve:

1. the initial problem identification and decision to use a regulatory solution
2. the design of the regulations concerned and their implementation
3. the administration and enforcement of those regulations
4. evaluation and review (PC 2011).



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Sound RIA is central to achieving good outcomes during stage one — the decision to regulate (or not) and in choosing the best approach to address the identified problem. RIA also has an important, though sometimes overlooked, role in improving outcomes during stages two and three — analysing and promoting sound implementation, enforcement, and monitoring of the regulation once the decision is made to regulate (discussed in chapter 6).

The fourth stage, evaluation and review, occurs at different intervals for different regulations, depending on their significance and the circumstances of their formulation. Consistent with OECD guidance, consideration of review arrangements should be included as a routine part of the policy development process for any new or amended regulations with significant impacts on business. Further, the RIA framework should be used for all such reviews. The OECD (2011, p. 10) notes that to achieve leading practice, ‘the methods of RIA should be integrated in programmes for the review and revision of existing regulations’. As with the initial RIA, such reviews should be proportionate to the nature and significance of the regulations concerned, and be sufficiently broad in scope to address all issues germane to the performance of the regulation.

The set of reviews which draw directly on RIA are ‘programmed reviews’ — or predetermined mandatory requirements that a review of a regulation be undertaken at a specified time in the regulation’s life, or when a well-defined situation arises, to ensure the regulation is working as intended (PC 2011). These reviews can take various forms, each with different strengths and weaknesses and with varying applicability and timing (table 9.1). Broadly speaking:

- *‘Late RISs’*, triggered in some instances where a RIS was not prepared, would appear to be largely directed at promoting transparency. However, as they are undertaken relatively soon after the decision point they may be able to influence implementation, and possibly help reverse regulatory mistakes early on.
- *Post implementation reviews (PIRs)* are also triggered where a RIS has been undertaken either inadequately or not at all. When completed relatively early in the life of the regulation, a PIR may be able to promote early changes in regulation and avert potentially large costs, provided it is broad enough (that is, not limited to an ‘implementation’ review) and is independent. A strength of PIRs is that they can draw on data related to the implemented regulation. However, where PIRs are delayed too long they risk becoming de facto ‘ex post evaluations’ and their transparency and sanction role (chapter 8) is likely to be diminished along with their capacity to ‘nip problems in the bud’.
- *Ex post reviews and evaluations flagged in RISs* (including embedded statutory reviews) ideally would involve an assessment of whether regulation is achieving its purpose at least cost, and whether the objectives of the regulation remain

appropriate. A strength of these reviews is that areas of uncertainty identified during RIA can be flagged for further examination and data collected accordingly. Such reviews have the advantage of allowing comparison of realised costs and benefits with those outlined in the original RIS.

- *Reviews triggered by sunset requirements* are normally required where the regulation scheduled to expire has a significant impact on business or the not-for-profit sector. A strength of sunseting is that automatic expiry forces reviews to occur. However, where sunseting places large demands on limited review resources there are risks that the reviews will be insufficiently rigorous.

**Table 9.1 Key features of ‘programmed’ reviews**

<i>Type of review</i>	<i>Indicative timing</i>	<i>Primary roles</i>
Late RISs	0-12 months	<ul style="list-style-type: none"> <li>• Sanction for non-compliance</li> <li>• Ensure regulation that has not been subject to RIA is assessed</li> <li>• Promote transparency</li> <li>• Flag problems early for regulation made in haste — with potential to avert costly errors</li> </ul>
Post implementation reviews	1-2 years	<ul style="list-style-type: none"> <li>• Sanction for non-compliance</li> <li>• Ensure regulation that has not been subject to RIA is assessed — particularly where regulation has been fast tracked or the extent of the compliance burden is uncertain</li> <li>• Identify early whether the regulation is working as intended, how it could be improved and whether the objectives remain appropriate</li> <li>• Compare realised impacts (where data are available) with anticipated impacts</li> </ul>
‘Ex post’ reviews flagged in RISs	3-5 years	<ul style="list-style-type: none"> <li>• Determine if regulation is working as intended; achieving objectives at least cost; how it could be improved; and whether objectives remain appropriate</li> <li>• Compare realised impacts with anticipated impacts</li> </ul>
Reviews triggered by sunset requirements	5-10 years <sup>a</sup>	<ul style="list-style-type: none"> <li>• Determine whether regulation scheduled to sunset should be allowed to expire, be remade or amended</li> <li>• Assess whether regulation remains relevant and appropriate given economic, social, technological and other changes since it was made/last reviewed.</li> </ul>

<sup>a</sup> Timing relates to broad-based sunseting provisions rather than individual sunset clauses, which can be shorter.

Source: Adapted from table E.2 of PC (2011).

Jurisdictional requirements and use of these categories of reviews are considered in the following sections.

## 9.2 ‘Late RISs’ and post implementation reviews

As noted in chapters 5 and 8, eight of the ten jurisdictions have processes in place to ensure some ex post analysis occurs in instances where a RIS is not undertaken for regulatory proposals that would ordinarily require it (table 9.2).

Table 9.2 **Processes for ex post review following RIS exemption or non-compliance<sup>a</sup>**

	<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>ACT</i>
PIR (exemptions)	✓				✓	✓		
PIR (non-compliance)	✓				✓ <sup>b</sup>	x		
Late RIS (exemptions)		✓	✓	✓			✓ <sup>c</sup>	✓ <sup>e</sup>
Late RIS (non-compliance)		x	x	x			x <sup>d</sup>	x

<sup>a</sup> Tasmania and the NT have provision for neither PIRs nor late RISs and are therefore not included in this table. <sup>b</sup> PIR only required when there is no RIS prepared, but not when there has been an inadequate RIS. <sup>c</sup> Only relates to proposals that require urgent implementation. <sup>d</sup> Agencies are required to find offsetting red tape reductions for non-compliant proposals, unless Cabinet makes an explicit decision to the contrary. <sup>e</sup> A late RIS only applies where exemptions for RISs relating to subordinate legislation have been disallowed.

Source: Jurisdictional guidance material (appendix B).

Australian Government agencies are required to undertake a PIR of regulation that did not have a RIS within one to two years, unless the impact was of a minor or machinery nature and the regulation did not substantially alter previous arrangements. The absence of a published RIS may be because the RIS was not adequate (which under the Australian Government’s best practice regulation framework is defined as a non-compliant proposal); or it may be because the Prime Minister granted an exemption for exceptional circumstances (which under the RIA framework is defined as a compliant proposal).

PIRs are also required in Queensland in similar circumstances. A PIR must be commenced within two years of the implementation date of any regulation with significant impacts where a regulatory assessment statement was not performed. The PIR should assess the impact, effectiveness and continued relevance of the regulation to date and analysis should be proportionate to the issue being addressed (Queensland Treasury 2010). The Commission understands that while a number of regulatory proposals for which a Treasurer’s exemption has been granted are the subject of a PIR or are scheduled for a PIR, at this stage two PIRs have commenced but none have been completed. (Queensland Government, pers. comm., 10 October 2012).

In Western Australia, PIRs are required for Treasurer’s Exemptions but not for those proposals that do not comply with RIA requirements (chapter 8). As with Queensland, no PIRs have been completed at this stage, although the Western

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Australian Department of Treasury noted that a number are due within the next 12 months and that:

They will take the same format as a RIS and will be assessed just as stringently. They will require verifiable evidence based on detailed quantitative and qualitative analysis of the impacts of the regulation put in place. (sub. DR37, p. 7)

In its current review of regulatory gatekeeping and impact assessment processes, the New South Wales Better Regulation Office (BRO) has sought views on its proposal that (subject to approval by the Premier) PIRs be undertaken for exceptional circumstances. The BRO notes that:

In such cases, a post implementation review should be completed within two years. The review should be approved by Cabinet or the Better Regulation Office prior to public release. (BRO 2011, p. 3)

Although five jurisdictions require that RISs be prepared for some proposals within 12 months, it is not clear how often these late RISs occur in practice or how beneficial they are. If a 'late RIS' was to reveal substantial problems it may be influential in shaping implementation of the regulation, depending on the timeframe for implementation of the regulatory decision. A further benefit of a late RIS is in the area of transparency, since the document is prepared too late for the final decisions, but in many cases prior to a point where substantial new data are likely to be available on actual impacts of the proposal. However, a key challenge for the proponent agency would be to resist pressures for the documents to become, in effect, ex post justification or rationalisation for prior decisions, particularly given that late RISs are prepared so close to the decision making point.

In Victoria, in some limited circumstances, regulations have an inbuilt 12 month expiry requirement (box 9.1). An advantage of this approach is that it provides a stronger incentive for agencies to actually undertake a RIS, albeit belatedly.

The Commission was advised that in Victoria, in practice, a RIS prepared where new interim regulations have been made is treated exactly the same as any other RIS — the RIS needs to satisfy the requirements of the SLA and the Victorian *Guide to Regulation* (that is, demonstrating that a policy problem exists and analysing the impacts of feasible options) and is not simply an ex post justification for the interim regulations. It is assessed by VCEC in the same way as all other RISs. The RIS is also subject to the same consultation and publication requirements as other RISs. It was noted that given the lead time for preparing a RIS (that is, the RIS will need to commence several months before the interim regulations expire), it may be impractical to use substantive data on actual impacts of the interim regulations, although this will not always be the case (VCEC, pers. comm., 25 July 2012).

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**Box 9.1      Victoria's 12 month expiry requirement for Premier's exemption**

In Victoria provisions are available for subordinate legislation to be exempted by the Premier from the preparation of a RIS under 'special circumstances'. However, in order for a Premier's exemption certificate to be granted, the proposed rule must be scheduled to expire on or before 12 months after its commencement date. Moreover, the Premier's certificate merely postpones the requirement to do a RIS. As the Guidebook states:

If a Premier's certificate is granted, the RIS process will still need to be commenced and completed within the lifetime of the certificate. Only in exceptional circumstances will more than one certificate be granted. Moreover, the duration of the certificate will be the shortest possible period to enable the RIS process to be undertaken (unless exceptional circumstances are involved). In practice, a six-month period is often the maximum period granted. (Victorian Department of Treasury and Finance 2011a, p. 51)

A recent Victorian example of where new interim regulations were made and a RIS was subsequently prepared when these expired was for the Electricity Safety Amendment (Bushfire Mitigation) Regulations 2011, which replaced the Electricity Safety (Bushfire Mitigation) Amendment Interim Regulations 2010. In this case, the 'final' regulations were substantively the same as the interim regulations, however, the RIS included extensive analysis, with detailed consideration of other options and primary data collection through interviews and surveys of affected businesses. VCEC has advised that in other current cases where a Premier's exemption has been granted, RISs are still being prepared and/or have not been publicly released (VCEC, pers. comm., 25 July 2012).

## **Australian Government PIRs**

The following discussion focuses on the Australian Government requirements and guidance material. This reflects the short time the PIR requirements have been in place in other jurisdictions and the consequent lack of available data or examples of completed reviews.

At the Commonwealth level, the number of non-compliant regulations (and Prime Minister's exemptions) increased from seven in 2007-08 to a peak of 30 in 2010-11. It has since halved (table 9.3).

As at end June 2012, a total of 84 PIRs were required, of which all but two were compliant. In the majority of cases the PIR had not started or the regulation had not been implemented. In both cases of non-compliance, the PIRs had commenced but not been completed (table 9.4). These relate to:

- restrictions on the quantity of liquid aerosol and gel items that may be taken on international flights to, from or through Australia (2007)

- restrictions on the use of certain lead compounds in industrial surface coatings and inks (2009).

**Table 9.3 Post implementation reviews added by year**  
Number

<i>Instigation for PIR</i>	<i>2007-08</i>	<i>2008-09</i>	<i>2009-10</i>	<i>2010-11</i>	<i>2011-12</i>
Proposal non-compliant with RIA	4	8	12	16	9
Proposal received a Prime Minister's exemption	3	6	4	14	5
<b>Total</b>	<b>7</b>	<b>14</b>	<b>16</b>	<b>30</b>	<b>14</b>

Sources: OBPR (2011a, 2012a).

Extensions to PIR commencement or completion have been granted in some recent cases. Earlier in 2012 the OBPR reported as non-compliant some regulatory proposals in which the associated PIRs had either missed their starting deadlines or not been completed within the required timeframe. These included two PIRs for the *Tax Laws Amendment Bill 2009* which have since been granted extensions by the OBPR to allow further tax data collection. In addition, a later start date for the PIR for the *Resale Royalty Right for Visual Artists Bill 2008* was agreed between the OBPR and the Office for the Arts (OBPR 2012a).

**Table 9.4 Post implementation review status and compliance**  
Number, as at end June 2012<sup>a</sup>

<i>PIR status</i>	<i>Compliant</i>	<i>Non-compliant</i>	<i>Total</i>
Regulation not implemented	10		10
PIR not started	43		43
PIR started	17	2	19
PIR completed — not published	1		1
PIR completed — published	11		11
<b>Total</b>	<b>82</b>	<b>2</b>	<b>84</b>

<sup>a</sup> Following the release of this table additional compliant PIRs have subsequently been published.

Source: OBPR (2012c).

All PIRs completed so far have been assessed by the OBPR as adequate — that is, meeting the Government's best practice regulation requirements. Recent PIRs include those undertaken for the Government guarantee of the deposits and wholesale funding of Australian deposit-taking institutions (2008) and the *Fair Work Act (2009)*. It is notable that some completed PIRs have been undertaken in conjunction with RISs which proposed significant changes in the regulation. For example, the PIR for live cattle exports was included as a separate section of a

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larger RIS for further reforms to the industry. The Commission has previously noted that the production of PIRs along with a RIS for revisions to the relevant regulations:

... lends support to the concerns that PIRs were designed to address — that regulations made without a RIS are more likely to need revision. Having to undertake a PIR may have brought issues to light more quickly than would otherwise have been the case. This suggests that allowing PIRs to be deferred can reduce their potential to act as a catalyst for revising poor regulation. (PC 2011, p. xxiii)

The OBPR reports 19 PIRs are scheduled to commence in 2012-13, with Treasury responsible for eight of these reviews. Many PIRs required in coming years cover important areas of regulation with significant potential impacts. These include:

- changes to the arrangements for executive termination payments (2009)
- the National Broadband Network (NBN) (2009) and the NBN implementation review (2010)
- pharmacy location rules (2010)
- changes to renewable energy targets and safety and quality requirements (2010)
- certain responses to the *Australia's Future Tax System Review*, including the minerals resource rent tax and targeting of not-for-profit tax concessions (2011)
- new large scale fishing activities in Commonwealth fisheries (2012).

Given the growing number of PIRs at the Commonwealth level and, more importantly, the significance of the issues to which they relate, there are concerns that the way in which PIR requirements are implemented may be undermining the RIA process (for example, Australian Chamber of Commerce and Industry, sub. 2; Australian Financial Markets Association, sub. 11; PC 2011). Ensuring this does not happen requires that PIRs be both a sufficient sanction to deter non-compliance with RIA processes, and that the consequences for not completing an adequate PIR be sufficient to encourage their completion.

Such issues may also exist or emerge in other jurisdictions which have provision for PIRs. However, the lack of transparency on PIR processes in these jurisdictions (compared with the Australian Government) means that such issues, if they arise, would be largely hidden and therefore more susceptible to undermining RIA processes.

As noted in chapter 8, the consequences of non-compliance for an agency reduce as the agency becomes more non-compliant with the best practice regulation framework. Failure to submit an adequate RIS results in public reporting *and* the requirement to complete a PIR. However, if the agency subsequently fails to

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undertake a PIR (or is late in starting or finishing a PIR) the agency faces only the prospect of being publicly reported by the Office of Best Practice Regulation (OBPR) as non-compliant with the PIR process, without further consequence.

### *Ensuring good quality analysis in PIRs*

Ensuring that PIRs not only occur, but also include robust analysis, is important for improving the likelihood of good regulatory outcomes. According to the Regulation Taskforce Report (2006), PIRs should be undertaken for proposals where:

- the introduction of the regulations had been fast-tracked — avoiding the full application of RIS requirements; or
- the extent of the compliance burden or the accuracy of the initial cost-benefit analysis was uncertain.

Such reviews should be used to identify ways of lessening high compliance costs and unintended adverse impacts, and to test whether the net benefits predicted to flow from a regulation were being realised. (p. 174)

The OBPR has stated that PIRs should be similar in scale and scope to the RIS that would have been prepared at the decision making stage, but rather than report on expected impacts it should report on actual impacts, adding that:

Stakeholder consultation should be viewed as essential and will form a key part of a PIR ... The PIR should conclude with an assessment, based on the available evidence, of how effective and efficient the regulation has been in meeting its original objectives. (OBPR 2012b, pp. 3-4)

Overall the Commission is of the view that OBPR PIR guidance material on the analysis that should be included is broadly sound. A challenge, however, is to ensure that quality of analysis undertaken for PIRs in practice aligns with the principles — in particular, that it is of a comparable level of rigour to that required in a RIS. If PIR requirements were seen as less demanding or rigorous than a RIS, then there are risks that that the RIS process would be weakened.

The large numbers of significant proposals that have avoided the RIS process — whether through non-compliance or the granting of exemptions — following the introduction of the Commonwealth PIR requirements, have raised concerns among stakeholders.

In relation to the *Future of Financial Advice* (FOFA) reforms introduced by the Australian Government in 2011, AFMA noted that a PIR prepared within two years was:

... an entirely inadequate outcome and effectively sidelined the RIA process. The costs in implementation of the reforms that will have been expended by industry by the time



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of the review will be substantial and there will likely be resistance to further change even if it would result in a more optimal outcome as a result. (sub. 11, pp. 5-6)

The change in the basis for analysis and industry adjustments to introduced regulation are important factors which distinguish a PIR from a RIS. Where implementation costs are known, and early outcomes monitored, PIRs *should* yield better information than a RIS, but their ex post nature means that the cost-benefit calculus for different options can change (PC 2011).

Once a proposal is implemented, large expenditures and adjustment costs have often been borne by governments, business and other stakeholders. Winding back regulation can be very costly. And what were only potential winners and losers from new regulations become actual winners and losers, and face different, and often stronger incentives to lobby governments. Hence, regardless of how well the subsequent PIR is done, it cannot be seen as a substitute for a RIS.

Another area of difference between PIRs and RISs is that the former can involve an explicit terms of reference while RISs generally do not. For example, at the Commonwealth level, the terms of reference for PIRs are approved by the OBPR.

A potential advantage of requiring explicit terms of reference for PIRs rather than relying solely on the broader RIA requirements is that specific issues that have arisen following implementation of the policy (such as unexpected costs or unintended outcomes) can be identified for addressing in the PIR. Clearly, any such terms of reference would need to supplement rather than replace the existing PIR requirements to ensure the scope and coverage of the analysis in the PIR is sufficiently broad.

An issue that arose during the lead up to the commencement of the Fair Work PIR was the appropriateness and scope of the OBPR-approved terms of reference for the review (Australian Senate 2012a, pp. 96-113; Ergas 2011; OBPR 2012d). Hence, ensuring that processes for the development of terms of reference for PIRs are clear, timely and transparent is important both for strengthening stakeholder confidence in, and ensuring the quality of, PIR processes and outcomes.

Some good design features for post implementation reviews are outlined below (box 9.2).

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**Box 9.2 Good design features for post implementation reviews**

PIRs should require the same rigour as the RIS process. Design features which would facilitate this include:

- reviews to be undertaken by an independent third party for any regulation assessed as to be of major significance
- provision to be made for data generation to monitor the costs of implementation and the outputs and outcomes
- forward looking impact assessment (as is undertaken for RISs) should be supplemented by actual data on observed impacts to date
- alternatives to achieving the objectives be evaluated
- consultation with stakeholders impacted or potentially impacted by the regulation.

Source: PC (2011).

### *Timing of PIRs*

Although a PIR has to commence within two years of the regulation being implemented, there can be considerable discretion in the interpretation of ‘implementation’, and the timing for the completion of the review is not clearly specified. Accordingly, the Commission (PC 2011) recommended that PIRs should commence within two years of the regulation coming into effect (or in instances where regulation is retrospective, the date the regulation is made), and the completion period should also be specified in the guidelines.

OBPR PIR guidance subsequently released (OBPR 2012b) noted:

The date on which legislation or regulation passes the Parliament, or a Minister announces a regulatory change, may not be a useful proxy for the date of implementation. (p. 7)

There is a range of factors which OBPR considers when deciding the timing of a PIR (OBPR 2012b). However in the Commission’s view these leave substantial scope for interpretation as to when ‘implementation’ occurs. Clearly, allowing a longer time between when a regulatory decision is taken and when a PIR is required will provide more opportunities to collect data on actual impacts. However, this is not without its costs. As issues lose currency over time, allowing too much time to elapse effectively reduces the sanction role played by PIRs. In addition, all regulations are subject to ex post evaluation and review as part of normal RIA process. Hence, if left too long, the PIR risks becoming a de facto ex post evaluation. While ex post evaluations are valuable tools (as will be discussed below) — their role is different to that of a PIR.

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### *Who is responsible for preparing a PIR?*

The agency responsible for bringing the original regulatory proposal to the decision maker has responsibility for ensuring that PIR requirements are met (OBPR 2012b). However, who actually prepares the PIR can vary. For example, some completed PIRs at the Commonwealth level have been prepared by the responsible policy department — Treasury prepared the PIR on the financial claims scheme; the Department of Agriculture, Fisheries and Forestry prepared the PIR on live cattle exports; and the Department of Infrastructure and Transport prepared the PIR for the changes to the Maritime Security Identification Card Scheme. In these three cases, the original proposals were progressed by the Australian Prudential Regulation Authority, the Australian Quarantine and Inspection Service (now in the Department of Agriculture, Fisheries and Forestry) and the Australian Maritime Safety Authority, respectively. The recent PIR for the Fair Work legislation was prepared by a government appointed panel (OBPR 2012e).

