Department of **Treasury and Finance**

Victorian Guide to Regulation

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incorporating Guidelines made under the *Subordinate Legislation Act 1994* which includes amendments effective from 1 January 2011 and 1 July 2011

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What is regulation?

Because it can be used in a number of different contexts, the term 'regulation' can be difficult to define.

Regulation involves the imposition of rules or principles intended to influence the behaviour of people and/or businesses, supported by the authority of the government. Government regulation can be viewed as a continuum, with mandatory, enforceable regulation (i.e. imposing penalties for non-compliance) at one end and self-regulation at the other.

The most explicit form of government regulation is legislation, either primary legislation, namely Acts of Parliament, or subordinate legislation, such as statutory rules (commonly referred to as 'regulations', a terminology that can create some confusion), ministerial orders, mandatory codes of practice and other legislative instruments. Subordinate legislation must be authorised by primary legislation, but is not made by the Parliament.

If a code of practice or other instrument is made under primary legislation that also authorises the imposition of penalties for breaches, then in effect the code becomes part of the legislation, although it will rarely be published with the primary legislation.

Self-regulation, meanwhile, sits at the opposite end of the spectrum to explicit government regulation. Self-regulation is generally characterised by the development of voluntary codes of practice or standards by an industry, with the industry solely responsible for enforcement, and where the Government's role may be non-existent, or limited to the provision of advisory information.

Policy approaches such as public information and education campaigns that do not involve the establishment of laws, rules or principles can be described as non-regulatory.

Readers of this Guide should note that, in the opening chapters of this Guide which discuss policy context and development (Chapters 2 and 3), the term 'regulation' should be taken in its broader sense, i.e. consideration is given to the full range of regulatory forms and government interventions that impose some form of rule to influence behaviour.

Chapters 4 and 5 of the Guide examine process issues and focus specifically on explicit government regulation in the form of legislation. The sections on the Business Impact Assessment processes are concerned with primary legislation, whereas the discussion of Regulatory Impact Statements relates to subordinate legislation (in particular, statutory rules and legislative instruments or 'regulations').

1. Introduction

1.1 The changing regulatory environment

Regulation has long been seen an important tool for governments seeking to achieve their key strategic policy objectives and to respond to community needs. However, there is increasing awareness that inappropriate or poorly-designed regulation can place an undue burden on business, the not-for-profit sector, government sector organisations (such as government schools and public hospitals) and the community as a whole, which can impede business growth, innovation and entrepreneurship. As governments strive to find ways to improve productivity and raise the living standards of their citizens, a better regulatory environment has become a key focus.

The establishment, in July 2004, of the Victorian Competition and Efficiency Commission (VCEC) demonstrated the commitment of the Victorian Government to regulatory reform. In addition to making specific suggestions on regulatory reforms in particular areas (as part of its function to undertake public inquiries in matters referred to it by the Government), the VCEC has worked with government departments and agencies to improve the quality of the assessment of the impact of regulatory proposals.

Since 2004, these assessments have included the scrutiny of primary legislative proposals through the Business Impact Assessment (BIA) process, where there are potentially significant impacts for business and/or competition. Meanwhile, statutory rules (subordinate legislation) that impose a significant economic or social burden on any section of the community remain subject to the well-established Regulatory Impact Statement (RIS) process.

The increased emphasis on an improved regulatory environment is also evident at the national level. In early 2006, a taskforce established by the Prime Minister and Federal Treasurer released a comprehensive report, Rethinking Regulation, which made 178 recommendations on actions to alleviate the compliance burden on business from government regulation. While the report focused on areas that are predominantly the responsibility of the Commonwealth Government, it recognised that all three levels of government contribute to the regulatory burden on business.

A regulatory reform stream has been established as part of the Council of Australian Governments (COAG) National Reform Agenda, which is focused on reducing the regulatory burden imposed by the different tiers of government. COAG has agreed that effective regulation is essential to ensure markets operate efficiently and fairly, to protect consumers and the environment and to enforce corporate governance standards. However, the benefits from each regulation must not be offset by unduly high compliance and implementation costs.

1.1.1 Revisions to the Guide

Since the release of the original edition of the *Guide* in February 2005, a number of other developments have taken place, which makes the preparation of this updated version of the Guide timely. For example:

- changes have been made to certain practices following government support for recommendations made by the VCEC in its inquiries (e.g. there are new consultation and reporting requirements where local government is expected to administer or enforce state legislation);
- new guidance material has been prepared by the Office of Small Business, which provides extra assistance to the assessment of regulatory impacts on small businesses; and
- based on its experience in assessing BIAs and RISs, the VCEC has identified areas where the guidance material needs to clarified and/or augmented.

Changes in this most recent version of the Guide are limited to two key areas:

- the *Subordinate Legislation Act 1994* has been amended to change the 'RIS threshold' and extend RIS requirements to a broader range of subordinate legislation. These changed requirements are discussed in Section 4 and Appendices D and E of the Guide;
- the requirement to report the change in administrative burden in Step 6A of Section 5 has been removed. For requirements to measure changes in burden from new regulatory proposals under the Regulatory Change Methodology Manual, see http://www.dtf.vic.gov.au/CA25713E0002EF43/pages/reducing-red-tape-on-business.