Ensuring appropriate governance arrangements is important for PIRs to work well. It may be difficult for an agency that has been implementing a particular regulatory solution to provide a ‘neutral’ assessment of the regulation 1-2 years later in a PIR. This suggests that, particularly where the impacts on business are major, an independent third party review would be desirable to ensure the review delivers robust conclusions and engenders stakeholder confidence and engagement with the process.

To promote stronger stakeholder engagement and ensure PIR processes are as transparent and accountable as possible, PIR terms of reference and other information such as planned consultations should be made publicly available as early as possible after the regulatory decision. For example, at the Commonwealth level, the Australian Government PIR guidelines state that forthcoming PIRs are supposed to be included in agencies’ annual regulatory plans (annual regulatory plans are discussed in chapter 7).

As PIR arrangements have been in place for a relatively short time, the effectiveness of jurisdictions’ PIR processes, where they exist, will need to be closely monitored over coming years. In particular, trends in numbers of significant new regulatory proposals which bypass the RIS process, and hence trigger PIR requirements, should be assessed. Should signs emerge of systematic bypassing of RISs processes, consideration should be given to the need for a further strengthening of incentives to:

- in the first instance, encourage the preparation of adequate RISs for regulatory proposals with significant impacts, and

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- in those instances where adequate RISs cannot be completed, ensuring comprehensive, rigorous (and timely) PIRs are prepared.

One possibility would be to require that regulations with significant impacts for which an adequate RIS was not prepared (either due to exemption or non-compliance) include PIR requirements in an explicit statutory review provision. Alternatively, an additional sanction that could be considered is that regulation for which an adequate RIS is not prepared be subject to automatic expiry, unless an adequate PIR is prepared within a requisite period, such as two years from the date the instrument comes into effect. This approach would have similarities with the 12 month expiry requirement currently used for some exemptions in Victoria.

#### LEADING PRACTICE 9.1

***Overall RIA processes are strengthened where comprehensive and rigorous post implementation reviews (PIRs) are required for regulatory proposals which were either exempted or non-compliant, with:***

- ***the terms of reference for all PIRs approved by the regulatory oversight body (as occurs at the Commonwealth level)***
- ***for all non-compliant proposals, and for those exemptions which have highly significant impacts, the PIR being undertaken through an independent process, paid for by the proponent agency***
- ***the regulatory oversight body publishing PIR adequacy assessments, including the reasons why the PIR was assessed as not adequate, or any qualifications where the PIR was assessed as adequate.***

### **9.3 Reviews and evaluations flagged in RISs or in legislation**

Consistent with leading practice, all Australian jurisdictions, with the exception of Tasmania, require that RISs include a discussion of how proposed regulations will be evaluated following implementation (table 9.5).

Requirements are generally quite broad. The Commonwealth's requirements are fairly typical, with the *Best Practice Regulation Handbook* (Australian Government 2010a) stating that a RIS (should) set out when the review is to be carried out and how the review will be conducted, including if special data are required to be collected.

Victoria's *Guide to Regulation* notes:

An evaluation strategy might include details such as the baseline data and/or information that will be collected to judge the effectiveness of the measure; the key performance indicators (KPIs) that will be used to measure the success of the measure; and when evaluations will be undertaken. (p. 27)

**Table 9.5 Review and evaluation requirements as part of RIA**

<i>Characteristics</i>	<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
<b>RIA to specify:</b>										
- how regulation is to be reviewed <sup>a</sup>	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓
- when review should occur	✓ <sup>b</sup>	✗	✓	✓	✓	✓	✓	✗	✓	✗
<b>Guidance provided on:</b>										
- specific questions review to address	✗	✗	✓	✓	✓	✓	✓	✗	✓	✗
- use of review or sunset clauses in legislation	✗	✓	✓ <sup>c</sup>	✗	✗	✗	✓	✗	✓	✓
- appropriate governance arrangements for review <sup>d</sup>	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗

<sup>a</sup> This can include whether specific data need to be collected. <sup>b</sup> The Commonwealth also has a five yearly 'catch-all' review requirement. <sup>c</sup> Embedded statutory reviews are required for all Bills. Statutory rules and other regulations should be reviewed every 5 years. <sup>d</sup> For example, guidance on appropriate level of independence, transparency, reporting arrangements.

Source: Jurisdictional guidance material (appendix B).

In terms of the goals of the review, most jurisdictions require that regulations be reviewed for ongoing relevance as well as the effectiveness and efficiency of the regulation. More detail is provided in a number of jurisdictions. Queensland's *Guide to Regulation*, for example, notes:

The objective of the review is to evaluate the continuing relevance, effectiveness and efficiency of the regulation. The review should:

- identify the need for continued regulatory action — does a problem still exist?
- evaluate whether the regulation met, or is meeting, its objectives while meeting regulatory best practice principles and not imposing unnecessary burdens on stakeholders
- consider competition impacts
- consider whether the regulatory objectives could be achieved in a more effective and efficient way, and
- include consultation with stakeholders. (Queensland Treasury 2010, p. 34)

Several jurisdictions highlight in their RIA guidelines that consideration should be given to incorporating sunset provisions or embedded statutory reviews. COAG requirements, for example, note that:

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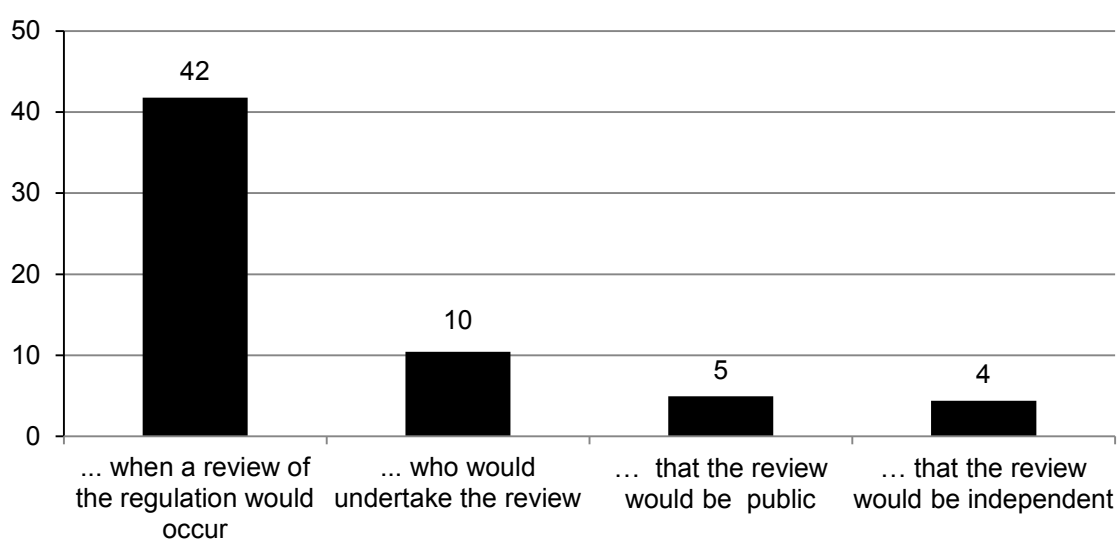
Ensuring that regulation remains relevant and effective over time may be achieved through planning for monitoring and review of regulation as part of the development of new regulatory proposals, or by incorporating sunset provisions or review requirements in legislative instruments. (COAG 2007a, p. 6)

## Observed practices on reviews flagged in RISs

Determining how well the ex post evaluation and review requirements are working in practice has proved difficult due to data limitations. The Commission's examination of RISs identified the extent and nature of the discussion of ex post evaluation and review arrangements contained in RISs (appendix E). Overall results revealed that the amount of information included in RISs was very limited. While almost all RISs included some discussion of a subsequent review, less than half of these included information on when the review would occur (figure 9.1). Most commonly, when this was included in RISs it involved a brief statement that a review would occur within 3-5 years with little further detail provided.

Figure 9.1 **Ex post reviews and evaluations foreshadowed in RISs**

Per cent of RISs that stated...



Data source: PC RIS analysis (appendix E).

The limited information on reviews provided in RISs was most evident in regard to governance arrangements. Few RISs provided information on who would undertake the review, whether the review would be public or whether the review would be independent. This is unsurprising given that no jurisdiction provides guidance on governance arrangements for reviews — including the appropriate scope,

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independence, or transparency of ex post reviews for regulations with significant impacts (table 9.5).

Further, while guidance material in several jurisdictions recommends that departments and agencies consider embedding statutory reviews in legislation and/or mandatory sunseting clauses, in practice their use was rare (5 per cent of RISs).

The limited information provided in RISs on reviews was also evident in the identification of data requirements that would need to be met to evaluate the effectiveness and efficiency of the regulatory proposal post implementation. This result is somewhat surprising, particularly given that lack of suitable data to undertake cost benefit analysis was nominated in the Commission's survey of agencies as one of the main barriers to more effective RIA. In addition, a key area identified where RIA could be strengthened was the production of more robust and objective estimates of costs and benefits (chapter 6). Ex post reviews provide an opportunity to collect robust data and information that may have been difficult to obtain at the time the RIS was undertaken. There seems little justification for RISs not systematically outlining both how data on key performance indicators will be collected and the necessary steps to review the regulation to see whether the anticipated benefits have eventuated or there have been unforeseen impacts.

Overall, the RISs examined generally provided enough information on review arrangements to meet the limited requirements for RIS adequacy and no more. For the most part this was the case regardless of the magnitude of the impacts of the regulatory proposal.

A number of participants called for more routine ex post evaluation (which they generally referred to as 'post implementation review') to promote greater rigour and accountability in RIA (box 9.3).

There are likely to be a number of benefits from more systematic ex post evaluation, with the proviso that such reviews are undertaken proportionately. In particular, priority should be given to regulatory proposals with large or uncertain impacts, including, but not limited to, those proposals for which the associated RIS did not contain much information on the expected costs and benefits of the proposal. The foreknowledge that there would be systematic scrutiny of whether claimed benefits and costs in RISs and underlying assumptions about the effectiveness of proposed regulatory solutions are borne out in practice, would provide greater incentives to ensure that RIS estimates are robust and impartial.

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### Box 9.3      **Calls for stronger ex post evaluation to support RIA**

#### *Small Business Development Corporation (Western Australia)*

The SBDC would also see benefit in requiring the post-implementation review of all new and amending regulatory proposals to be made mandatory under the RIA process, not just those subject to a Treasurer's Exemption (as required under the RIA Guidelines). By introducing a rigorous ex-post review mechanism, Ministers and agencies will be compelled to undertake comprehensive scrutiny of the 'realised' impacts of their regulatory action and then justify why the regulation should continue. (sub. 25, pp. 10-11)

#### *Plastics and Chemicals Industries Association*

At present there are no requirements for post-implementation reviews of regulatory decisions that require regulatory impact analysis. Consequently, there is no quality control of information that has been used to support decisions. Non delivery of stated benefits could significantly change the cost-benefit consideration ... Post-implementation reviews are needed to ensure that assumptions and benefits contained in RISs are 'real' and delivered. (sub. 8, pp. 4-5)

#### *WA Department of Transport*

[I]t would be useful if agencies were to introduce standardised post implementation review process for proposals that undergo a RIA to assess the impact of the introduction of the proposal. The review process could include an evaluation of measurable indicators such as the number of positive and negative pieces of ministerial correspondence, customer feedback, media interest or industry circulars in relation to the proposal. Over a period of time the results of the post implementation review process could be used to give some indication of whether the agencies are implementing improved regulation as a result of the RIA process. (sub. 12, p. 3)

#### *Officers undertaking RIA in the Victorian transport portfolio*

Both DOT and VicRoads have not undertaken [ex post] reviews of RIA estimates. Such reviews could be undertaken as part of general post-implementation reviews, but in practice these are not undertaken. The key issue is that resources are not made available to such activities. This is despite a broad acknowledgement of the potential benefits. (sub. 17, p. 14)

In consultations with regulatory oversight bodies, the Commission learned that responsibility for ensuring that reviews foreshadowed in RISs are conducted rests with departments and agencies in all jurisdictions. No jurisdiction systematically monitors the outcomes of reviews foreshadowed in RISs or, indeed, whether the reviews take place at all. In addition, there appears to be very limited comparison of whether the estimated costs and benefits identified in RISs are borne out by subsequent experience.

Lack of good ex post evaluation of new regulation is not a uniquely Australian problem. A study by the United Kingdom's National Audit Office of all statutory instruments made in 2005 that were subject to RIA found that by mid-2009 only 29



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per cent had been subject to ex post review (NAO 2010b). Unfortunately no comparable data are available for Australian jurisdictions.

Concerns have been expressed in several OECD countries about the lack of ex post assessment of the impacts of regulation more broadly, and some governments are seeking to ‘rebalance’ their evaluation efforts (box 9.4). As part of the RIS process in Canada all regulations with a major impact on business require a formal monitoring and evaluation plan which outlines data collection requirements, governance arrangements and review timing (TBCS 2009).

**Box 9.4 Ex post evaluation of regulation in other countries**

There is a move internationally for greater requirements for ex post evaluation of regulation. For example, stronger ex post review requirements for new regulations are proposed in the United Kingdom and the European Union. According to the United Kingdom’s National Audit Office (NAO), the process for determining whether a review should occur has improved somewhat, but it implies the process could do better:

In 2007 we reported that there continued to be an unstructured and ad hoc approach to post implementation review across all departments. Since then, we have found greater numbers of Impact Assessments include a statement of when a review should be conducted, although relatively few have been carried out to date. (NAO 2010b, p. 9)

In addition, both Canada and the United States have recently established requirements in their regulatory systems to undertake ex post evaluations of significant regulations. In particular:

- The Canadian Government explicitly requires evaluations of both the stock and flow of regulation in its 2007 Cabinet Directive on Streamlining Regulation. In addition, rolling five year evaluation plans are required (TBCS 2009)
- In the United States, Executive Order 13563 requires retrospective reviews of existing regulation alongside the regulation impact assessment process:  
... It asks for ‘periodic review’ to identify ‘rules that may be outmoded, ineffective, insufficient, or excessively burdensome.’ It directs agencies to produce preliminary plans for period review of significant rules and submit them to OIRA [Office of Information and Regulatory Affairs] within 120 days. Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Before a rule has been tested, it is difficult to be certain of its consequences, including its costs and benefits. During the process of retrospective analysis, the principles ... remain fully applicable, and should help to orient agency thinking. (Sunstein 2011, p. 5)

Sources: TBCS (2009), NAO (2010b), Sunstein (2011).

## **Suggestions for improving arrangements for reviews flagged in RISs**

The Commission (PC 2011) examined the issue of ex post evaluation and reviews with regard to the Commonwealth requirements — in particular how to improve the

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likelihood that reviews flagged in RISs are undertaken systematically and with an appropriate degree of rigour, recommending:

The Australian Government's Best Practice Regulation guidelines should be modified to: require a formal review and performance measurement plan in cases where the expected impact of a proposed regulation is rated as 'major' by the Office of Best Practice Regulation (OBPR); encourage the use of embedded statutory reviews where there are significant uncertainties regarding the effectiveness or impacts of the proposed regulation; ensure that any proposed review is proportionate to the potential impact of the regulation; ensure that all reviews foreshadowed in regulatory impact statements take place within five years. (PC 2011, p. xxvi)

Given the evidence collected as part of this study, there are likely to be benefits in strengthening ex post review requirements along the same lines across all jurisdictions, particularly for proposals with large or uncertain impacts. A key element in making this work well would be more systematic monitoring to ensure reviews are actually undertaken and acted upon.

The regulatory oversight body in each jurisdiction would seem best placed to supervise these requirements, which essentially represent an extension of its current activities. In particular, the regulatory oversight bodies could: encourage more proportionate, timely, and useful reviews; ensure early consideration is given to the availability of data for reviews, particularly for regulations with major impacts; promote more timely rectification of any adverse impacts arising; and help maintain 'fit for purpose' regulation. Publication of a timetable for the reviews would also assist agencies, business organisations and other stakeholders to better coordinate consultation efforts.

The Commission has previously recommended that such actions be taken at a Commonwealth level:

The Australian Government should establish a system that: tracks reviews proposed to meet the RIS requirements to ensure they are undertaken; monitors the progress of reform recommendations from these and other commissioned reviews; makes this information available on a public website, with links to planned reviews, completed reviews, government responses, and a record of subsequent actions. (PC 2011, p. xlv)

Details of scheduled reviews — including any embedded statutory reviews (discussed below) — could be included in annual regulatory plans with monitoring by oversight bodies to ensure they are periodically updated to reflect ongoing developments in review plans.

*In reviewing existing regulations, more efficient use of RIA resources is achieved by targeting resources at those regulations with highly significant or uncertain impacts.*

*All regulatory oversight bodies should monitor and report publicly on regulatory reviews flagged or required as part of RIA processes. Annual regulatory plans could be utilised for this, with oversight bodies checking them for adequacy.*

### **‘Embedded’ statutory reviews**

An approach that has been adopted to ensure that reviews foreshadowed at the time regulation is developed actually take place is to build the review requirement into the regulation. In some cases legislation includes a requirement for a review to be conducted and in some instances it also sets out the specifics of the review, such as timing, scope and governance arrangements. These ‘embedded’ reviews have generally been used for significant areas of regulation where there are uncertainties about the efficacy or impacts of the legislation; where the regulatory regime is transitional; or to reassure stakeholders who are adversely affected by new legislation (PC 2011).

Embedded reviews vary considerably in scope from consideration of major changes or repeal of the legislation to consideration of only the implementation design features.

In New South Wales, the *Guide to Better Regulation* (NSW Department of Premier and Cabinet 2009) states that review provisions should be included in all Bills, unless a Bill has a minimal impact. In most cases reviews are to be conducted every five years and statutory reviews must be tabled in Parliament to allow for public scrutiny. However, the timing of reviews and details about review objectives can be varied on a case-by-case basis.

An examination of the stock of primary legislation in force in New South Wales (as at end October 2012) revealed that a total of 265 instruments contained a review provision. Although the time periods varied, wording of provisions typically ran along the following lines:

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

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(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years. (*Architects Act 2003* (NSW), section 89)

Overall, agencies in New South Wales completed 11 comprehensive statutory reviews of Acts in 2009-10. The New South Wales BRO is canvassing views on strengthening RIA requirements to mandate the inclusion of a review provision in all Bills, including amending legislation (BRO 2011).

Embedded statutory reviews can sometimes be paired with a sunset clause, which states that the legislation will expire at a particular time subject to the findings of the review. In its submission to this study the Small Business Development Corporation of Western Australia noted ‘... embedding sunset clauses in laws and regulations, which would trigger a review before the law or regulation can be renewed’ (sub. 25, p. 11) was an option for consideration to strengthen RIA processes in Western Australia.

Similarly, Borthwick and Milliner (2012) recommended that the Australian Government introduce either a sunset clause or a review provision into all primary legislation that has a more than minor regulatory impact on business or the not-for-profit sector, noting that while subordinate legislation at the Commonwealth level is subject to sunset provisions under the *Legislative Instruments Act 2003*:

... primary legislation are not required to be reviewed as a matter of course. A review provision would ensure that the Government and Parliament periodically reflects on whether the Act is meeting its objectives, and whether the objectives could be achieved in a more efficient and effective way. (Borthwick and Milliner 2012, p. 77)

The evidence collected in this study — including the challenges agencies face in obtaining robust data on likely costs and benefits of proposed regulations in RIA — and the lack of systematic follow up of reviews flagged in RISs highlights the benefits from more systematic use of such reviews.

The Commission is therefore of the view that mandating the systematic use of review provisions for primary legislation with significant impacts would help strengthen overall RIA processes. Such a requirement would not be appropriate for subordinate legislation. Reviews of subordinate legislation in most jurisdictions are covered by sunset or staged repeal requirements (discussed in the following section).

In addition to mandating a review, such provisions could also specify the time period for the review — which could vary depending on circumstances — as well as aspects of scope, coverage and governance arrangements.

*Provision for a mandatory review should be included in all future primary legislation where the associated proposal triggers RIS requirements.*

## 9.4 Reviews associated with sunseting requirements

A key tool for regulatory review that draws on RIA processes is sunseting. Sunset clauses are requirements for legislation (usually subordinate) to lapse after a specified period if not re-made. The rationale for sunseting is that much regulation inevitably has a ‘use-by date’, when it is no longer needed or will require significant modification. But without a trigger to reassess its usefulness, at least some of this regulation will inevitably remain in place (PC 2011). Sunseting should, at least theoretically, reduce the average age of the stock of regulation and ensure regular review and reform of the stock of regulations.

Sunseting can either be narrow, with clauses included in specific legislation, or broad, applying to classes of legislation. Given that automatic lapsing would be problematic for much primary legislation, broad based sunset arrangements are confined to subordinate legislation (table 9.6). However, specific sunset clauses can generally be included in individual Bills. For example, in Western Australia, sunset clauses are used in Bills at the direction of Cabinet, Parliament or individual Ministers. While most jurisdictions have stated that these are used on occasion, systematic data on this are not available.

**Table 9.6 Sunset requirements in Australian jurisdictions**

Characteristic	Cwltth	COAG	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Broad-based sunseting for subordinate legislation	✓	..	✓	✓ <sup>c</sup>	✓	×	✓	✓	×	×
Time period (years)	10	..	5	10	10	..	10	10	..	..
Deferral (years)	1 <sup>a</sup>	..	1-5 <sup>b</sup>	1	1-5	..	1-4	1	..	..
RIA for remaking regulations with significant impacts	✓	..	✓	✓	✓	..	✓	✓ <sup>d</sup>	..	..

<sup>a</sup> Applies to requirements as at 1 January 2012. Since then, amendments to the Commonwealth Legislative Instruments Act have increased this to up to 5 years to allow greater flexibility and promote greater use of ‘thematic’ or package reviews of related instruments. <sup>b</sup> Postponement occurs in 1 year intervals. Postponement on the third, fourth or fifth occasions can only occur if the responsible Minister has given the Legislative Review Committee at least one month’s written notice. <sup>c</sup> Statutory rules sunset 10 years after coming into effect. RISs are prepared before the rules are remade. Legislative instruments do not ordinarily sunset. <sup>d</sup> A RIS is not required for the remaking of subordinate legislation where the original regulation has been in operation at some time in the preceding 12 months, and has been in operation for less than 10 years, and a RIS was prepared in relation to the original regulation. In practice, this means regulation could go for up to 19 years without a review. .. not applicable.

Source: Jurisdictional guidance material (appendix B).

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General sunset clauses applied to classes of legislation were first employed in Australia by state governments. Six jurisdictions have legislation for general sunsetting, or ‘staged repeal’ of delegated legislation — the Commonwealth, New South Wales, Victoria, Queensland, South Australia and Tasmania. The OECD (2002) has previously noted that Australia has been at the forefront of OECD countries in the use of sunsetting.

Where governments do not want sunsetting regulation to lapse, it must be remade — following the same procedural requirements (including RIA) as new legislation. For example, the Australian Government’s (2010a) *Best Practice Regulation Handbook* requirements apply to any regulation remade due to sunsetting.

Most jurisdictions have a ten year sunset period (including the Australian Government, Victoria, Queensland, South Australia and Tasmania). New South Wales has a five year period. Sunsetting provisions also apply at the local government level for by-laws and local laws in a number of jurisdictions (PC 2012).

The sunset requirements introduced in the Commonwealth, New South Wales, Victoria, South Australia and Tasmania apply to the pre-existing stock of regulation. To facilitate this, the sunsetting of existing legislation was staggered. However, in Queensland sunset requirements are generally applied to new instruments that commenced after sunset requirements were introduced.

Knowing the amount of regulation that lapses as a result of sunsetting arrangements and is subsequently remade essentially unchanged would shed light on the usefulness of RIA for sunsetting, but definitive data are not available.

## **How well does RIA for sunsetting work in practice?**

### *Views on the benefits of sunset reviews*

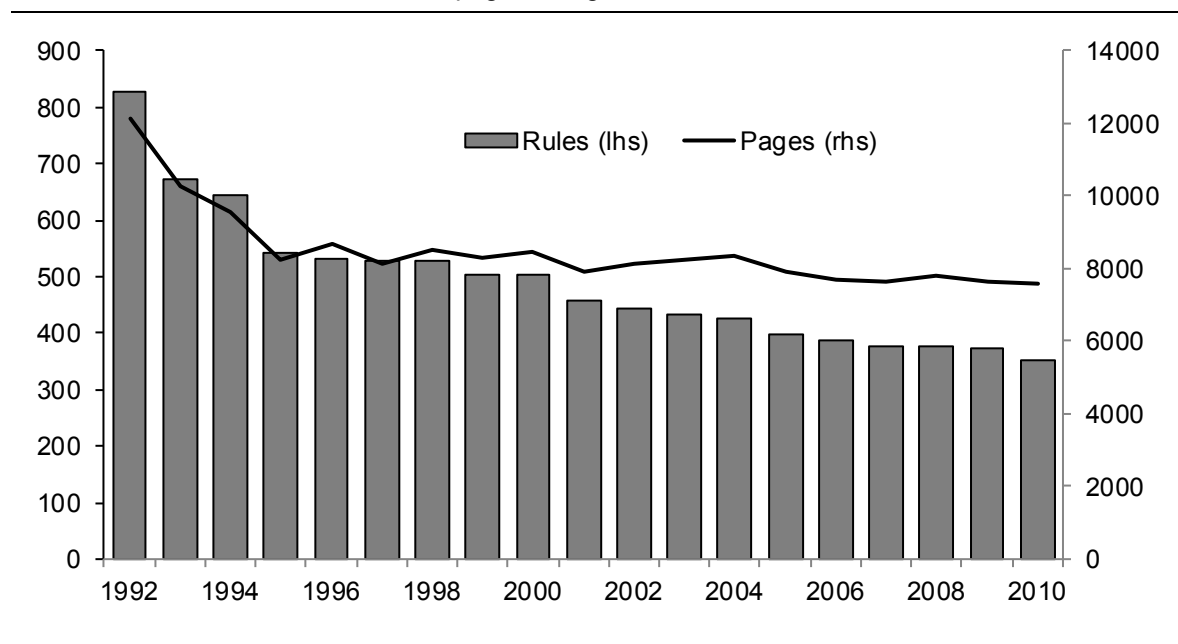
There is some evidence that reviews associated with sunsetting do play a role in promoting better regulatory outcomes. A recent US empirical study by Sobel and Dove (2012), which examined how differences in the regulatory review processes across US states affect the level of regulation, found strong evidence of benefits from reviews associated with sunsetting:

By making regulations fight to stay in place, even if it is just to put them through the political battle necessary to be re-enacted individually instead of being pork-barrel legislated, sunset provisions force a re-evaluation of all regulations and tend to lessen the degree of regulation within a state. (p. 37)

An OECD study (1999) reviewed the use of sunseting in several Australian states and found some benefits, noting that it had substantially reduced the overall number of regulations in force, removed much redundant regulation from the statute books and encouraged the updating and rewriting of much that remained.

While not a measure of the level of regulatory burden, data on the number of instruments and pages of regulation subject to staged repeal in New South Wales via sunseting show a significant reduction in regulation after the introduction of sunseting. Reduction in the regulatory stock achieved through sunseting was greatest in the first few years, as the *Subordinate Legislation Act 1989 (NSW)* required the sunseting of the pre-existing stock of regulations (all statutory rules in force prior to 1 September 1990) in stages — with one-fifth of the stock subject to sunseting each year between 1991 and 1995 (figure 9.2). Even allowing for this, reduction has slowed in recent years, with the BRO (2011) noting that this may reflect, in part, that the easiest reforms have been identified and resolved in the early years of the repeal program.

**Figure 9.2 NSW subordinate legislation subject to staged repeal**  
Number of rules and pages of legislation



Data source: BRO (2011).

Tasmania's Department of Treasury and Finance also reported benefits from reviews of sunseting regulation in their state:

While the sunseting of regulations is often viewed as administratively onerous (particularly where considerable review of the legislation has been undertaken within the 10 year period), it is generally considered that sunseting is very beneficial and has

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led to improved regulatory outcomes at the end of the 10 year period. In some cases regulations have not been remade at the end of the 10 year period. (sub. 22, p. 1)

The use of RIA for reviews associated with sunseting regulation can lead to early engagement from the relevant departments and improve the overall effectiveness of the process. VCEC noted that effective early engagement by regulators improved the regulatory proposals relating to sunset reviews of the Environmental Protection (Industrial Waste Resource) Regulations 2009 and the Children's Services Regulations 2009. The departments responsible for both of these RISs engaged with VCEC more than 12 months before the regulations were due to sunset. VCEC (2009) noted that early engagement enabled these RISs to be used as tools to analyse the costs and benefits of various options, and better shape the proposed regulations.

Nevertheless, analysis by VCEC for Victorian RISs assessed between 2005 and 2009 found that 14 per cent of the compliance savings came from re-made sunseting regulations rather than from new/amended regulations, despite the fact that 40 per cent of the RISs were for sunseting regulation (VCEC 2011b). More recently, however VCEC notes that it has observed significant savings for regulations that have sunset recently (VCEC pers. com., 25 October 2012). For example, the recent RIS prepared in Victoria for the re-made Dangerous Goods (Storage and Handling) Regulations proposed significant reductions in regulatory burden compared to the previous regulations.

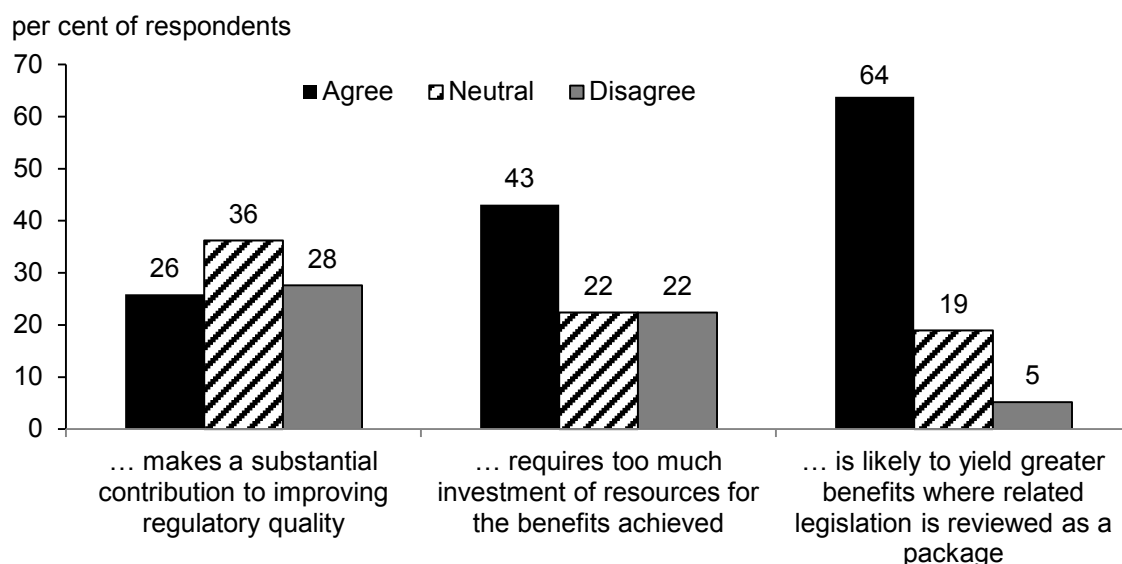
The Commission's survey of agencies undertaken for this study identified that:

- only one-quarter of respondents thought that sunseting made a substantial contribution to improving regulatory quality
- more than 40 per cent agreed that sunseting requires too much investment of resources for the benefits achieved; just over one-fifth of respondents disagreed (figure 9.3).

This issue of managing the resource burden of reviews for sunseting regulation was also raised with the Commission by both agencies and oversight bodies during consultations. Other issues raised and considered below include difficulties in determining the appropriate base case to use in such reviews and various approaches to dealing with review burden.



**Figure 9.3 Agency views on sunseting of regulation<sup>a</sup>**  
Responses to question on whether sunseting of regulation...



<sup>a</sup> Based on 58 survey responses by agencies and departments, of which: 6 respondents answered 'do not know' to the question of whether sunseting makes a substantial contribution to improving regulatory quality; and 7 respondents answered 'do not know' to the questions on investment of resources and package reviews. 'Agree' comprises both 'strongly agree' and 'agree'. Disagree comprises both 'strongly disagree' and 'disagree'.

Data source: PC RIA Survey (2012).

### *Managing the resource burden of sunset reviews*

Reviews associated with sunseting can create particular pressures on the RIA resources of agencies and oversight bodies that are not always evident in assessment of new regulation. These pressures can arise due to: the sheer volume of regulation that sunsets each year; the often limited scope for smoothing out workloads given that regulation will expire at a particular date (and scope for extensions is sometimes limited). In addition, priorities for reviewing existing regulation can be low for governments keen to develop and implement new policy agendas.

In discussing the NSW staged repeal program for sunseting subordinate legislation, for example, the BRO (2011, p. 27), noted that 'the resources needed to undertake reviews on an ongoing basis are substantial.'

For reviews associated with sunseting to achieve benefits that justify the potentially large investment of RIA resources they can entail, some prioritising of reviews and resources is necessary. A key challenge is ensuring that RIA undertaken for remaking sunseting instruments is appropriately rigorous. The time pressures involved mean overly mechanistic or 'tick and flick' reviews are a risk. For

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example, in a submission to this study, AFMA, while generally supportive of sunseting, noted that:

Sunset clauses, while a welcome addition to ensure regular review of regulation, are a fairly primitive approach to ongoing assessment of regulatory relevance. In practice when regulations reach their sunset timing they are reintroduced sometimes without sufficient re-assessment. (sub. 11, p. 10)

Similarly, a review of Victoria's RIS process found:

Despite efforts by VCEC to raise awareness of sunseting regulations well in advance, these are often not considered soon enough because of departmental workloads and/or lack of resourcing for RIS preparation, particularly when a number of regulations are due for renewal within a defined period of time. This means that the RIS process receives little attention early on, particularly at the stage when alternative options could be considered, and RIS documents are prepared in a rush. (Access Economics 2010, p. 23)

While one of the strengths of sunseting as a tool for regulation reform is that agencies are forced to act, in all jurisdictions that have sunseting, there are mechanisms available for delaying the sunseting and associated reviews (table 9.6). For example, New South Wales' five-yearly sunseting requirement has seen the postponement of substantial numbers of regulations scheduled to sunset. In 2009 and 2010 the staged repeal of 51 per cent and 42 per cent of expiring regulations, respectively, were postponed. The BRO (2011) notes that this may reflect a review period (five years) that is too short for some regulations and that agencies are choosing to allocate resources to higher priority activities. Options for addressing this problem, while ensuring the stringency of sunseting provisions in NSW are maintained, are currently being examined by the BRO.

In other jurisdictions, mechanisms for delay include:

- Victoria — on the certificate of the minister, the Victorian Governor may extend the operation of a regulation once only for a period not exceeding 12 months
- Queensland — extensions of one year or a maximum of five years for subordinate legislation substantially uniform or complementary with legislation of the Commonwealth or another state
- South Australia — postponement of expiry for up to a maximum of four years.

In Queensland, expiry of substantial numbers of sunseting instruments has been delayed over the past decades through the granting of extensions. However, the numbers have been falling — down from 100 extensions granted in 1998 to only 32 in 2008, suggesting that the process of regulation review may have become better established and/or the volume of regulation that is sunseting and requiring review has eased to a manageable quantity (Scrutiny of Legislation Committee 2010).

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While there can be legitimate reasons for deferral of sunseting — such as to allow for thematic or package review (discussed below) — sunseting is less likely to work well where exemption rules and rollover time limits are lax, allowing undue deferral of review.

### *Determining the appropriate base case for sunseting reviews*

While there have been no suggestions that RIA is not the appropriate framework for reviewing sunseting regulation, the level of impact analysis and the appropriate base case that should be used in determining whether the regulation should be maintained was raised as an issue in consultations with stakeholders. The Australian Government Attorney-General's Department noted:

In relation to sunseting regulations, the impact analysis will be different to a process which involves considering making a new regulation or regulatory scheme. It may be in some cases that the need for continuing regulation is clear, and the RIA requirements should not require unnecessary additional analysis. It seems sensible to provide different guidance on the steps required to analyse existing regulation. (sub. 4, p. 2)

An issue raised in this regard is what the appropriate base case should be for undertaking RIA for regulation scheduled to sunset. Where regulation has been in place for a long time, a base case of 'no regulation' may be both nonsensical and infeasible to analyse. Officers undertaking RIA in the Victorian transport portfolio noted:

Consideration should be given to removing the requirement to assess sunseting regulations against a zero regulation base case. In some cases, this requirement is too onerous as it is not feasible to collect data associated with no regulations. For example, the requirement to carry lifejackets onboard recreational vessels has been a long standing requirement in Victoria (since the introduction of the *Victorian Motor Boating Act 1962*). (sub. 17, p. 5)

An alternative model suggested by officers undertaking RIA in the Victorian transport portfolio was that a zero regulation base case could only be applicable in instances where the regulation is identified as clearly problematic or that it is not meeting regulatory objectives.

The Commission is of the view that for sunseting reviews to work well in assessing whether regulation should be remade or allowed to lapse, they should always adopt a RIA framework. There are likely to be benefits from a base case of continuation of a regulation, particularly where such regulations have been in place for a long time, or have been reviewed multiple times. However, 'no regulation' should always be included as an option and the likely impacts assessed accordingly, with the depth of analysis proportionate to the significance of the issue. In cases where

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the regulation has been identified as problematic, the base case should be ‘no regulation’.

### *Package reviews*

Although sunseting can be effective at removing redundant regulation (usually subordinate legislation), the ability of reviews associated with sunseting to achieve deeper or more broad-based reform is constrained by sunseting’s mechanistic character. However, reviews associated with sunseting offer the opportunity to examine related legislative instruments, including primary legislation, in a thematic or systemic manner. The Commission has noted (PC 2011) that it is through such reviews that some of the greatest benefits are likely to be found.

For example, in examining the Australian Government’s sunset legislation (set out in the *Legislative Instruments Act 2003*), the Commission noted that sunseting would be enhanced if it were able to provide a catalyst for more systemic reviews:

These reviews should cover both sunseting and related legislation, including where appropriate, the primary legislation. This approach is potentially not just more cost-effective, but provides the opportunity to improve the quality of regulation. (PC 2011, p. x)

This issue was also addressed in a submission to this study by the Australian Government Attorney-General’s Department which noted:

RIA requirements can place a large burden on agencies when many individual instruments are sunseting at the same time. Allowing for thematic reviews of instruments may assist to streamline this process and allowing for a single RIA for a number of related instruments subject to a thematic review would reduce the workload on agencies and business without undermining the goals of the RIA process. (sub. 4, p. 2)

Following the Commission’s 2011 review, the Australian Government subsequently amended the sunseting requirements in the *Legislative Instruments Act 2003* to allow for package review and also to better smooth out the volume of instruments required (box 9.5).

Also supporting an approach of packaged reviews, around two-thirds of agencies responding to the Commission’s survey considered that sunseting was likely to yield greater benefits if related subordinate and primary legislation were reviewed as a package (figure 9.3).

*There are likely to be benefits for regulatory outcomes and efficient use of RIA resources from:*

- *prioritising sunseting regulations against agreed criteria, to identify the appropriate level of review effort and stakeholder consultation*
- *grouping related sunseting regulations for thematic or package review*
- *where appropriate, consideration of subordinate regulation in conjunction with its overarching primary legislation.*

**Box 9.5      Recent changes to Australian Government sunseting requirements**

The Government's *Legislative Instruments Amendment (Sunsetting Measures) Act 2012*, which commenced in September 2012, introduced several measures to improve the operation of sunseting provisions at the Commonwealth level. The changes aim to allow for better management of workload burdens on governments (and stakeholders) associated with reviewing and remaking legislative instruments.

Key features include changes to:

- more efficiently allow for the repeal of redundant instruments and provisions
- provide greater certainty about what instruments sunset and when they sunset, and provide staged sunseting dates for older instruments to remove large peaks in the number of instruments scheduled to sunset in coming years
- enable the Attorney-General to align sunseting dates of related legislative instruments to enable thematic reviews to be conducted
- clarify the requirements for explanatory material for instruments, including instruments that are remade following a review.

The Explanatory Memorandum noted that rules for calculating when instruments and provisions sunset were difficult to apply, particularly for older instruments amended before or just after the *Legislative Instruments Act (LIA)* came into force. It also noted:

The [Act] introduces and encourages thematic reviews of legislative instruments by creating a mechanism to align sunseting dates. This may involve bringing forward some sunseting dates, and pushing others back by up to five years. The ability to conduct thematic reviews will facilitate more efficient and effective review processes, and enable departments and agencies to comprehensively engage with stakeholders prior to the remaking of any instrument. This is consistent with the Productivity Commission recommendation that more flexibility be introduced to the LIA to enable thematic reviews of related instruments (*Legislative Instruments Amendment (Sunsetting Measures) Bill 2012* (Explanatory Memorandum), p. 8).

Sources: *Legislative Instruments Amendment (Sunsetting Measures) Bill 2012* (Explanatory Memorandum); PC (2011).

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## 9.5 Conclusion

Sound regulatory policy involves adopting a fully integrated approach to the development of regulation: from problem identification and the decision to employ a regulatory solution; through the design, implementation and enforcement of the regulations; to ex post review. While Australian jurisdictions have a number of review processes in place, there remains scope for improvement, including:

- ensuring that regulation with significant impacts that has not undergone RIA is subject to PIR (and ensuring that an adequate PIR is subsequently completed)
- for reviews foreshadowed in RISs
  - more systematic monitoring to ensure they actually take place and are undertaken with an appropriate level of rigour
  - greater transparency in governance arrangements and development of the terms of reference to improve review effectiveness and stakeholder engagement
- more comparisons of whether the estimated costs and benefits identified in RIA are borne out by subsequent experience
- more widespread use of embedded statutory reviews and individual sunset clauses, particularly where the assessment of costs and benefits in RIA was limited or there is significant uncertainty about impacts
- promoting greater use of either thematic or package reviews of related regulation for sunseting regulations, including where appropriate in conjunction with overarching primary legislation.

Ultimately, ex post reviews, no matter how well done, should not be seen as substitutes for ex ante analysis. However, when done effectively, ex post reviews can complement RIA processes and lead to better regulation.

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## 10 Improving integration

### Key points

- Regulatory impact analysis (RIA) requirements will be fully integrated into policy development when key RIA aspects — such as considering and evaluating a range of regulatory and non-regulatory options — occur routinely as part of the process.
- Despite jurisdictions requiring RIA to commence at the start of the policy development process, RIA is often an afterthought or ‘add-on’ to regulatory development.
- Identifying where integration has occurred is not easy but there are indications that some national standard setting bodies, COAG ministerial councils, certain independent Commonwealth regulators, and selected agencies in particular states have more fully embraced RIA.
- Successful integration of RIA can be hampered by a number of significant barriers including a lack of political commitment, a lack of skills to undertake RIA and the RIA process being administratively burdensome.
- The following aspects of RIA system design can be improved to better integrate RIA processes in all jurisdictions:
  - greater ministerial transparency, through statements to parliament regarding compliance with the RIA process, will not only help political commitment but have a cascading effect on the commitment of senior managers and agencies more generally
  - implementing a multi-stage process to assist with early integration of RIA into the policy development cycle
  - publication of oversight body adequacy assessments with explanations, the requirement to complete a post-implementation review (PIR) for non-compliant and exempted regulatory proposals and annual reporting of agency compliance information
  - giving agencies responsibility for deciding if a regulation impact statement (RIS) is required and streamlining preliminary impact assessment (PIA) requirements.
- For agencies which undertake RISs regularly, oversight bodies should consider establishing a memorandum of understanding to clarify expectations on what regulations need a RIS and the standard of the RIS documentation, as well as communication and dispute resolution procedures.
- Improving the evidentiary base on the performance of RIA would also enhance the integration of RIA requirements into policy development and the resulting regulatory outcomes for the community. Victoria has made substantial progress developing and publishing research in this field.

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## 10.1 What is integration?

Integration of RIA occurs when implementation of RIA requirements (such as considering and evaluating regulatory and non-regulatory alternatives) is embedded within the policy making process. To achieve this, integration requires two key elements: the skills and capacity — both within regulatory agencies and by decisions makers — to make use of RIA and the appropriate incentives to undertake a comprehensive RIA process. Governments and individual agencies can take steps aimed at improving integration but these steps will generally need to be combined with capacity and commitment for integration to fully occur.

It is not always clear when there is integration, but it is evident that integration has not occurred when policy is developed without the use of RIA, for example, with a RIS completed either after a policy decision has been made or not at all. Without integration, RIA's benefits of informing decision makers on the impacts of different policy options, providing consistent approaches to stakeholder engagement and transparency in policy development will not be realised.

Fundamental to its objectives, RIA processes need to be started early — once a problem has been identified that might need a regulatory solution. When RIA is commenced at this early stage of policy development, there is a real possibility of it being adopted as an integral part of the policy process. Jacobs (2006) suggests that starting RIA early in policy development is the most important determinant of how well the assessment of options is done — perhaps more important than the design of the RIA system.

The importance of the timing of the RIA process has long been highlighted, with the OECD's 1997 RIA best practices stating that it is necessary to 'integrate RIA with the policy-making process, beginning as early as possible' (OECD 1997, p. 8). And more recently the *Recommendation of the OECD Council on Regulatory Policy and Governance* re-emphasised the need to 'integrate RIA into the early stages of the policy process for the formulation of new regulatory proposals' (OECD 2012a, p. 4).

This chapter examines the extent to which Australian jurisdictions, including COAG, have successfully adopted RIA into the policy development process. The chapter first focusses on the evidence of, and barriers to, integration and then proceeds to draw upon leading practices, some of which are canvassed in earlier chapters of this report, to suggest ways in which integration can be improved. In doing so, the chapter draws upon the Commission's surveys of agencies and regulatory oversight bodies, submissions and stakeholder consultations.



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## The difficulty of achieving integration

Most OECD member countries find the integration of RIA in the policy development process to be one of the most significant challenges and Australia is no exception (Jacobs 2006). In its review of regulatory reform in Australia, the OECD concluded that early integration of RIA continues to be an issue, despite Australia's well developed and detailed RIA processes (OECD 2010a).

Integration of the RIA process takes time and goes through a number of phases. This progression is unlikely to be straightforward — rather, there are likely to be ebbs and flows over time in RIA acceptance and integration. However, with sufficient support, ongoing evaluation of the efficacy of, and appropriate refinement to, RIA processes by governments, the degree of integration of RIA should increase over the longer term. As noted by the OECD:

... the integration of RIA should be seen as a long-term policy goal. All countries, even those with many years of experience with undertaking RIA and with very advanced RIA systems in place still experience problems with the quality and timeliness of RIA documentation. There is an ongoing need to provide support for public officials responsible for RIA and to improve the way that RIA is prepared. (OECD 2009b, p. 18)

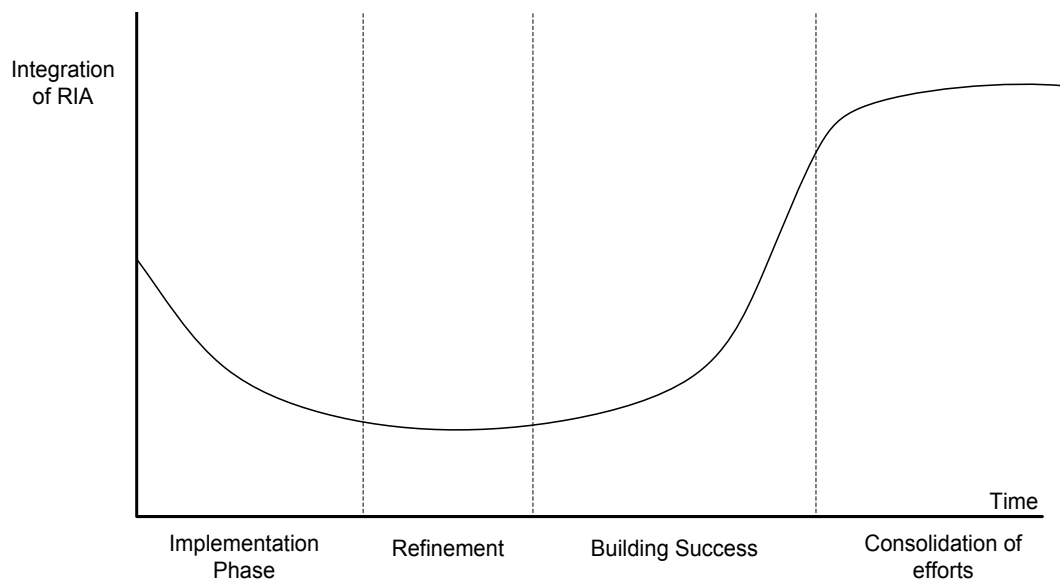
The Commission identified, based on Jacobs (2006), four broad phases for implementing RIA and achieving integration of RIA over time (box 10.1). Moving through these phases of integration assumes there are deliberate steps (such as those discussed later in this chapter) successfully taken to aid integration. Without such steps, adoption of RIA will occur only for some policy processes or in some agencies.

Each jurisdiction will have a unique integration path and may not move through each phase sequentially. A jurisdiction may, for example, experience a setback in the integration of RIA if there are significant changes to the system or a change of government which reduces political commitment to RIA. Nor will a jurisdiction achieve the highest level of integration with the mere passage of time. For example, in the United Kingdom, despite RIA operating for close to 30 years, a recent review found that organisation change was 'slow' and that 'some policy teams still varied in their engagement with Impact Assessments at appropriate points in policy development' (National Audit Office 2010a, p. 33). Similarly, Borthwick and Milliner (2012) reported that while the Australia Government RIA process has existed in some form since 1985, there was a 'vast gap between what the RIA Framework required and the practices too often followed' (p. 10).

## Box 10.1 Phases of RIA integration

### Implementation phase

Following its introduction, agencies start to accumulate experience with RIA but may also encounter implementation problems, making it difficult to see the benefits of RIA. The general acceptance of RIA tends to fall as: the framework may not be fully understood, particularly when it should be applied; agencies may not believe they have the skills to undertake the required analysis; and agencies may view the introduction of RIA as a criticism of existing policy development capabilities.



### Refinement phase

During this phase, integration of RIA into agency culture is generally at a lower level than other phases. Agency staff can often be quite sceptical of the overarching benefits as their initial experience may have been problematic. The aim is to minimise the time spent in this phase by recognising system design faults and other barriers to integrating RIA (such as lack of political support), implementing changes promptly, and by publishing positive examples of RIA impacts on regulatory outcomes.

### Building success phase

Through this phase, there is increasing acceptance of RIA. Agencies potentially have completed a number of proposals using the RIA process, giving them more certainty about the required steps and the benefits of the process. Agency staff may also have more developed support mechanisms such as comprehensive and detailed guidance material, training courses and advice from oversight bodies as well as strong political support from ministers.

### Consolidation of efforts phase

In the final stage, the benefits from the system design and the support mechanisms in place are fully achieved.

Source: Adapted from Jacobs (2006).

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## 10.2 Jurisdiction progress on integration

Many Australian jurisdictions are in the ‘implementation or refinement phase’ of RIA integration — particularly those jurisdictions with relatively new RIA processes, such as Western Australia and South Australia. The Western Australian Government acknowledged the obstacles to integration when implementing RIA:

Although significant training had been delivered by the RGU [Regulatory Gatekeeping Unit], the introduction of such a large, ambitious program was always going to have its detractors. (Western Australia Government, sub. 24, p. 2)

While a few jurisdictions, such as Victoria, may have begun ‘building on the success’ of previous efforts, the Commission considers that no Australian jurisdiction has reached the level of integration whereby there is a ‘consolidation of efforts’.

### **Lack of integration is widespread**

Despite OECD principles of integrating RIA into the early stages of policy making being embedded in RIA guidelines, there are substantial gaps between the requirements and actual practice in all jurisdictions. Stakeholders provided the Commission with numerous examples of RIA not being integrated into the policy process or started only after a minister had decided on the regulatory approach to be taken (see discussion below — ‘top down policy development tension with RIA’) (box 10.2).

Compared with other jurisdictions, the Tasmanian RIA process for primary legislation starts considerably later in the policy development cycle. Under this process, ‘the Cabinet decision on the policy objective is almost always made before the preparation of the RIS’ (Tasmanian Department of Treasury and Finance, sub. 22, p. 2). In addition, analysis of the impacts of subordinate legislation in Tasmania is not required until after the policy decision has been made by the relevant minister and the legislation drafted. The Tasmanian Department of Treasury and Finance advised that the early stages of policy development usually involve steps that may typically be embodied within a RIA process — such as defining and scoping of the problem, analysing alternative options, undertaking consultation and analysing costs and benefits (sub. 22). However, the late start in the formal RIA process is potentially indicative of an overall lack of integration of RIA into policy development.

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**Box 10.2 Stakeholder claims of tension with Ministerial decision making and a lack of integration with RIA processes**

The Construction Materials Processors Association (CMPA) claimed it had 'seen no evidence that the RIA process has been effectively integrated into policy development' (sub. 9, p. 2).

The Australian Food and Grocery Council stated that the RIA process 'is short cut or not carried out at all' (sub. 5, p. 8).

The Centre for International Economics identified that the main problem it encountered, as a consultant, was the tendency for agencies to either progress to drafting a RIS document or deciding on the desired regulatory option, before defining the nature and size of the problem (sub. 14).

A number of submissions outlined the view that the RIA process is used to justify the proposed regulatory response:

... once a proposed policy or regulatory response has been established, the RIA is used as an additional procedural requirement to justify the merits of the policy, rather than a process to carefully examine the proposed regulatory actions and its policy alternatives. (Australian Chamber of Commerce and Industry, sub. 2, p. 1)

CropLife has concerns that some regulatory impact analyses tend to be used by regulators to justify decisions that have already been taken by regulators and to support preferred regulatory options. (CropLife Australia, sub. 7, p. 1)

There is also a concern that a RIA is only developed as an after-thought, once the decision has essentially been formulated. How effective can a RIA be if it is not included in the policymaking process from the beginning? (WA Local Government Association, sub. 6, p. 1)

Likewise, the Australia Financial Markets Association (AFMA) noted its concern that there is 'not always sufficient commitment politically and at the agency level to following the principles embedded in the RIA approach in good faith' (sub. 11, page 2).

Even some agencies acknowledged that the RIS process is not always integrated into the start of the policy development process. For example, the officers undertaking RIA in the Victorian transport portfolio noted:

... contributions of the RIA can be limited as sometimes the policy decision has been made before the RIA is undertaken (either through a strategic plan or Ministerial announcement). The RIA process then is viewed as a costly and burdensome "add on" prior to implementation. (sub. 17, p. 2)

The Victorian Government noted:

COAG RIA are often initiated well after decisions are made about the reform, meaning that they become a document that advocates for a particular option rather than being a decision making tool. (sub. DR32, p. 1)

The Western Australian Department of Transport highlighted the friction between early integration of RIA process and having ministerial approval to proceed:

... the challenge for agencies is in exercising discretion in deciding when to commit resources to a RIA prior to obtaining ministerial mandate to progress with the proposal. (sub. 12, p. 2)

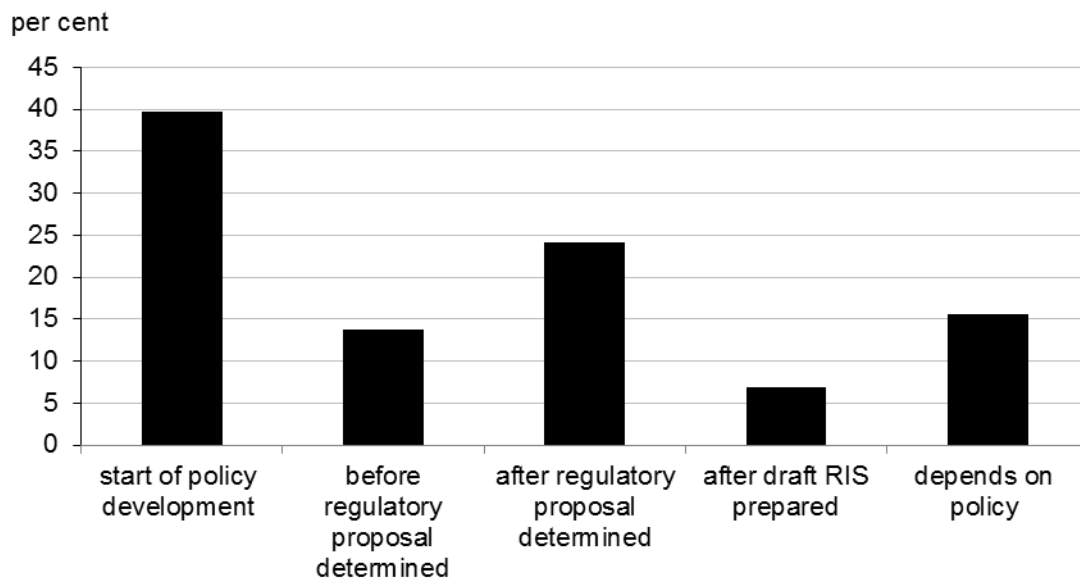
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## Isolated examples of integration

The Commission found some instances of agencies integrating RIA early in the policy development process. For the most part, demonstration of integration relies on subjective assessments and agency self-reporting.

Around 40 per cent of agencies responding to the Commission's RIA survey reported that they generally engaged with their oversight body at the start of the policy development process — indicating the RIS document (or equivalent) was more likely to be developed in conjunction with the policy process (figure 10.1). A further 15 per cent of agency survey responses indicated that the first engagement with the oversight body varied depending on the particular policy initiative.

Figure 10.1 **Agency first engagement with oversight body<sup>a</sup>**



<sup>a</sup> Based on 58 survey responses.

Data source: PC RIA Survey (2012).

The Commission found some agencies which viewed RIA as integral to informing the policy development process. These agencies were typically in jurisdictions which have had RIA in place for several years and have some noted successes from its use, such as Victoria. The officers undertaking RIA in the Victorian transport portfolio, for example, stated:

The officers most frequently involved in undertaking RIA believe that the type of discipline promoted through RIA requirements is essential to achieving good regulatory outcomes. It is also agreed that RIA should be integrated into review and policy development processes so far as is possible. (sub. 17, p. 2)

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Integration was also evident in some instances where longer term regulatory reforms were planned and there was time to embrace RIA, such as the development of a single Biosecurity Act to consolidate seven existing Acts in Queensland. The Australian Government Attorney-General's Department cited the COAG reform process to regulate chemicals to prevent the use of homemade explosives as an example of early integration of RIA, stating:

... the need to consider the RIA process under the COAG RIA guidelines was acknowledged early in the policy development process and factored into the work program. The clarity of the COAG RIA guidelines meant that AGD [Attorney-General's Department] did not consider the RIA process as an 'add on' to the policy development cycle. (sub. 4, p. 5)

During discussions with some of the national standard setting bodies (such as the Australian Building Codes Board, Australian Transport Commission, and Food Standards Australia New Zealand) and independent Commonwealth agencies (for example, Australian Securities and Investments Commission), the Commission gained the strong impression that the essential elements of RIA are firmly embedded in their regulation development processes.

These agencies that have shown indications of integrating RIA typically undertake a number of RISs each year and generally have comparatively high compliance rates with RIA processes compared with the overall average over recent years (PC 2006b, OBPR 2007, 2008a, 2009, 2010, 2011a, 2012a).

The Commission was also encouraged to see some examples of COAG ministerial councils embracing the RIA process instead of announcing regulatory options prior to a full and comprehensive impact analysis. In October 2012, for example, COAG's Standing Council on Primary Industries announced that the Australian Government would prepare a RIS to assist the council to make a decision concerning the implementation of an electronic national livestock identification system.

Similarly, in July 2010, COAG's Environment Protection and Heritage Council (EPHC) (now the Standing Council on Environment and Water) agreed to undertake a consultation RIS to consider the problem of increasing use of landfill and on-going litter from packaging waste. In its communique, the Council stated:

Ministers agreed that a RIS will consider not only [container deposit legislation] CDL, but also a limited number of options which may have a positive cost benefit and a tangible impact on recovery rates and litter reduction. The RIS process will be transparent and consultative and the scope and approach will be the subject of early engagement with key stakeholders (EPHC 2010, p. 3).

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This announcement was made in an atmosphere of strong pressure for governments to appear decisive and regulate a container deposit scheme. For example, Senator Ludlum (2010) stated:

Instead of seeing action, we're seeing more promises of studies and reviews and statements rather than just putting a foot forward and getting a national container deposit scheme up and running.

### **10.3 Barriers to integration**

Drawing together the evidence presented to the Commission, the use of RIA to better inform policy development is most often hampered by: a lack of political commitment; lack of skills and data; and the administrative burden of the overall process.

#### **Lack of political commitment**

The OECD has long emphasised the importance of political commitment to improving the quality of regulatory policies. Endorsement of RIA 'at the highest political level' was one of the ten best practices used by the OECD for many years as the basis for assessing country RIA systems (OECD 1997). The OECD (2010b) noted that political commitment is needed to counter the various incentives of government agencies to not undertake RIA:

Because of its capacity to prevent rent seeking and promote the highest social benefit in regulation, RIA has many potential opponents. Departments may have an incentive to evade the requirements of RIA, either because of resource demands or because it precludes a favoured use of regulatory powers ... To overcome opposition to RIA and assist it to be effective and useful in supporting reform it should be endorsed at the highest levels of government. (OECD 2010b, p. 44)

In its latest Recommendation on Regulatory Policy and Governance, the OECD reaffirmed the importance of high level political commitment to quality regulatory outcomes (OECD 2012a).

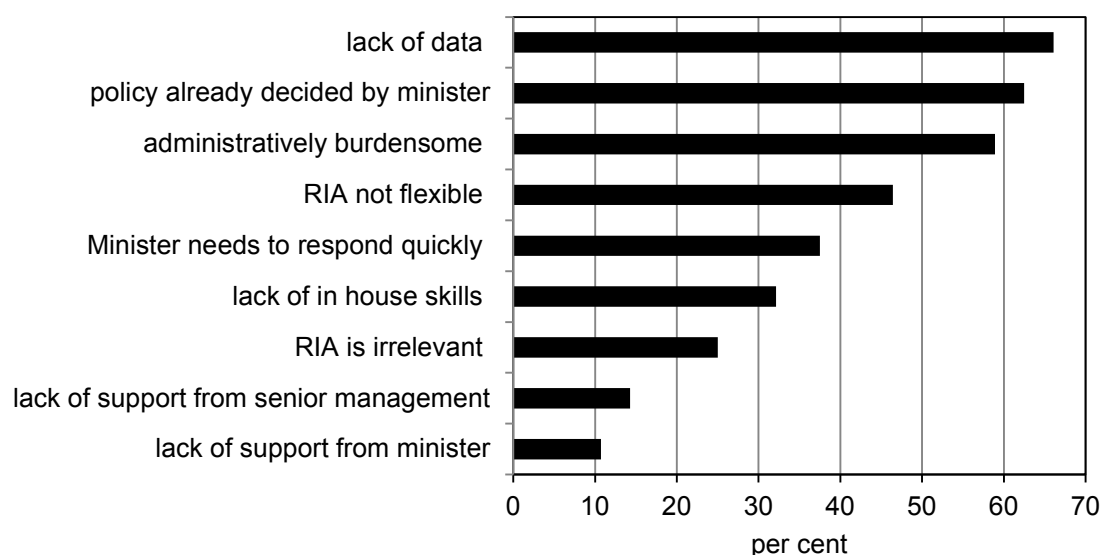
#### *Top-down policy development tension with RIA*

RIA is largely based on the notion that policy is developed from the bottom-up: an issue is identified and agencies proceed to use the RIA framework to assist in investigating, consulting, considering alternatives and then developing a document with information for decision makers.

In reality, policy solutions are regularly framed by the minister, government or COAG before the RIA process starts (that is, it is often a top-down process). This may occur for a variety of reasons, including a policy being announced as an election commitment (potentially while in opposition), the perceived need to respond promptly to an issue or desire to expedite high profile policies. Against this backdrop, Ministers often desire to have RIS documents that promote the preferred regulatory option, choosing not to have contrary or negative stakeholder comments included. Australian jurisdictions are not unique in this regard. The OECD noted that in all member countries, ‘use of RIA does not trump politics’ (OECD 2010a, p. 112).

The Commission has heard numerous anecdotes from agencies of how policies have been pre-decided by the responsible minister and either the agency was then required to prepare a RIS to support the announced policy or an exemption was granted. Over 60 per cent of responses to the Commission survey indicated that ‘policy already decided by minister’ was one of the main barriers to using RIA processes to better inform policy development (figure 10.2).

**Figure 10.2 Main barriers to using RIA processes to better inform policy development<sup>a</sup>**



<sup>a</sup> Based on survey answers from 56 respondents (4 respondents answered that there were ‘no barriers’). Survey respondents were able to select multiple answers.

Data source: PC RIA Survey (2012).

Ministers bypassing the RIA process brings into question whether there is genuine political commitment to the process. If ministers saw value in the RIA process they would view it as a useful tool to inform their decision making and would request



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impact analysis prior to making decisions — especially for proposals with significant or uncertain impacts. After consulting with eight ministers, Borthwick and Milliner (2012) noted a lack of ministerial commitment to the Australian Government RIA:

Significantly, none of the ministers consulted saw that RISs had any real relevance to their, or Cabinet's, decision making ... (p. 38)

Political and agency commitment is seen by some stakeholders to be key to integrating RIA into policy development. For example, Queensland Treasury stated:

It's less about changing the process and more about getting 'buy in' from Ministers and agencies so that regulatory best practice principles and RIA become embedded within the policy development process as a fundamental part of that process that informs and influences decision-making. (PC RIA Survey 2012)

More generally, the integration of RIA into the policy development process of agencies is diminished when policy options have been determined, narrowed or ruled out.

- Agencies may come to see the process as a *compliance exercise*. Some or all of the RIA steps may appear redundant, impacting on the perceived value of the process. For example, if a regulatory option has already been decided on, there may be little benefit in outlining a range of options that will not be genuinely considered.
- Agencies may see the process as *unnecessary* and not of value. Some ministers may simply not expect or provide opportunity for their agency to complete RIA processes (when required), instead seeking an exemption or circumventing the gatekeeper by 'walking' the regulatory proposal into Cabinet.
- If ministers are not allowing opportunity for agency staff to undertake high quality RIA or do not value the process, agencies will under-invest in staff RIA training and data development strategies.

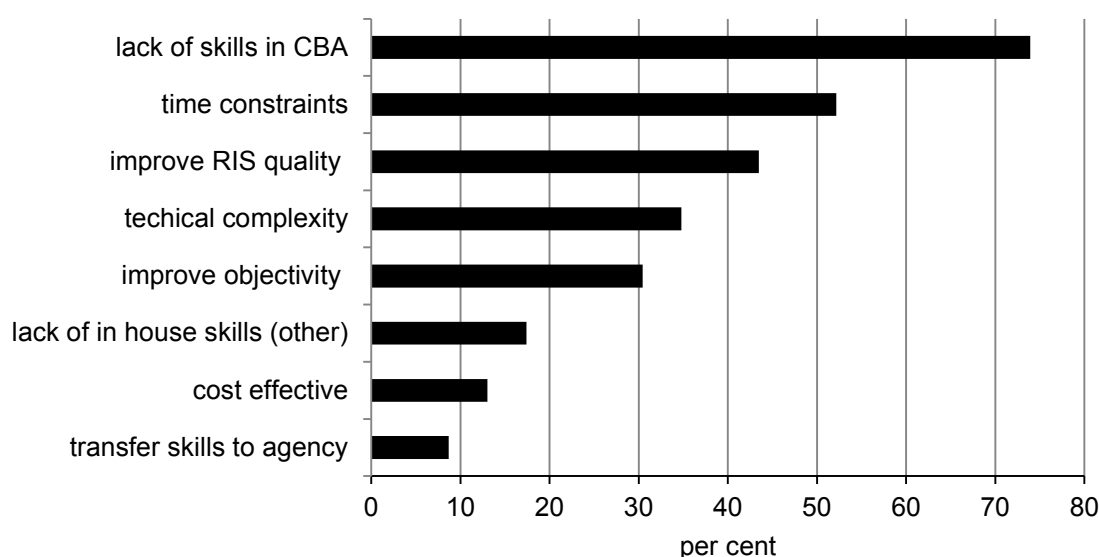
## **Lack of skills**

In its design, it was envisaged that RIA should be completed by public servants in policy agencies. The RIA process draws on expertise and information that resides in the proponent agency, with those developing policy also responsible for undertaking RIA (OECD 2009b). This concept is fundamental to integrating RIA into general policy development.

Despite the range of capacity building mechanisms in place (chapter 3), consultants are used in the RIA process because agencies sometimes lack the skills set,

particularly for cost-benefit analysis, needed to complete RISs and to improve regulatory quality. Of those who engaged consultants, over 70 per cent of agencies indicated it was because of a lack of in-house skills to undertake cost-benefit analysis (figure 10.3). Other skills-based reasons were also given as motivations for employing consultants (such as to improve the quality of the RIS and to transfer knowledge from the consultants to agency staff). Borthwick and Milliner (2012) found that in the Australian Government ‘all too often agencies have resorted to employing consultants’ to make up for ‘perceived shortcomings in capacity and capability’ (p. 53).

**Figure 10.3 Reasons consultants are engaged<sup>a</sup>**



<sup>a</sup> Survey respondents were able to select multiple answers. Based on answers from 22 respondents (out of a possible 23) that indicated they had used consultants.

Data source: PC RIA Survey (2012).

Some stakeholders considered claims of lack of skills to be puzzling as the skills set required for RIA is not exceptional and should be core skills for public servants in policy agencies (see, for example, CMPA sub. 9). Borthwick and Milliner (2012, p. 53) also found this claim ‘extraordinary’ stating that the seven elements required of a RIS ‘should hardly be onerous to an agency which should know its business’. Even within the public sector, some officials were critical of the general skill level of agency staff, stating that it is ‘not so much a lack of [RIA] skills but a lack of policy skills’ (PC RIA Survey 2012). Concerns regarding the decline in analytical skills in the public service and its ability to conduct work in-house or manage consultancies were raised in a previous Commission study (PC 2011).

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## **Lack of data**

Throughout this study, stakeholders have stressed the lack of objective data as a main barrier to completing RIA. Aggregated responses from the Commission's RIA survey highlights lack of data as the most cited barrier to using RIA to better inform policy development (figure 10.2).

Data gathering can be costly and much of the data required are held by the regulated sector and not known to government agencies. Industry can also be reluctant to provide data owing to concerns that commercially important data may be disclosed to competitors. AFMA highlighted costs and the sensitive nature of data as barriers to releasing data for regulatory impact analysis (sub. 11). The CMPA claimed that the lack of data was because consultation periods did not allow sufficient time for stakeholders to provide the necessary data:

Policy developers must recognise that the required level of analysis takes considerable time and needs substantial input from the industry and community affected by the policy. It is unrealistic to require this detailed data to be provided in a response to a RIS within a 4-6 week consultation period. (sub. 9, p. 18)

The Queensland Consumer Association noted in its submission that, unlike other stakeholders, it does not have enough resources to be able to provide 'objective evidence about likely costs and benefits' (sub. DR28, p. 3). The officers undertaking RIA in the Victorian transport portfolio noted that the lack of data can influence the regulatory outcome:

Sometimes the requirements of RIA can be too onerous (for example data is not available or the time to obtain and cost of data is prohibitive) which then can influence the design and outcome of the regulatory measure. (sub. 17, p. 4)

The Commission found that these difficulties in collecting data may have flowed through to the comprehensiveness of RIS documents. Extensive quantification of costs and benefits was limited to a small proportion of RISs, with nearly half containing a solely qualitative discussion of benefits (chapter 6).

## **Administrative burden of RIA**

Almost 60 per cent of responses to the Commission's RIA survey indicated that the administrative burden of the RIA process is one of the main barriers to integrating RIA into policy development (figure 10.2). Burden on agencies can arise from:

- the design of the RIA process
- poor application by the agency (such as preparing a RIS too late)

- 
- the way that RIA requirements are implemented by the oversight body in the relevant jurisdiction.

Agencies have raised concerns that they are often committing scarce resources to a process that has become purely a compliance exercise and unlikely to inform decision making. A number of agencies have also suggested that the process of drafting a RIS can involve numerous iterations of the RIS document with the oversight body, making the RIA process unnecessarily administratively burdensome. For example, the Commonwealth Department of Climate Change and Energy Efficiency (DCCEE) noted:

Recent experience has shown that multiple iterations of draft RISs, each identifying new issues, can create the impression of ‘shifting goal posts’ and add to the resource intensiveness of the process. It is recognised that multiple iterations may be needed to arrive at a final decision, but this process is more efficiently managed where all the relevant issues have already been identified (DCCEE 2012, p. 3).

The re-drafting burden seems to arise, in part, because some of the issues related to a policy problem are often not fully known at the outset. When an agency contacts its regulatory oversight body at an early stage, an initial assessment is often made about the relative significance of the proposal, based on partial information. However, once more information is gathered and conveyed to the oversight body — potentially revealing the full and significant impact of a regulatory response — the regulatory oversight body may appropriately change their advice on the required level of detail in the RIS.

### *Multiple RIA processes*

The operation of parallel RIA processes for different types of regulation (chapter 1) can lead to differing objectives, requirements and potentially unnecessary burden on agencies when applying the different systems. This is potentially an issue in New South Wales, Victoria, Tasmania and the ACT (and was also, until recently, an issue in Queensland). Several jurisdictions are cognisant of the potential burden this may create and are examining other options.

In New South Wales, for example, the two RIA processes capture a different but overlapping set of regulatory instruments. The Better Regulation Office (BRO) noted that this ‘causes uncertainty for agencies about what processes must be followed and the impact analysis required’ (BRO 2011, p. 15). The BRO has proposed that New South Wales should have one consistent approach to RIA (BRO 2011).

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In its review of the Victorian regulatory framework, the VCEC (2011b) highlighted that Victoria has ‘different approaches to impact assessment of primary and subordinate legislation, for reasons that are not clear’ (p. XXXVII). In making its recommendations to strengthen RIA in Victoria, the VCEC has reduced the number of discrepancies between RISs (for subordinate legislation) and Business Impact Assessments (for primary legislation). The Victorian Government is currently reviewing these recommendations (Victorian Government 2012).

Queensland has now created one RIA system with recent amendments to the *Statutory Instruments Act 1992 (Qld)* and *Legislative Standards Act 1992 (Qld)*, including repealing the RIA requirements for subordinate legislation. Following the proclamation of these changes in November 2012, all RIA requirements will be outlined in a single set of guidelines to be approved by the Treasurer.

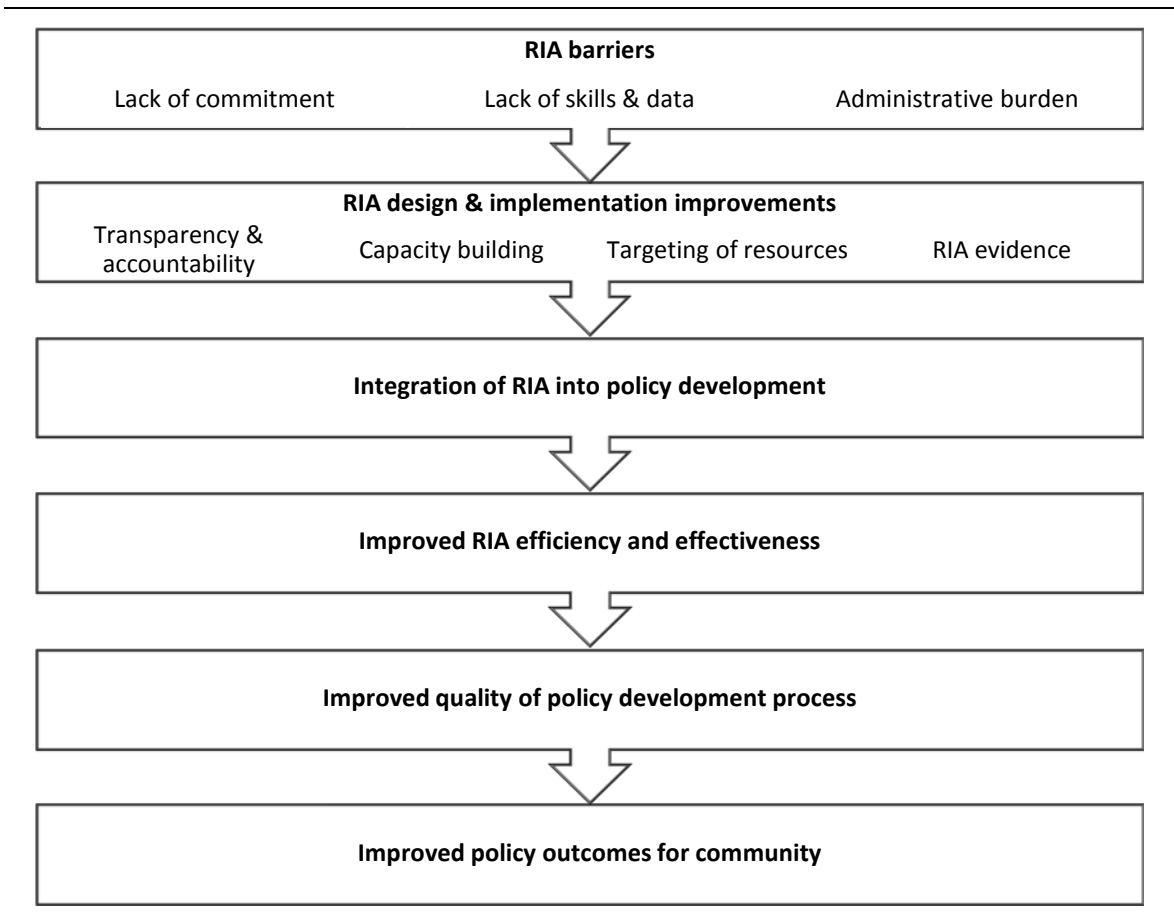
## **10.4 Better integration of RIA into policy development**

The full potential of RIA and its integration into the policy development process are more likely to be realised when the implementation of the process accords with best practice principles. While RIA processes across Australia all have a reasonably high degree of consistency with OECD and COAG guiding principles, the Commission found system design aspects in all jurisdictions that could improve RIA integration. The Commission considers that there also needs to be greater focus on ensuring existing requirements are implemented well in practice.

In the rest of this section, the Commission draws on the leading practices, some of which are identified in the preceding chapters, to make a number of suggestions that may enhance the integration of RIA requirements into policy development, and thereby improve the effectiveness and efficiency of RIA processes (figure 10.4). The main mechanisms relate to:

- improving the implementation and effectiveness of RIA through enhanced transparency and accountability mechanisms
- better targeting of RIA resources
- building capacity in agencies to undertake high quality RISs
- improving the evidentiary base on the performance of RIA to enhance the capacity of governments to identify strengths and weaknesses in RIA processes and to make considered improvements.

Figure 10.4 Improving policy outcomes through better integration of RIA



**Improving the implementation of RIA through transparency and accountability measures**

The incentive for agencies to conduct high quality RIA is driven to a large extent by perceptions of what governments and individual ministers expect. The Commission considers that effective transparency and accountability measures can create the pressures and incentives that motivate governments, ministers and agencies to fully embrace RIA. The primary impact of key transparency and accountability measures discussed below are summarised in table 10.1. A number of jurisdictions already have some of these measures in place. However, most have no measures in place to ensure accountability of their oversight body (chapter 8).

**Table 10.1 Primary impact of transparency and accountability measures**

<i>Transparency and accountability measure</i>	<i>Agency</i>	<i>Oversight body</i>	<i>Minister</i>
Exemptions are made public			■
Ministerial statement to parliament outlining reasons for progression of exempt proposals			■
Publication of agency assessment of determinations of the need for a RIS	■		
Public consultation RIS	■		
Public final RIS	■		■
Publication of adequacy assessment with reasons/qualifications	■	■	■
Ministerial statement to parliament outlining reasons for progression of non-compliant proposals			■
Post implementation review undertaken through a public and independent process for all non-compliant and highly significant exempt proposals	■		■
Periodic audit of agency assessment on need for a RIS	■		
Public performance audit of oversight body		■	
Published annual compliance reporting	■		■

### *Multi-stage RIA to enhance transparency*

Multi-stage RIA processes, including a two-stage RIS, can improve transparency of the policy development process for stakeholders. They have also been put forward by stakeholders and academics as a method of fostering a culture of starting RIA early and, therefore, better integrating RIA into the policy development (for example, Jacobs 2006, AFMA sub. 11, Chi-X Australia sub. 13, The Centre for International Economics sub. 14). Such an approach generally requires agencies to put deliberate thought into the process of policy development and assemble relevant evidence early in the process.

Current leading practices in this area identified by the Commission include: the two-stage RIS approach (COAG, Western Australia); and clear guidelines and streamlined processes for preliminary impact assessment (such as Queensland's Regulatory Principles Checklist which is commenced at the beginning of the policy development process and continues to be updated at key stages throughout).

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### *Increasing awareness and commitment through transparency*

Leading practices in transparency identified by the Commission which would enhance RIA commitment include: publication of exemptions, including reasons ; the publication of agency assessments of the need for a RIS; ministerial statements to explain departures from the RIA process; the publication of final RISs that relate to decisions (Commonwealth, COAG and Western Australia); timely publication of oversight body adequacy assessments and reasons/qualifications for these assessments; and oversight bodies reporting annually on agency compliance with RIA requirements (Commonwealth, COAG and Victoria) and with required reviews.

Requiring ministers to outline, in parliament, whether the legislative proposal they are introducing was assessed in accordance with RIA principles and their reasons for departing from the process (if applicable) would not only increase transparency (see chapter 7) but may also provide a number of other benefits for RIA integration, including:

- greater commitment to RIA from senior managers and increasing the likelihood that RIA will be followed (and to a better standard)
- reducing the likelihood that RIA processes will be bypassed by ministers (and agencies) as they will have to outline reasons for their actions in parliament
- better informing parliamentary debate about the impacts of the regulatory proposal
- promoting greater awareness amongst parliamentarians (and the wider community) of the features of good quality regulatory impact analysis.

The transparency created by this action would enable key stakeholders, parliamentarians, the media and the broader community to become powerful advocates of RIA, creating additional pressure on politicians and agencies to ensure good processes are followed.

### *Accountability measures to encourage greater RIA compliance*

Appropriate sanctions for non-compliance and the publication of compliance information also play a role in encouraging agencies and Ministers to meet RIA requirements. In relation to accountability and quality control measures for agencies, current leading practices highlighted by the Commission which would enhance RIA commitment include: oversight body assessment of the adequacy of all RISs and of compliance with the RIA process for all regulatory proposals; a requirement to complete a post implementation review (PIR) for all non-compliant



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and exempted regulatory proposals (under various circumstances, this requirement is currently adopted in the Commonwealth, Queensland and Western Australia); oversight body sign-off of PIR terms of reference (as in the Commonwealth); and a higher level of autonomy of oversight body functions (as in Victoria and, more recently, Queensland).

Although not currently adopted in any Australian jurisdiction, the Commission also considers that, as a stronger sanction for non-compliance, it should be a requirement that PIRs be conducted through an independent process. This will provide strong incentives for agencies to deliver high quality impact analysis when the policy is first being developed (chapters 8 and 9).

To support these measures, the Commission has identified a number of other accountability measures based either on RIA practices overseas or widely accepted good practices in public administration. These include, for example, instigation of basic auditing practices — of agencies by the oversight bodies, and of oversight bodies by an independent third party (such as the jurisdictional audit office). There may also be merit in having the jurisdictional audit office assess how RIA is being implemented within government more generally. This may increase the support for RIA and not leave the regulatory oversight body as the sole champion of the process (chapter 8).

To improve accountability and enhance integration, a number of jurisdictions require senior agency officials or ministers to sign off or certify that the RIA process has been adequately followed in preparing the RIS document (chapter 3). The aim of this process is to reinforce that the agency is responsible for the quality of the RIS document and by raising awareness of that responsibility to the highest level, it will have a feedback effect that senior officials and ministers value and expect the RIA process to be followed and integrated into policy development. While certification may be useful as one of a number of measures to improve accountability and integration of the RIA process, it is unclear how effective, on its own, it has been in achieving this aim.

### *Legislating RIA processes for greater commitment*

The OECD recommends that any broadly-based RIA process should be established via a decree or decision from government (OECD 2009b). Australian RIA processes for primary legislation are typically an administrative requirement outlined in RIA guidelines and supported by other procedural documents such as Cabinet handbooks (chapter 3). In New South Wales, Victoria, Tasmania and the ACT, RIA processes for subordinate legislation have been formalised in legislation (chapter 1). In other

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countries, the legal or policy basis upon which the RIA requirement is established varies substantially (box 10.3).

**Box 10.3 Formal authority for RIA in OECD countries**

The OECD has identified four basic forms of authority for RIA:

- established by law
  - Czech Republic, Republic of Korea and Mexico
- based on a Presidential order or decree
  - United States
- based on a prime ministerial decree, or guidelines of the Prime Minister
  - Austria, France, Italy and the Netherlands.
- based on a directive or resolution of the Cabinet or the government
  - Canada, Denmark, Finland, Germany, Ireland, Japan, New Zealand, Norway, Poland, Portugal, Sweden, and the United Kingdom.

*Source:* OECD (2009b).

In some ways, legislating RIA processes is akin to mandating commitment to RIA. However, whether this results in the early integration of RIA into policy development or alternatively, to greater use of legitimate RIA ‘escape’ options such as exemptions, is uncertain. The key question is whether legislating the RIA process necessarily bestows a greater degree of authority or political commitment and therefore assists in maximising the degree of integration and compliance.

Embedding RIA processes in legislation can have both advantages and disadvantages. Legislating RIA could, in principle, promote transparency and signal the importance that the government places on the processes, which in turn could contribute to a higher level of commitment by ministers and government officials. However, there appears to be little, if any, evidence to support this notion, particularly given the limited number of OECD countries that have chosen to embed their RIA processes in legislation.

The parliamentary debate and delays typically associated with making legislative amendments may make legislated RIA requirements less susceptible to being removed or watered down. However, making worthwhile refinements to the RIA requirements could also become more difficult.

Finally, legislating RIA processes allows jurisdictions to potentially access a different set of consequences and sanctions (such as financial penalties) for lack of compliance with RIA that would not be available when RIA processes are determined by guidelines.

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Based on experiences in Australian jurisdictions, it is not clear to the Commission that legislating RIA requirements is necessary for RIA to be integrated into policy development. While Borthwick and Milliner (2012) acknowledge that they have not undertaken a comprehensive analysis of the way RIA can be established, they recommended that RIA not be mandated by legislative backing unless the Australian Government determines that the current process cannot be made to work effectively and consistently. The Australian Government's preliminary response stated that legislating 'was not necessary to ensure effective regulatory impact analysis', highlighting that such an arrangement could 'limit flexibility' in responding to stakeholder concerns (Australian Government 2012b). Some evidence of the usefulness or otherwise of legislating RIA may be available in the future with the Queensland Government considering the merits of legislating the requirement for its RIA process for both primary and subordinate legislation.

### **Better targeting of RIA resources**

Better targeting of RIA efforts in some jurisdictions — for both new and amended regulation and reviews of existing regulations — may reduce the administrative burden of RIA processes for agencies as well as helping to ensure a level of scrutiny for regulation that is commensurate with its likely impacts. The Commission has identified the following key targeting measures for *new and amended* regulations:

- a threshold significance test for determining whether a RIS is required that is defined broadly and considers both positive and negative impacts on the community or part of the community (chapter 4)
- agencies responsible, with the assistance of their regulatory oversight body if the agency so chooses, for deciding if the significance threshold has been triggered and a RIS is therefore required (chapter 4)
- streamlining of preliminary assessment processes (chapter 4), including ensuring minimal resources are devoted to proposals that are excluded from RIA (chapter 5)
- minimising inefficient duplication of previous consultation and impact analysis such as that provided through discussion papers, 'green papers' or comprehensive reviews conducted as a basis for a regulatory proposal (chapter 2).

To improve the efficiency of resources allocated to *review* of existing regulations, the Commission has noted the following targeting measures that jurisdictions could consider (chapter 9):

- 
- effective ‘triage’ processes to ensure that resources are targeted at regulations that impose highly significant or uncertain impacts
  - grouping of sunseting regulations for review either thematically and/or in conjunction with their overarching primary legislation.

### *Clearer expectations to help target resources*

Some departments have also suggested that oversight bodies should provide more information on their expectations regarding the required level of detail and quality of RISs, in particular by highlighting past examples of ‘good’ RIS documents or at least making ‘good’ RISs more accessible. For example, the Australian Government Attorney-General’s Department suggested:

An improved search tool to hone in on specific details of RIS documents previously assessed as ‘adequate’ by OBPR would assist agencies to better understand OBPR expectations and improve accessibility to relevant precedents. (sub. 4, p. 6)

A leading practice that would assist in defining expectations for RIS content and adequacy assessment is ready access (via the internet) to a central RIS register. Not only does such a register increase transparency of the process but also encourages knowledge transfer as the register can act, for agencies, as a source of ‘good’ RIS examples — providing an indication of the level of analysis required (chapter 7). The Commonwealth and COAG RIA processes are generally the most transparent, timely and accessible, with RISs added to a central on-line register at the time of regulatory announcement (Commonwealth) or as soon as possible after the compliance assessment (COAG)

In some instances, targeting of RIA resources could be enhanced through greater discipline in the provision of oversight body comments on RISs and ensuring expectations are made clear to the agency earlier in the RIA process. One agency survey respondent stated that the drafting process could be improved through ‘more strategic/thematic comments from the oversight body, with a narrowing of the field of issues in subsequent iterations, and a process moving towards conclusion’ (PC RIA Survey 2012).

To this end, agencies could consider establishing with the oversight body at the outset, expectations for RIS content including broad timeframes for submission of draft and final RISs to the oversight body for assessment and/or specification of the number of drafts to be considered by the oversight body before the RIS is assessed. Having an agreed framework aims to reinforce that the agency is responsible for the quality of the RIS document while better targeting the provision of guidance and feedback on drafts. This may better enable agencies to develop the policy (and accompanying RIS) to the necessary standard within the desired period.

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For agencies that regularly undertake RISs, a memorandum of understanding (MOU) between the oversight body and agency could be established to:

- provide greater clarification of the guidelines regarding which agency specific regulatory instruments do not need a RIS ('carve outs' in the Australian Government)
- clarify what other documentation or processes are already generated by the agency which could effectively satisfy elements of the RIA process
- establish dispute resolution mechanisms.

The OBPR and Commonwealth Treasury are current negotiating an MOU in regard to a number of PIRs scheduled in the coming year:

At the moment we are in the process of negotiating a memorandum of understanding with the Treasury essentially on how to operate the post-implementation review schedule for that portfolio.

... We are in discussions with them about what they need to do and essentially what we are trying to get out of the memoranda of understanding are ongoing communication, to try to set out when they have to do something by and what they can do in particular time frames. (Senate 2012b , pp. 36–37)

An MOU provides documented evidence of the agreed framework that will withstand staff turnover in agencies and the oversight body. For transparency, MOUs should be published.

#### LEADING PRACTICE 10.1

***For those agencies which undertake RISs regularly, oversight bodies should consider establishing a memorandum of understanding (which would be published) to:***

- ***clarify interpretation of guidelines on what needs a RIS (specific to the instruments or activity of the particular agency)***
- ***outline what sort of documentation generated by the agency would, in part, satisfy RIA requirements (such as consultation documents)***
- ***lay out an approach for dealing with disputes between the agency and the oversight body.***

### **Improving agency capacities**

For agencies to integrate RIA into their policy development, they need the necessary information on RIA requirements, the skills to undertake key steps of the process and an understanding of the value of RIA in contributing to better quality

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regulation. RIA processes should be supported by a range of capacity building tools, such as written guidance material, training programs, advice from regulatory oversight bodies, regulatory networks and secondments/outposts (chapter 3).

### *Formal training*

The Commonwealth, COAG and Victoria represent leading practices in RIA training in Australia by offering regular ongoing training sessions for agencies that are well-advertised and flexible to agency needs (chapter 3).

Jurisdictions might also consider the merits of extending RIA training to ministers' offices and ensuring training is undertaken by more senior managers. Without training of more senior managers and ministerial advisers on the importance of RIA, the capacity of formal training programs to bring about integration may be limited, with junior officers relied upon to convey the 'message up the line'.

The Commission recognises that in some smaller jurisdictions, where in a typical year very few RISs are prepared, it may not be cost effective for the oversight body to provide extensive formal RIA training. Tasmania and the Northern Territory, for example, have found that offering more intensive 'coaching' for individual officers undertaking RIA is a more targeted and efficient approach.

### *Better data collection strategies*

Agencies tend to view the problem of lack of data as an external problem — something outside their control. However, lack of data often indicates a lack of skills and strategies within agencies for collecting information about their own policy area. While agencies such as the Australian Bureau of Statistics have high quality data collections and can be a useful source of information, they will not always have the information needed for a specific proposal. In most circumstances, agencies need to develop their own data collection strategies for RISs. Some jurisdictional guidance material provides strategies for data collection which should be drawn upon more widely. Greater access to RISs (through a central internet register, which exists for the Commonwealth and COAG) would also provide agencies with scope to learn from strategies employed by others. Agencies should have data collections for ongoing policy analysis which should also be useful in completing RISs.

Better use by agencies of the consultation requirements in the RIA process may assist the collection of data from industry stakeholders, although this would need to be validated against other sources (chapter 7). Publication of a consultation RIS would allow stakeholders to comment on data used or provide alternative data.

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The Commission recognises that it is not always possible to quantify all impacts of regulatory proposals, but considers that even some quantification alongside qualitative evidence improves the usefulness of a RIS in informing decision making. In the event that data sources are extremely limited, agencies (as well as industry and consumer stakeholder groups) should develop strategies and data collection methods at the regulatory design and implementation phase to ensure data will be available when the regulation is subsequently reviewed and evaluated.

### *Using consultants effectively*

Using consultants may fill a ‘skills gap’ but agencies need to have some capacity in RIA, including cost-benefit analysis, to evaluate work provided by consultants, as RIS quality remains the responsibility of the proponent agency in all jurisdictions.

Systematically outsourcing the entire RIA process or RIS document is unlikely to facilitate integration of RIA into agency culture. Outsourcing without the skills to manage the contract or understand the product delivered may lead to documents that are not as useful to decision makers as they would otherwise be, for example, because they are overly technical, too long or focus on too many issues.

However, the use of consultants can assist agencies to build the skills necessary to undertake RIA and support the integration of RIA into agency culture. To successfully use consultants to achieve this end, ideally the nature of the policy problem needs to be clearly defined prior to employing a consultant and a senior manager needs to work closely with the consultant to refine the choice of policy options and provide necessary information to facilitate the consultant’s analysis.

Regulatory oversight bodies may consider the merits of developing short guidance material to advise agencies on how to get maximum value from RIA consultancy arrangements. The Victorian Department of Primary Industry have developed a guidance note on engaging consultants (Victorian DPI 2011). This guide highlights that knowledge transfers should occur as a result of engaging a consultant, suggesting the agency should ultimately obtain from the consultant all relevant material, including important contacts developed (not just the RIS), and require an internal seminar. Such tools provide agencies with the guidance to manage the consultancy, develop in-house skills and deliver a document that is useful for decision makers.

### *Written guidance material*

All jurisdictions publish RIA guidance material; most are sound, incorporating the seven key elements identified in COAG *Best Practice Regulation Guide* (COAG

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2007a). While there are specific areas for improvement, the Commission concluded that more detailed guidance material is unlikely to substantially improve RIS quality (chapter 6).

The amount of detail on key analytical requirements for RIA provided in guidance material, however, differs substantially across Australian jurisdictions. Striking the right balance on the level of detail is not straightforward. Guidance material can be drafted at a high level, omitting more technical information, but it will be less able to support higher analytical standards required in some RIS documents (OECD 2009b). On the other hand, long and comprehensive guidance material may be impenetrable for the general user. One potential solution is to develop brief and non-technical guidance material that is supported by a number of more detailed and technical documents. Internationally, RIA written guidance in the United Kingdom caters for the different needs of users and appears to be a leading practice in this regard. Some Australian jurisdictions have adopted a similar approach, including the Commonwealth, COAG, New South Wales, Queensland, Western Australia and South Australia.

### *Coordinating units promote integration*

Some agencies have established centralised regulatory units to implement RIA requirements, among other regulatory functions (chapter 3). In these agencies, the relevant policy area is generally responsible for completing the process but is assisted by the centralised unit for RIA guidance and technical assistance. Integration is more likely to be fostered in agencies with centralised units as:

- internal RIA processes are established and refined over time
- staff within the unit are committed to undertaking and complying with the RIA process as it is one of their principal responsibilities — the process is not viewed simply as an additional administrative task or a distraction from their core work
- the RIA capacity of staff within the unit is developed over time with ongoing exposure to the process and other staff value this experience and knowledge.

Around half of the agency survey respondents indicated that their agency had a centralised unit that assisted in undertaking the RIA process (PC RIA Survey 2012). A centralised unit was more common in agencies that undertake a comparatively larger number of RISs or have significant regulatory responsibilities. The Victorian DPI, which has had a regulatory unit since 2007, argues that its unit supports and challenges policy teams and portfolio regulators to embed better regulation principles into policy development and enforcement (Victorian DPI 2010). However, smaller agencies and those that engage with RIA processes only a few



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times each year may not find it cost effective to establish a centralised unit. The Australian Government Attorney-General's Department highlighted this point:

... it may not be cost effective for an agency to maintain staff with expertise on a range of matters (including subject matter expertise) to complete RIS documents on an ad-hoc basis. While maintaining a section of experts purely for that purpose would be desirable, it would be difficult to justify under the current economic environment. (sub. 4, p. 5)

### *Network of coordinators can aid integration*

Some jurisdictions have established regulatory network coordinators (or had them at some stage) so these representatives can come together to share experiences and ideas, learn from others and transfer knowledge between agencies (chapter 3).

The success of such arrangements is mixed. Some networks of coordinators have operated for a limited period or been in infrequent contact with other agencies, some operate in name only with minimal influence, while others are reported to be useful in sharing experiences and improving the operation of the RIA process. For example, in Western Australia, the RIA working group appears to be pivotal in providing agencies with a forum to discuss the implementation of RIA and suggest improvements (Western Australian Government, sub. 24)

### *Outposting initiative*

The OBPR introduced an outposting initiative in late 2011 (chapter 3). While only a small proportion of agencies have used the initiative to date, it appears to be reasonably successful in delivering on its objective of assisting the host agency to meet RIA requirements. The Commonwealth DCCEE has had an outpost officer primarily dealing with ongoing COAG regulatory work. Its experience has been 'very positive' with perceived benefits to the Department and OBPR, including improving integration of RIA:

Not only has it worked to lift expertise in regulation analysis in the Division but also seems to have contributed to an understanding within OBPR of the type of issues that we face when trying to complete a RIS. From our perspective, it has helped accelerate an understanding among our staff that regulatory analysis is part of the everyday tool kit ... (DCCEE 2012, p. 3)

These benefits come at a cost to the agency as they pay the OBPR for the services of the outpost officer (chapter 3). The Australian Government Attorney-General's Department has called for these services to be made easily accessible to ensure 'cost effectiveness for agencies' (sub. 4, p. 4). An agency survey respondent also noted benefits of this model but noted that costs are a barrier for a small agency:

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OBPR should be complimented for its recently introduced initiative to outsource staff to agencies to assist in RIS development and this might be a useful model for the future to assist in building expertise in smaller agencies and meeting OBPR expectations. However they should review the total cost arrangement which is very expensive for a small agency (PC RIA Survey 2012).

Despite generally positive feedback, Borthwick and Milliner (2012) found mixed support from agencies regarding the outpost officer initiative and they themselves have not put their full support behind this initiative. Their reservations rest with the possibility that the outpost officer could become a substitute for agencies accepting responsibility for the RIA process — work that the review felt should be ‘core business’ for agencies (p. 53). As with use of consultants, agencies need to utilise the skills of the outpost officer to build up the skills of agency staff. An outpost officer completing a RIA process in isolation is unlikely to encourage greater integration and does risk becoming a substitute for the agency staff engaging with the RIA requirements.

Another potential risk of an outpost officer scheme is that the officer will become ‘caught up’ in the agenda of the host agency and be subsequently less objective in their oversight functions on return to the regulatory oversight body. Such an outcome would be more likely the longer an oversight body officer is outposted, although OBPR has taken steps to minimise the risks through its MOU on outposting with agencies (OBPR 2011c).

## **Improving the evidentiary base**

As discussed in chapter 2, concrete evidence on the performance of the RIA process is fairly limited. Improved monitoring and review are essential to providing information on the efficiency and quality of RIA systems and on practices that work well or are less effective. This can then inform refinements and improvements to systems over time and assist integration of the RIA process into the policy development cycle.

The Commission considers that systematic ex post evaluation of RIA processes and performance monitoring would provide greater transparency and accountability and would also potentially build an evidentiary basis for future reviews of RIA. In addition to other reporting and accountability measures, jurisdictions could consider the following:

- more systematic monitoring and reporting of the implementation of RIA requirements (including in relation to consultation, quantification of impacts in RISs, and consideration of alternatives) — such as building on the RIS analysis undertaken in this report (appendix E).

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- systematic comparison of estimates of regulatory impacts in a sample of RISs (perhaps concentrating on those regulations with the most significant ex ante impacts) with those impacts that emerged as a result of regulatory implementation — this can help to reveal systemic errors in RIS methodologies and lead to more accurate estimates over time
  - tracking and recording of changes to proposals as a result of RIA, including instances where proposals that were under consideration were amended, withdrawn or improved — this would raise stakeholder and political awareness of the benefits of RIA and facilitate refinements to individual RIA components (such as improvements in consultation practices or impact analysis)
  - better recording of the costs associated with RIA — this information (including agency resources devoted to preparation of RISs and the costs of oversight body functions related to RIA) is necessary to assess the cost effectiveness and efficiency of RIA.

The VCEC already collects and reports on some of this information, including via a survey of policy officials after they have completed a RIS (chapter 2). Their approach could be a starting point for other jurisdictions.

The Commission recognises, however, that the collection of such information imposes costs on agencies so consideration would need to be given to the frequency and scope of collections. For example, the information could perhaps be gathered for selected periods or for only a sample of agencies. However, as RIA becomes more integrated into policy development processes, this information will become more difficult to isolate and collect.

Ultimately, improving the evidentiary base on the performance of RIA (along with improving transparency and accountability; better targeting of RIA resources; and capacity building in agencies to undertake quality RISs) will enhance the integration of RIA requirements into policy development and the resulting policy outcomes for the community.

#### LEADING PRACTICE 10.2

***Published evidence of the usefulness of RIA in improving the quality of regulatory outcomes — including which key aspects are instrumental in achieving this objective — would help inform refinements and improvements to RIA processes over time. Victoria has made substantial progress developing and publishing research in this field.***



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## APPENDIXES



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## A Study participants

This appendix lists the organisations and individuals that have participated in the study.

Following receipt of the terms of reference on 28 February 2012, an initial circular advertising the study was distributed to several hundred government representatives, industry organisations and individuals and the study was advertised in national and metropolitan newspapers.

The Commission released an Issues Paper on 26 March 2012 to assist interested parties in preparing their submissions. A Draft Report for the study was released on 31 August 2012. There were 26 submissions received by the Commission prior to the release of the draft report and 11 received after the draft report. A listing of all submissions is included in table A1.

In addition, the Commission met with a number of stakeholders, including business groups, academics and government agencies. A list of those meetings is in table A2.

Surveys were undertaken of government agencies involved in RIA processes in each jurisdiction. The methodology used for the surveys is discussed in appendix D. The names and responses of agency respondents, other than the regulatory oversight bodies, are treated as confidential. The regulatory oversight bodies in each jurisdiction, which responded to the survey and assisted the Commission in providing detailed information on the operation of RIA processes for their jurisdiction, are listed in table A3.

The Commission thanks all who have contributed to the study.

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**Table A.1 Submissions received**

<i>Participant</i>	<i>Submission No</i>
Accord Australasia	26
Australian Accounting Standards Board	15
Australian Chamber of Commerce and Industry	2
Australian Financial Markets Association	11
Australian Food and Grocery Council	5
Australian Government Attorney-General's Department	4
Australian Government Department of Infrastructure and Transport	21, DR36
Australian Government Office of Best Practice Regulation	DR35
Australian Logistics Council	10
Association of Mining and Exploration Companies	DR29
Australian Trucking Association	23
Business SA	18
Chi-X Australia Pty Ltd	13
Consumer Action Law Centre	16
Consumers Federation of Australia	DR34
Construction Material Processors Association	9, DR31
CropLife Australia Limited	7
Haglund, Martin	DR27
Master Builders Australia	19
Northern Territory Department of Treasury and Finance	DR30
Officers undertaking RIA in the Victorian Transport Portfolio	17
Plastics and Chemicals Industries Association	8
Queensland Consumers Association	1, DR28
Tasmanian Department of Treasury and Finance	22
Tasmanian Parliamentary Standing Committee on Subordinate Legislation	3
The Centre for International Economics	14
Victorian Department of Premier and Cabinet	DR32
Western Australia Department of Transport	12
Western Australia Department of Treasury	DR37
Western Australia Local Government Association	6
Western Australia Small Business Development Corporation	25
Western Australia State Government	24
Confidential	20, DR33

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**Table A.2 Consultations**

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*Commonwealth and national organisations*

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Accord Australasia  
Australian Industry Group  
Australian Building Codes Board  
Australian Chamber of Commerce and Industry  
Australian Food and Grocery Council  
Australian Institute of Company Directors  
Australian Pesticides and Veterinary Medicines Authority  
Australian Prudential Regulation Authority  
Australian Securities and Investments Commission  
Business Council of Australia  
COAG Reform Council  
Consumer Health Forum of Australia  
Department of Agriculture, Fisheries and Forestry  
Department of Climate Change and Energy Efficiency  
Department of Finance and Deregulation – Deregulation Group  
Department of Finance and Deregulation – Office of Best Practice Regulation  
Department of Health and Ageing  
Department of Prime Minister and Cabinet – Cabinet Secretariat  
Department of Prime Minister and Cabinet – COAG Secretariat  
Food Standards Australia and New Zealand  
Legislative and Governance Forum on Food Regulation (Secretariat)  
National Transport Commission  
Property Council of Australia  
Safework Australia  
Standing Council on Energy and Resources (Secretariat)  
The Treasury

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*New South Wales*

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Better Regulation Office  
Department of Finance and Services  
Department of Infrastructure and Planning  
Department of Treasury  
Department of Trade and Investment, Regional Infrastructure and Services  
Independent Pricing and Regulatory Tribunal  
Legislative Review Committee  
NSW Business Chamber  
NSW Fair Trading

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Table A.2 (continued)

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*Victoria*

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Consumer Action Law Centre  
Department of Premier and Cabinet  
Department of Primary Industries  
Department of Transport  
Department of Treasury and Finance  
Environmental Protection Authority  
Scrutiny of Acts and Regulations Committee  
Victorian Competition and Efficiency Commission  
VicRoads

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*Queensland*

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Council of the Ageing Queensland  
Department of Education and Training  
Department of Environment and Resource Management  
Department of Employment Economic Development and Innovation  
Department of Treasury  
Queensland Business Commissioner  
Queensland Competition Authority – Office of Best Practice Regulation  
Queensland Consumer Association  
Queensland Council of Social Services  
Queensland Parliament – Committee Office  
Synergies Consulting

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*Western Australia*

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Department of Agriculture and Food  
Department of Commerce  
Department of Racing, Gaming and Liquor  
Department of Transport  
Department of Treasury – Regulatory Gatekeeping Unit  
Small Business Development Corporation

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*South Australia*

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Anglicare SA  
Attorney General's Department  
Business SA  
Department of Premier and Cabinet – Aboriginal Affairs and Reconciliation  
Environment Protection Authority  
Motor Trades Association  
Restaurant and Catering South Australia

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Table A.2 (continued)

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*South Australia (continued)*

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Impact assessment agencies

Department of Premier and Cabinet – Cabinet Office

Department of Treasury and Finance

Department for Manufacturing, Innovation, Trade, Resources and Energy

Department for Communities and Social Inclusion

Department of Environment and Natural Resources

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*Tasmania*

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Department of Infrastructure, Energy and Resources

Department of Justice

Department of Primary Industries, Water and Environment

Department of Treasury and Finance

Joint Standing Committee on Subordinate Legislation

Tasmanian Chamber of Commerce and Industry

Tasmanian Small Business Council

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*Australian Capital Territory*

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ACT Treasury Directorate

ACT Office of Industrial Relations

Department of Environment and Sustainable Development

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*Northern Territory*

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Department of Health

Department of Justice

Department of Treasury

Department of Treasury – Regulation Impact Unit

Regulation Impact Committee

Department of Business and Employment

Department of the Chief Minister

Department of Justice

Department of Treasury

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*Other*

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PricewaterhouseCoopers (Melbourne and Perth)

Mr Rex Deighton-Smith, Jaguar Consulting

Mr Robert Milliner and Mr David Borthwick AO PSM

The Centre for International Economics

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**Table A.3    Regulatory oversight bodies**

As at January 2012

<i>Jurisdiction</i>	<i>Regulatory oversight body</i>
Commonwealth	Australian Government Department of Finance and Deregulation – Office of Best Practice Regulation (OBPR)
COAG	Australian Government Department of Finance and Deregulation – Office of Best Practice Regulation (OBPR)
New South Wales	Department of Premier and Cabinet – Better Regulation Office
Victoria	Victorian Competition and Efficiency Commission
Queensland	Department of Treasury – Regulatory Review Branch
Western Australia	Department of Treasury – Regulatory Gatekeeping Unit
South Australia	Department of the Premier and Cabinet – Cabinet Office
Tasmania	Department of Treasury and Finance – Economic Reform Unit
ACT	Department of Treasury – Microeconomic Policy Unit
Northern Territory	Department of Treasury – Regulation Impact Unit

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## B Jurisdiction guidance material

This appendix lists the primary guidance material (including legislation) in each jurisdiction that was used to generate many of the figures and tables in this report.

### Commonwealth

Australian Government 2010, *Best Practice Regulation Handbook*

Australian Government 2010, *ComLaw: browse Acts by year/number – 2010*, <http://www.comlaw.gov.au/Browse/Results/ByYearNumber/Acts/Asmade/2010/0> (accessed 23 July 2012)

Australian Government 2010, *ComLaw: browse Legislative Instruments by registration date – 2010*, <http://www.comlaw.gov.au/Browse/Results/ByRegDate/LegislativeInstruments/Asmade/2010/0> (accessed 23 July 2012)

Australian Government 2011, *ComLaw: browse Acts by year/number – 2011*, <http://www.comlaw.gov.au/Browse/Results/ByYearNumber/Acts/Asmade/2011/0> (accessed 23 July 2012)

Australian Government 2011, *ComLaw: browse Legislative Instruments by registration date – 2011*, <http://www.comlaw.gov.au/Browse/Results/ByRegDate/LegislativeInstruments/Asmade/2011/0> (accessed 23 July 2012)

Department of the Prime Minister and Cabinet 2012, *Cabinet Handbook*, 7<sup>th</sup> Edition

Office of Best Practice Regulation 2008, *Annual Regulatory Plans: Guidelines for departments and agencies on preparing and publishing annual regulatory plans*

Office of Best Practice Regulation 2012, *Guidance Note Post-Implementation Reviews*

### COAG

Best Practice Regulation 2007, *A Guide For Ministerial Councils and National Standard Setting Bodies*

Handbook for COAG Councils (nd), *A Guide for Best-practice Operations for COAG Council Secretariats*

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## New South Wales

Department of Premier and Cabinet 2008, *Assessment against the Competition Test*

Department of Premier and Cabinet 2008, *Measuring the Costs of Regulation*

Department of Premier and Cabinet 2008, *Risk-Based Compliance*

Department of Premier and Cabinet 2009, *Consultation Policy*

Department of Premier and Cabinet 2009, *Guide to Better Regulation*

Department of Premier and Cabinet 2011, *Ministerial Handbook*

*Legislation Review Act 1987*

New South Wales Government 2010, *Official notification of the making of statutory instruments and other legislative events*, <http://www.legislation.nsw.gov.au/> (accessed 23 July 2012)

New South Wales Government 2011, *Official notification of the making of statutory instruments and other legislative events*, <http://www.legislation.nsw.gov.au/> (accessed 23 July 2012)

*Subordinate Legislation Act 1989*

## Victoria

Department of Treasury and Finance 2011, *Victorian Guide to Regulation Appendices*

Department of Treasury and Finance 2011, *Victorian Guide to Regulation*, Edition 2.1

*Subordinate Legislation Act 1994*

Victorian Government 2010, *Gazette archives 2010*, <http://www.gazette.vic.gov.au/> (accessed 13 August 2012)

Victorian Government 2011, *Gazette archives 2011*, <http://www.gazette.vic.gov.au/> (accessed 13 August 2012)

Victorian Government 2012, <http://www.legislation.vic.gov.au/> (accessed 23 July 2012)

## Queensland

Department of Local Government 2012, *Local laws online*, <http://www.dsdlp.qld.gov.au/local-government/local-laws-online.html> (accessed 13 August 2012)

Department of Premier and Cabinet 2010, *The Queensland Cabinet Handbook: Governing Queensland*

Queensland Government 2010, *Acts as passed in 2010*, [http://www.legislation.qld.gov.au/Acts\\_Passed/Acts\\_Passed\\_NUM\\_2010.htm](http://www.legislation.qld.gov.au/Acts_Passed/Acts_Passed_NUM_2010.htm) (accessed 23 July 2012)

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Queensland Government 2010, *Subordinate legislation as made in 2010*, [http://www.legislation.qld.gov.au/SL\\_AsMade/SL\\_AsMade\\_NUM\\_2010.htm](http://www.legislation.qld.gov.au/SL_AsMade/SL_AsMade_NUM_2010.htm) (accessed 23 July 2012)

Queensland Government 2011, *Acts as passed in 2011*, [http://www.legislation.qld.gov.au/Acts\\_Passed/Acts\\_Passed\\_NUM\\_2011.htm](http://www.legislation.qld.gov.au/Acts_Passed/Acts_Passed_NUM_2011.htm) (accessed 23 July 2012)

Queensland Government 2011, *Subordinate legislation as made in 2011*, [http://www.legislation.qld.gov.au/SL\\_AsMade/SL\\_AsMade\\_NUM\\_2011.htm](http://www.legislation.qld.gov.au/SL_AsMade/SL_AsMade_NUM_2011.htm) (accessed 23 July 2012)

Queensland Treasury 2010, *Regulatory Assessment Statement System Guidelines*

*Statutory Instruments Act 1992*

Statutory Instruments Regulation 2002

## **Western Australia**

Department of Treasury 2010, *Regulatory Impact Assessment Guidelines for Western Australia*

Department of Treasury 2012, *How to Complete a Preliminary Impact Assessment*

Department of Treasury 2012, *How to Complete a Regulatory Impact Statement*

Western Australia Government 2010, *Western Australian Legislation: Original Acts as passed*

Western Australia Government 2011, *Western Australian Legislation: Original Acts as passed*

Western Australia Government 2012, *Western Australian Government Gazette*, <http://www.slp.wa.gov.au/gazette/gazette.nsf> (accessed 5 September 2012)

## **South Australia**

Department of the Premier and Cabinet and Department of Treasury and Finance 2011, *Better Regulation Handbook: How to design and review regulation, and prepare a Regulatory Impact Statement*

South Australian Government 2010, *Acts of the Parliament of South Australia: 2010 Acts as enacted*, <http://www.legislation.sa.gov.au/>, (accessed 23 July 2012)

South Australian Government 2010, *Regulations and rules made by the Governor of South Australia: 2010 regulations and rules as made*, <http://www.legislation.sa.gov.au/>, (accessed 23 July 2012)

South Australian Government 2011, *Acts of the Parliament of South Australia: 2011 Acts as enacted*, <http://www.legislation.sa.gov.au/> (accessed 23 July 2012)

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South Australian Government 2011, *Regulations and rules made by the Governor of South Australia: 2011 regulations and rules as made*, <http://www.legislation.sa.gov.au/> (accessed 23 July 2012)

*Subordinate Legislation Act 1978*

## **Tasmania**

Department of Premier and Cabinet 2012, *By-law directory*, [http://www.dpac.tas.gov.au/divisions/lgd/council\\_by-laws](http://www.dpac.tas.gov.au/divisions/lgd/council_by-laws) (accessed 23 July 2012)

Department of Premier and Cabinet 2012, *Cabinet Handbook*

Department of Treasury and Finance 2010, *Subordinate Legislation Act 1992 Administrative Handbook*

Department of Treasury and Finance 2011, *Legislation Review Program: Procedures and Guidelines Manual*

*Subordinate Legislation Act 1992*

*Subordinate Legislation Committee Act 1969*

## **Australian Capital Territory**

ACT Government 2009, *Cabinet Handbook*

ACT Government 2009, *Legislation Handbook*

ACT Government 2010, *Acts as notified*, <http://www.legislation.act.gov.au/a/annual/2010.asp> (accessed 23 July 2012)

ACT Government 2010, *Disallowable instruments as notified*, <http://www.legislation.act.gov.au/di/annual/2010.asp> (accessed 23 July 2012)

ACT Government 2010, *Subordinate laws as notified*, <http://www.legislation.act.gov.au/sl/annual/2010.asp> (accessed 23 July 2012)

ACT Government 2011, *Acts as notified*, <http://www.legislation.act.gov.au/a/annual/2011.asp> (accessed 23 July 2012)

ACT Government 2011, *Disallowable instruments as notified*, <http://www.legislation.act.gov.au/di/annual/2011.asp> (accessed 23 July 2012)

ACT Government 2011, *Subordinate laws as notified*, <http://www.legislation.act.gov.au/sl/annual/2011.asp> (accessed 23 July 2012)

Department of Treasury 2003, *Best Practice Guide For Preparing Regulatory Impact Statements*

*Legislation Act 2001*



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## Northern Territory

Department of the Chief Minister 2012, *Acts*, <http://notes.nt.gov.au/dcm/legislat/Acts.nsf> (accessed 23 July 2012)

Department of the Chief Minister 2012, *Subordinate – by year and number*, <http://notes.nt.gov.au/dcm/legislat/Acts.nsf> (accessed 23 July 2012)

Northern Territory Treasury 2007, *Regulation-Making Framework: Alternatives to Regulation*

Northern Territory Treasury 2007, *Regulation-Making Framework: Assessing the Impact of Regulation*

Northern Territory Treasury 2007, *Regulation-Making Framework: Best Practice Consultation Principles*

Northern Territory Treasury 2007, *Regulation-Making Framework: Principles and Guidelines*



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# C Best practice principles for RIA

## C.1 COAG principles

COAG has agreed that all governments will ensure that regulatory processes in their jurisdictions are consistent with the following best practice principles for regulation making:

1. establishing a case for action before addressing a problem;
2. a range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed;
3. adopting the option that generates the greatest net benefit for the community;
4. in accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that:
  - a. the benefits of the restrictions to the community as a whole outweigh the costs, and
  - b. the objectives of the regulation can only be achieved by restricting competition;
5. providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear;
6. ensuring that regulation remains relevant and effective over time;
7. consulting effectively with affected stakeholders at all stages of the regulatory cycle; and
8. government action should be effective and proportional to the issue being addressed (COAG, 2007b, p. 4).

All Australian governments also agreed, in the *COAG Regulatory Reform Plan* (endorsed by the Business Regulation and Competition Working Group on 30 June 2009), to establish and maintain effective arrangements that maximise the efficiency of new and amended regulation, and avoid unnecessary compliance costs and restrictions on competition, by:

- establishing and maintaining gate keeping mechanisms as part of the decision-making process

- 
- improving the quality of RIA through the use, where appropriate, of cost-benefit analysis
  - better measurement of compliance costs from new and amended regulation
  - broadening the scope of RIA, where appropriate, to recognise the effect of regulation on individuals, the cumulative burden of regulation, and consideration of alternatives to new regulation
  - applying the regulatory reform arrangements to ministerial councils (COAG 2007a, p. 8).

## C.2 OECD principles

The OECD has provided substantial guidance on leading practices in RIA over many years. Most recently, the OECD Council approved the *Recommendation of the OECD Council on Regulatory Policy and Governance* (box C.1). This recommendation gives guiding principles for member countries to initiate RIA processes that are integrated in a policy cycle of regulatory design, enforcement, review and evaluation. Other elements of the broader recommendation that are closely linked to RIA or relevant to best practice regulation making processes include those covering: the importance of high level political commitment; oversight of regulatory policy; coordination across jurisdictions; transparency; consultation; and the application of RIA to reviews of regulation.

### Box C.1 Recommendation of the OECD Council on Regulatory Policy and Governance<sup>a</sup>

The OECD Council on Regulatory Policy and Governance recommends, in regard to RIA, that member countries:

Integrate Regulatory Impact Assessment into the early stages of the policy process for the formulation of new regulatory proposals. Clearly identify policy goals, and evaluate if regulation is necessary and how it can be most effective and efficient in achieving those goals. Consider means other than regulation and identify the tradeoffs of the different approaches analysed to identify the best approach.

1. Adopt ex ante impact assessment practices that are proportional to the significance of the regulation, and include benefit cost analyses that consider the welfare impacts of regulation taking into account economic, social and environmental impacts including the distributional effects over time, identifying who is likely to benefit and who is likely to bear costs. (4.1)
2. Ex ante assessment policies should require the identification of a specific policy need, and the objective of the regulation such as the correction of a market failure, or the need to protect citizens' rights that justifies the use of regulation. (4.2)

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### Box C.1 (continued)

3. Ex ante assessment policies should include a consideration of alternative ways of addressing the public policy objectives, including regulatory and non regulatory alternatives to identify and select the most appropriate instrument, or mix of instruments to achieve policy goals. The no action option or baseline scenario should always be considered. Ex ante assessment should in most cases identify approaches likely to deliver the greatest net benefit to society, including complementary approaches such as through a combination of regulation, education and voluntary standards. (4.3)
4. When regulatory proposals would have significant impacts, ex ante assessment of costs, benefits and risks should be quantitative whenever possible. Regulatory costs include direct costs (administrative, financial and capital costs) as well as indirect costs (opportunity costs) whether borne by businesses, citizens or government. Ex ante assessments should, where relevant, provide qualitative descriptions of those impacts that are difficult or impossible to quantify, such as equity, fairness, and distributional effects. (4.4)
5. Regulatory Impact Analysis should as far as possible be made publicly available along with regulatory proposals. The analysis should be prepared in a suitable form and within adequate time to gain input from stakeholders and assist political decision making. Good practice would involve using the Regulatory Impact Analysis as part of the consultation process. (4.5)
6. Ex ante assessment policies should indicate that regulation should seek to enhance, not deter, competition and consumer welfare, and that to the extent that regulations dictated by public interest benefits may affect the competitive process, authorities should explore ways to limit adverse effects and carefully evaluate them against the claimed benefits of the regulation. This includes exploring whether the objectives of the regulation cannot be achieved by other less restrictive means. (4.6)
7. When carrying out an assessment, officials should: (4.7)
  - Assess economic, social and environmental impacts (where possible in quantitative and monetized terms), taking into account possible long term and spatial effects;
  - Evaluate if the adoption of common international instruments will efficiently address the identified policy issues and foster coherence at a global level with minimal disruption to national and international markets;
  - Evaluate the impact on small to medium sized enterprises and demonstrate how administrative and compliance costs are minimised.
8. RIA should be supported with clear policies, training programmes, guidance and quality control mechanisms for data collection and use. It should be integrated early in the processes for the development of policy and supported within agencies and at the centre of government. (4.8)

Source: OECD (2012a).

- <sup>a</sup> Section four of the OECD Recommendation. The numbers in brackets are the reference numbers from the source document.



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## D Surveys of agencies and regulatory oversight bodies

### D.1 Survey design and distribution

The most effective way to collect some of the information required for the study was through surveys (box D.1). Two groups were surveyed in each of the ten jurisdictions: regulatory oversight bodies and agencies involved in the RIA process. The two surveys have a number of common questions and covered similar areas including:

- agency details
- perceptions of the RIA process
- influence of the RIA process on decision making and outcomes
- costs of RIA.

In addition, oversight bodies were asked questions relating to training that they provide and agencies were surveyed on matters relating to the integration of RIA into the policy development process and their use of consultants.

The surveys were emailed to agencies and oversight bodies in ‘smart pdf’ format. All respondents answered the survey electronically and submitted the completed survey via a return email. The surveys were sent out in late April 2012 with responses received over the following two months.

Although the Commission was requested to benchmark RIA processes as at January 2012, for practical reasons survey respondents were asked to provide information or perceptions based on their experience in recent years. If there were material differences between the RIA process that operated in recent years and the process as at January 2012, they were asked to provide such details in the return email with the survey.

The question design was piloted with a small number of oversight bodies and agencies to ensure the questions were clear and unambiguous. The technical aspects of the survey format were tested by Commission staff and a number of external parties unrelated to the project.

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#### Box D.1      **Use of surveys to evaluate regulatory frameworks**

Surveys are an effective way of collecting information (both factual and perceptions) on RIA requirements and their practical implementation. While all jurisdictions publish RIA guidance material, some material is not current and in other situations, the actual practice is not captured in the guidance material. Agency experiences in interpreting and applying RIA requirements are not generally in the public domain but nevertheless provide useful insights into how RIA processes are performing.

The Commission's consultation with government agencies and other stakeholders provided some understanding of this. However, surveys of key 'users' of RIA processes are an efficient and cost-effective option for collecting and comparing large amounts of information from ten jurisdictions. Surveys also provide respondents the opportunity to supply the most up to date information.

Surveys of government agencies (including local government) have been used extensively in previous benchmarking studies (see for example, PC (2012)). Particularly insightful, are responses to those questions which are addressed to both the regulator and the regulated. The OECD (2012b) notes in its *Practitioner's guide to Perception Surveys* that:

Perception surveys are increasingly used in OECD countries to evaluate the performance of regulatory reform programmes, in particular in the area of reducing administrative burdens. (p. 7)

The survey design and questions used in this study have drawn on past Commission benchmarking studies and are very similar to those used in a number of other studies, including studies of regulatory processes. In particular, the Commission has drawn on two perception surveys administered by the VCEC: one related to the quality and usefulness of training provided by the VCEC and the other provided to agencies at the completion of their RIS processes to obtain feedback on the process and their interaction with the VCEC (Access Economics 2010).

## D.2      **Survey responses**

### **Regulatory oversight bodies**

All nine regulatory oversight bodies, as listed in appendix A, were surveyed and all responded. The Office of Best Practice Regulation (OBPR), as the regulatory oversight body for both the Commonwealth and COAG, did not complete the perception or RIA influence questions in the survey as they considered that such matters represent policy issues for their government. The regulatory oversight bodies were advised that their survey responses could, where the Commission considers it necessary in order to evidence a point in the report, be attributed to their relevant jurisdiction.



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## Agencies

Over 100 agencies were surveyed across all jurisdictions (table D.1). Broadly, agencies were included in the sample if they had been engaged in the RIA process over the period from 1 January 2010 to 31 December 2011, through completing a preliminary impact analysis (PIA), a regulation impact statement (RIS), and/or applied for an exemption from RIS requirements. Other identified agencies which had provided substantial input to, or comments on a RIS during that period, were also sent surveys. To elicit information on the COAG RIA process, surveys were sent to the secretariats of the ministerial councils and national standard setting bodies. In addition, agencies in the Commonwealth, states and territories were advised that if they had undertaken work under the COAG RIA process in the relevant period, they could complete a survey relating to that work.

In the explanatory material provided with the survey, agencies were advised that no survey response would be reported in a manner that could be attributable to a particular respondent. Consequently, the names of surveyed agencies are not listed in this report.

In total, the Commission received 60 responses to its survey of agencies — a response rate of 57 per cent. Some agencies provided multiple responses so as to reflect the varied experiences within their agency. Taking this into account, there were 51 agency responses (table D.1). There was a high number of responses to individual questions, particularly for the perception based questions.

Copies of the survey forms and aggregated responses can be found on the Commission's website.

Table D.1    **Agency survey responses by jurisdiction**  
Number

	<i>Surveys sent</i>	<i>Survey returns</i>	<i>Agencies responding</i>
Commonwealth	25	19	17
COAG	12	6	6
NSW	12	6	5
Vic	12	4	4
Qld	8	4	3
WA	11	9	6
SA	7	3	3
Tas	7	2	2
ACT	4	2	2
NT	8	5	3
<b>Total</b>	<b>106</b>	<b>60</b>	<b>51</b>

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## E Analysis of regulation impact statements

This appendix discusses the results and methodology of the Commission's analysis of regulation impact statements (RISs). A list of the questions used to analyse each RIS is provided in the last section of the appendix along with aggregated results.

### E.1 Coverage and methodology

#### Coverage

The Commission examined 182 RISs prepared in all Australian jurisdictions to identify the extent to which key analytical features were present (table E.1). All RISs examined have been assessed as meeting the requirements of the relevant jurisdictional RIA process by the relevant oversight body (in jurisdictions where formal assessment takes place).

Included in the analysis were all RISs completed and made publicly available in each jurisdiction (with the exception of the Commonwealth) in 2010 and 2011. For the Commonwealth, only RISs prepared in 2011 were examined, due to the large number of RISs undertaken.

Table E.1 **RISs analysed by jurisdiction**

1 January 2010 to 31 December 2011

	<i>Cwlth</i>	<i>COAG</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>	<b><i>Total</i></b>
Number of RISs	66	24	40	24	6	3	2	7	7	3	<b>182</b>

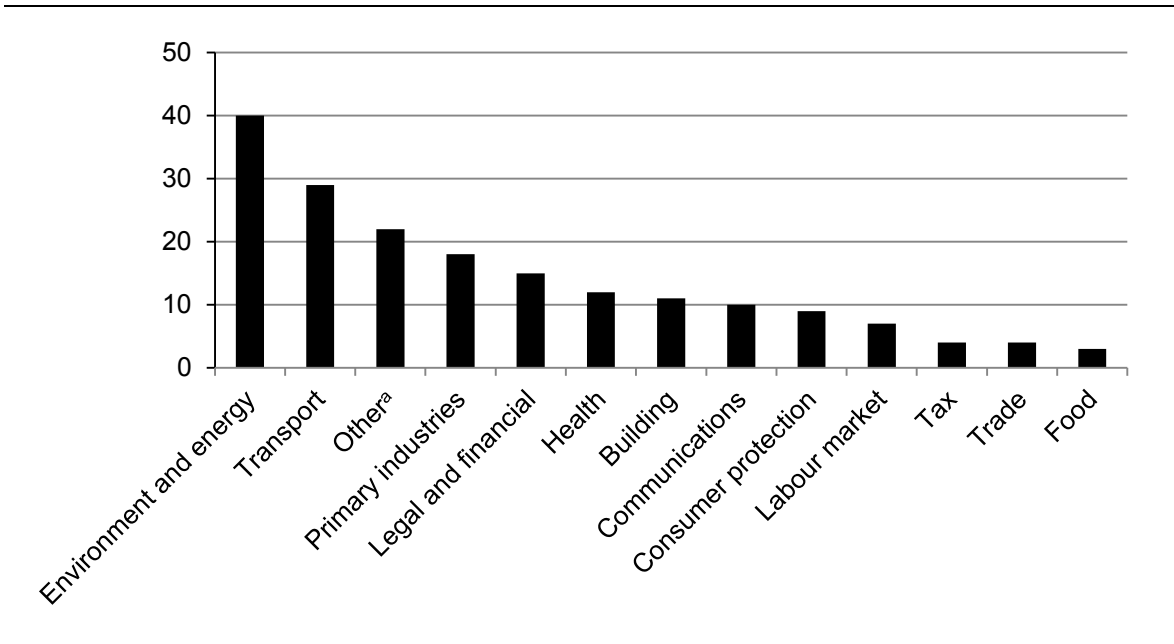
To improve comparability across jurisdictions, consultation RISs for jurisdictions with two-stage RIS processes were excluded from the analysis. Hence, only the final RISs for COAG, Western Australia, and Queensland were included. However, for New South Wales, Victoria and Tasmania, the analysis includes consultation RISs as this was the final document produced in the RIA process. That is, the

analysis in the RIS was not updated to include consultation outcomes before it was given to decision makers.

All the RISs examined are publicly available, with the exception of three RISs for the Northern Territory — which were made available to the Commission during the course of the study. Hence, the analysis excludes RISs for primary legislation for those jurisdictions where these are not made public — namely BIAs in Victoria, some BRSs in New South Wales, final RASs in Queensland and most RISs for primary legislation in the ACT.

RISs covered a wide range of subject areas — including the environment and energy, transport, primary industries, legal and financial, health and building (figure E.1). The RISs examined also covered a number of different types of regulatory instruments — including both new and amending bills and regulations as well as some quasi regulation. A number of RISs for the remaking of regulations subject to sunseting or staged repeal were also examined, however by far the largest category of instruments was amending regulation (figure E.2).

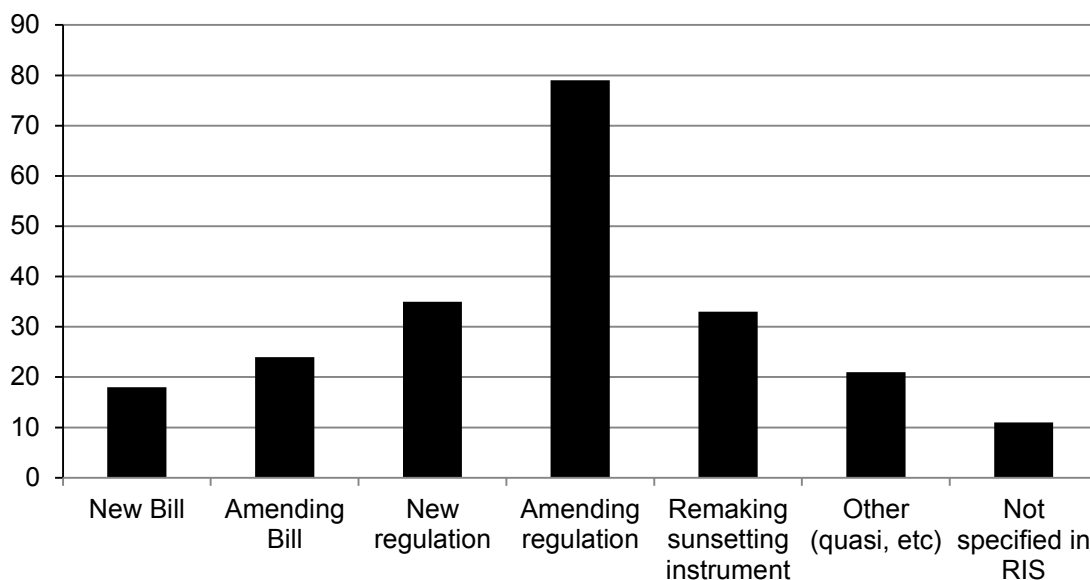
Figure E.1 **RISs examined by area of regulation**  
Number of RISs



<sup>a</sup> 'Other' comprises a mix of mainly social regulation. Examples include regulations affecting the not-for-profit sector, childcare centres, caravan parks, student visas, protection of exhibited animals and research using animals.

Data source: PC RIS analysis.

**Figure E.2 Type of regulatory instruments in examined RISs**  
Number of instances<sup>a</sup>



<sup>a</sup> Some RISs covered more than one category.

Data source: PC RIS analysis.

RISs also varied substantially in terms of the significance of the issues examined, ranging from regulatory proposals with highly significant and widespread economic impacts to those with less significant (though still appreciable) impacts and/or narrower impacts.

## Methodology

As far as possible, objective indicators of the presence (or absence) in RISs of selected analytical features were used. The indicators chosen were drawn from criteria developed by Hahn and Dudley (2007) and various other studies, including Renda (2006), NAO (2010a), Cecot et al. (2008), Ellig and McLaughlin (2010) and the European Court of Auditors (2010).

The indicators used in this study provide descriptive information on the broad characteristics and coverage of the RISs examined. The indicators cover key elements of RIA including:

1. *Problem identification* — including the discussion of why government intervention was required and whether aspects of the problem were quantified (table E.2)

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2. *options* — including the number and breadth of options (including non-regulatory options) considered
  3. *impact analysis* — including the types of impacts assessed, extent to which significant costs and benefits were quantified and monetised, whether costs and benefits were directly compared through calculation of a net benefit and whether discount rates and sensitivity analysis were used
  4. *consultation* — including how consultation was conducted, the extent to which views of those consulted were reflected in RISs, and how stakeholder views were taken into account
  5. *implementation and review* — including information on how the proposal was to be implemented, enforced and monitored, use of risk-based approaches to design and enforcement, details on ex post review timing and governance arrangements
  6. *other* — including RIS length and whether an executive summary was included.

Broadly speaking the methodology can be characterised as a ‘RIS content analysis’ or ‘scorecard’ approach. No attempt was made to systematically measure or verify the accuracy or appropriateness of the analysis (including assumptions, methodologies and calculations) present in RISs. To do so would have replicated key elements of the work of the regulatory oversight bodies. The greater time that would be required to assess each RIS in that way, and the substantial information requirements needed to do it well, would have meant a substantial reduction in the overall number of RISs that could be examined for this study.

While the indicators were selected to be as objective as possible, a degree of subjectivity in the analysis was sometimes unavoidable. In some cases, determining the presence or absence of an element was a simple ‘yes/no’ decision (such as whether a net benefit was calculated or a discount rate used). However, in other cases such results were supplemented with additional information on the comprehensiveness of the analysis. In these cases, judgements had to be made on the *extent* to which particular analytical features were present (table E.2).

To assist in making such judgements as consistently as possible across the full set of RISs examined, and to keep the levels of subjectivity within acceptable bounds, the Commission employed a series of categories to reflect the different levels of content in RISs. For example, in assessing the extent to which costs were quantified, the Commission made assessments as to whether analysis present in RISs involved:

- (a) a solely qualitative discussion
- (b) very basic quantification
- (c) quantification of some aspects, but with gaps
- (d) extensive quantification for most/all aspects

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Further, in assessing the discussion of the intervention rationale in RISs, determining whether a discussion was present or absent was generally a straightforward ‘yes/no’ decision. However, in many cases the discussion was a brief or cursory statement noting the presence of a market or government failure or other systemic issue the regulation was supposed to solve. In a number of instances the existence of ‘spillovers’, ‘externalities’, ‘information problems’ or ‘regulatory failures’ were asserted, with little or no supporting argument (see chapter 6). Hence, further delineation in this category was needed. In these instances the RISs were recorded as including a ‘limited discussion of the intervention logic’, to distinguish them from RISs that included a more thorough analysis.

## Factors affecting jurisdictional results

Where results were presented by jurisdiction (chapter 6) the categories presented were, Total, Commonwealth, COAG, New South Wales, Victoria and Other — the latter comprising the remaining jurisdictions with insufficient numbers of RISs to enable meaningful analysis at an individual jurisdictional level.

Care is needed in interpreting observed differences across jurisdictions, particularly in drawing inferences based on single indicators. A range of factors can influence jurisdictional results, including:

- *differences in RIS requirements and significance thresholds* across jurisdictions — jurisdictional RIA systems that result in a larger number of RISs for less significant issues will tend to score lower on some aspects of content analysis
- the *magnitude of the impacts* of the regulatory proposals in the benchmark period — jurisdictions with a higher proportion of highly significant RISs (which could vary substantially from year-to-year) will, if analysis is proportionate to likely impacts, tend to score higher for a number of aspects of RIS content
- the *type of regulation/area of the economy* to which the RISs in the benchmark period relate — which can influence the availability of reliable data. For example, RISs in transport and other ‘hard’ infrastructure related areas often have higher levels of quantification and monetisation than RISs for environmental or social regulation, reflecting, at least in part, the more extensive quantitative analysis required for the associated large investments.

Further, the extent to which the number and complexity of RISs prepared during the benchmark period for each jurisdiction may have a bearing on RIS quality is unknown. The amount of new regulation produced within each jurisdiction will vary from year to year depending on a range of factors including reform priorities,

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regulatory and electoral cycles and the operation of staged repeal and sunseting arrangements.

It is unclear to what extent these factors influenced the results of the content analysis. The limited number of RISs available meant that standardising for these factors across jurisdictions was not possible. However, to reduce problems associated with inter-jurisdictional differences in RIA requirements, the analytical features examined in the Commission's RIS analysis were generally based on high level OECD principles for leading practice RIA and COAG-agreed best practice principles, rather than individual RIA requirements in particular jurisdictions.

A limitation of the approach adopted is that a RIS could score well in terms of comprehensiveness of content, yet still be of poor quality. Nevertheless, given that many of the indicators relate to fundamental RIA elements, RISs with few of the analytical features in the content analysis are unlikely to be of high quality.

## **E.2 Other studies of RIS content and quality**

Publicly available systematic ex post assessments of RIS content and quality have been limited in Australia. Regulatory oversight bodies generally undertake extensive assessment of RISs as part of the process leading up to decision making and publication of the RIS. However, while some publish information on RIS adequacy and compliance rates, they do not generally publish systematic data on the content and quality of RISs. Nevertheless, a few studies have been made public and are summarised below.

- Data on overall RIS quality is published each year by the Victorian Competition and Efficiency Commission. The latest analysis examined all Victorian RISs produced over the period from 2007-08 to 2011-12 (VCEC 2012). Criteria employed included the extent of quantification of the magnitude of the problem, predicted costs and predicted benefits. The criteria used were 'solely qualitative' (that is, no quantification), 'some quantification, but with obvious gaps', 'comprehensive quantification of most aspects using available data', 'rigorous quantification of all aspects supported by robust data'. This analysis found that total RISs with some quantification of the extent of the problem ranged from 70-85 per cent; for quantification of predicted costs it was higher (around 90 per cent) and quantification of predicted benefits was around 70-80 per cent.
- In its assessment of the effectiveness of the RIS process in Victoria, Access Economics (2010) examined RISs to verify their rigour. A sample of 10 RIS documents was provided by VCEC from which Access Economics selected five.



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The overall finding was that while the RIS documents assessed generally satisfied Victoria's RIS requirements key areas of improvement included:

- more widespread consideration of non-regulatory options
  - greater efforts at improving accessibility of documents (through greater use of plain language) would improve their usefulness in consultation
  - better structuring of documents would help stakeholders to identify conceptual and practical shortcomings in the policy proposals.
- *CRA International* (2006) examined a sample of 32 RISs prepared by Commonwealth departments relating to regulatory proposals in 2004-05. Key findings included:
    - 77 per cent of RISs in the sample did not attempt to quantify the costs of regulation and compliance costs were rarely quantified
    - there was frequent use of vague language in RISs when discussing costs and benefits
    - around one-third of RISs in the sample did not analyse policy alternatives
    - overall RIS quality was poor, with some RISs using outdated data, poor and/or unrealistic assumptions, biased formulation of costs and benefits and a lack of standardisation and consistency in the presentation of costs and benefits in RISs across government departments.

## **International studies**

A large number of overseas studies of impact assessments have been conducted, particularly in recent years. Mostly these have been based on a scorecard approach, but some more in-depth qualitative assessments and comparisons of ex post and ex ante assessments have also been published. Examples of studies include:

### *United Kingdom*

- The National Audit Office in the UK reviewed a randomly selected sample of 50 of the 196 final Impact Assessments for new legislation in 2008-09 (NAO 2010a).
- An assessment of 499 RIAs undertaken between 1998 and 2002 and 167 in 2002-03 — by the British Chamber of Commerce (see Ambler, Chittendend, and Shamutkova 2003 and Ambler, Chittendend, and Obodovski 2004).

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### *European Union*

- Analysis of the first 70 Extended Impact Assessments (IAs) completed by the European Commission — Renda (2006), using a scorecard approach.
- An examination of 111 EU IAs — Cecot et al. (2008) scored the assessments using a number of objective measures of quality.
- ‘Systematic research’ on over one quarter of all 2003-2008 EU IA reports by the European Court of Auditors (2010).

### *United States*

- Study of 48 proposed federal regulations subject to RIA between 1996 and 1999 and subsequently 55 cases of RIA performed by federal agencies — Hahn and Litan (2000) and Hahn and Dudley (2004).
- 74 RIAs issued by the US EPA between 1982 and 1999 — Hahn and Dudley (2007).
- Several recent studies have attempted to measure the quality of US analysis in more detail — Ellig and McLaughlin (2010), from the Mercatus Centre, for example, go beyond the ‘yes/no’ scorecard analysis to include a qualitative evaluation of how well the RIA performed for regulations from all agencies in 2008.
- Various assessments that compare ex ante benefits and costs in RIA with actual ex post estimates — Harrington et al. (2000); OMB (2005) and Harrington (2006).

### *Summary of findings*

Based on the Commission’s review of the findings of many of these studies, a number of observations can be made that are broadly consistent with the findings of the Commission’s RIS analysis and other studies of RISs in Australia.

There is a wide variation in the standard of RISs but, overall, RIS quality has been found to be low. Generally the analysis has fallen short of the relevant guidelines or requirements, with important components of RISs frequently missing. Common deficiencies include:

- inadequate evaluation of alternatives (including the option of not regulating)
- the level of quantification and monetisation of costs and benefits — business compliance costs are often not quantified and benefits are quantified less frequently than costs

- costs and benefits are seldom directly compared (net benefits are not usually estimated).

Some studies revealed no significant differences in quality over time (eg Hahn and Dudley 2007 (USA)) or even suggested impact analysis may be getting worse (for example, Hahn 2010 (USA) and Renda 2006 (EU)), but more recent studies of EU IAs found evidence of improvements (Renda (2010), Cecot et al. (2008)).

On a more positive note, overall a review of ex ante/ex post comparisons does not seem to reveal any clear or systematic biases in RIS estimates of benefits relative to costs (see, for example, Hahn (2010) and Morgenstern (2011)).

### E.3 Questions and aggregate results

Key questions and the aggregated results are provided in table E.2.

**Table E.2 RIS content analysis**  
**— questions and aggregate results by indicator**

<i>Question</i>	<i>Answer</i>	<i>per cent</i>
<b>1. Problem</b>		
Was the extent of the problem quantified?	No, solely qualitative discussion	27
	Very basic quantification	29
	Quantification of some aspects, but with gaps	32
	Extensive quantification of most or all aspects	12
Did the RIS discuss why government intervention was required?	No discussion	7
	Yes, but limited discussion of intervention logic	41
	Yes, more extensive discussion	53
<b>2. Options</b>		
Was a 'no action' option explicitly considered? (or for sunseting: allowing regulation to lapse)	No discussion	31
	Yes, but limited discussion or quickly dismissed	27
	Yes, more extensive discussion	41
Were non-regulatory alternatives considered?	No discussion	51
	Yes, but limited discussion or quickly dismissed	18
	Yes, more extensive discussion	31
Was more than one option presented (excluding 'do nothing')?	No	32
	Yes	39
	Yes, but essentially variations of the same option	29

(continued next page)

**Table E.2 RIS content analysis**  
**— questions and aggregate results by indicator** (continued)

<i>Question</i>	<i>Answer</i>	<i>per cent</i>
<b>3. Impact analysis (costs and benefits)</b>		
Did the RIS contain <i>any</i> discussion of the following impacts?		
... impacts on key stakeholder groups		97
... national market implications		38
... restrictions on competition		42
... social impacts		61
... environmental impacts		37
... small business impacts		35
... regional impacts		28
Did the RIS include ...		
... quantification of predicted costs?		
	No, solely qualitative discussion	27
	Very basic quantification	19
	Quantification of some aspects, but with gaps	36
	Extensive quantification for most/all aspects	18
... monetisation of predicted costs?		
	No, solely qualitative discussion	30
	Very basic monetisation	18
	Monetisation of some aspects, but with gaps	35
	Extensive monetisation for most/all aspects	17
... quantification of predicted benefits?		
	No, solely qualitative discussion	42
	Very basic quantification	18
	Quantification of some aspects, but with gaps	30
	Extensive quantification for most/all aspects	10
... monetisation of predicted benefits?		
	No, solely qualitative discussion	47
	Very basic monetisation	18
	Monetisation of some aspects, but with gaps	26
	Extensive monetisation for most/all aspects	9
... quantified administrative and compliance costs for business?		
	No, solely qualitative discussion	34
	Very basic quantification	17
	Quantification of some aspects, but with gaps	34
	Extensive quantification for most/all aspects	15
Did the RIS calculate a net benefit?		
	For all options or preferred option	27
Did the RIS use sensitivity analysis?		
	Yes	16
Did the RIS use a discount rate?		
	Yes	31
Was multi-criteria analysis used?		
	Yes	13

(continued next page)

**Table E.2 RIS content analysis**  
**— questions and aggregate results by indicator** (continued)

<i>Question</i>	<i>Answer</i>	<i>per cent</i>
<b>4. Consultation<sup>a</sup></b>		
Did the RIS outline the views of those consulted?		
	No	7
	Yes, limited detail	50
	Yes, more extensive discussion	43
Did the RIS outline how these views were taken into account?		
	No	29
	Yes, limited detail	38
	Yes, more extensive discussion	33
Was there evidence that outcomes and responses of public consultation in some way influenced the preferred option?		
	Yes	57
<b>5. Implementation and review</b>		
Did the RIS include information about how the proposal was to be implemented and enforced?		
	No	25
	Yes, limited detail	48
	Yes, more extensive discussion	27
Did the RIS discuss potential non-compliance? (ie incidence, likely impacts etc)		
	No	67
	Yes, limited detail	17
	Yes, more extensive discussion	16
Did the RIS include any estimates of monitoring or enforcement costs?		
	Yes	34
Was there evidence of a risk-based approach to the design and enforcement of the regulatory compliance strategy?		
	Yes	27
Did the proposed regulation include a review clause (embedded statutory review)?		
	Yes	5
Did the RIS contain an explicit statement of ...		
	... when a review of the regulation would occur?	42
	... who would undertake the review?	10
	... that the review would be public?	5
	... that the review would be independent?	4
Did the RIS state the regulation would include a sunset clause?		
	Yes	1
<b>6. Other</b>		
Did the RIS have an executive summary?		
	Yes	41
How long was the RIS?		
	Average length, including attachments (pages)	54

<sup>a</sup> These estimates exclude consultation RISs and are based on data from the following jurisdictions: Commonwealth, COAG, NSW (BRSSs, but not RISs), Western Australia, South Australia and the Northern Territory.



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