Because many users of the Guide have become familiar with its layout, every effort has been made to retain its original structure in this updated version. Of course, given the nature of some of the new material that has been incorporated, this has not always been possible.

1.2 Purpose and structure of this Guide

This Victorian Guide to Regulation establishes a consistent framework across the whole of government for the development of regulation in Victoria. After being first released in February 2005, the Guide replaced previous guidance material on regulation published by the Victorian Government.[1] This new version now also replaces the interim guidelines, issued by the Treasurer in October 2006, for the measurement of changes in administrative burden, which is an integral part of the Government's Reducing the Regulatory Burden initiative.

The Guide is the definitive handbook used by the Government to develop regulation and to achieve its vision of well-targeted, effective and appropriate regulation. Use of the principles and processes detailed in this Guide will assist the Government in meeting its policy objectives and help to ensure the development of better regulation that imposes the lowest possible burden on Victorian business, not-for-profit and government sector organisations, and the community as a whole.

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[1] The *Guide* replaces the following publications that were formerly overseen by the former Office of Regulation Reform: *Principles of Good Regulation*, *Regulatory Impact Statement Handbook* and *Regulatory Alternatives*.

The introductory chapters set the broad framework for executive decision-making on the need for regulation and its form. The remainder of the Guide is primarily designed to assist policy officers within government departments, agencies and other regulatory bodies in the development of best practice regulation.

The Guide incorporates the guidelines made under section 26 of the *Subordinate Legislation Act 1994* (often referred to as the 'Premier's Guidelines'), which are relevant to those involved in the making of statutory rules and legislative instruments (i.e. subordinate legislation) and preparing the associated Regulatory Impact Statements (RISs). The Premier's Guidelines refer to matters such as: the preparation, content, publication and availability of statutory rules and legislative instruments; and the procedures to be implemented and the steps to be undertaken for the purpose of ensuring consultation, coordination and uniformity in the preparation of statutory rules and legislative instruments.

The full set of *Subordinate Legislation Act 1994* Guidelines is contained in **Appendix E** of the Guide. However, much of the information contained in the Guidelines is also included in the main body of the Guide, where appropriate.

This Guide also subsumes the Guidelines for the Application of the Competition Test to New Legislative Proposals, which were formerly overseen by the Competition Policy Task Force (Victoria). The competition test is now described as part of **Step 5** in Chapter 5 of the Guide (while **Appendix D** includes sample competition policy certificates that need to be submitted as part of the RIS documentation when a statutory rule or legislative instrument, is being made)'. It should be noted that the competition test outlined in **Step 5** must be applied for all primary legislative proposals, regardless of whether a Business Impact Assessment (BIA) is required, and for all statutory rules and legislative instruments for which a RIS is required.

The Guide is structured under three broad headings:

- policy context and development;
- process issues; and
- a step-by-step guide to the preparation of BIAs and RISs.

The coverage of the chapters contained under each of these headings is detailed in the following table.

Policy context and development

Chapter 1 **Introduction**

What is the purpose of the *Guide*, and why is good regulation important?

Chapter 2 **Purposes and Types of Regulation**

Provides policy context, and describes the various forms of regulation and other measures. It examines the following issues:

- Under what circumstances should governments consider intervening in the market?
- What are the different forms of government regulation?
- What other measures are available to achieve economic and social objectives?

Chapter 3 **Development of Good Regulation**

Discusses issues related to the development of best practice regulation, and addresses:

- What are the characteristics of 'good' government regulatory systems?
- When designing regulation, what factors need to be taken into account to ensure that the characteristics of good regulation are achieved?

Process issues

Chapter 4 **Processes for Legislative Regulation Making**

Examines the processes that are in place in Victoria to ensure the appropriate scrutiny of regulatory proposals, and indicates:

- Under what circumstances must a Business Impact Assessment be undertaken? What are the processes involved in the preparation of a BIA?
- What are the purposes of Regulatory Impact Statements and when must they be prepared? What processes must be followed when preparing a RIS?
- How does the Government's *Charter of Human Rights and Responsibilities Act 2006* affect the regulation-making process?
- Where it is intended that local government will administer or enforce the proposed regulation, what consultation is required?

Preparation guidelines

Chapter 5 **Preparation of BIAs and RISs: Step-by-Step Guide**

A step-by-step guide to the preparation of BIA and RIS documents, highlighting:

- What issues need to be considered?
- What sort of information and analysis must be included in each of these steps?

In addition, the following appendices are attached to the *Guide:*

Appendix	Description
A. The Victorian Competition and Efficiency Commission	The role and functions of the VCEC, with contact details.
B. Forms of Regulation and Other Instruments	Advantages, disadvantages and when to use different forms of regulation and other measures.
C. Cost-Benefit Analysis Techniques	Overview of important issues and techniques to consider when undertaking cost-benefit analysis.
D. Subordinate Legislation Rule-Making Processes	Description of the various stages of the subordinate legislation making process, and lists of the various types of documentation that need to be submitted.
E. *Subordinate Legislation Act 1994* Guidelines	Consolidated version of guidelines made under section 26 of the *Subordinate Legislation Act 1994*.
F. Small Business Regulatory Impact Assessment Manual	Guidance material prepared by Office of Small Business to assist in identifying and assessing the impact of regulation on small business.
G. References	Details of publications documents referred to in the *Guide*.

1.3 Scrutinising the need for regulation

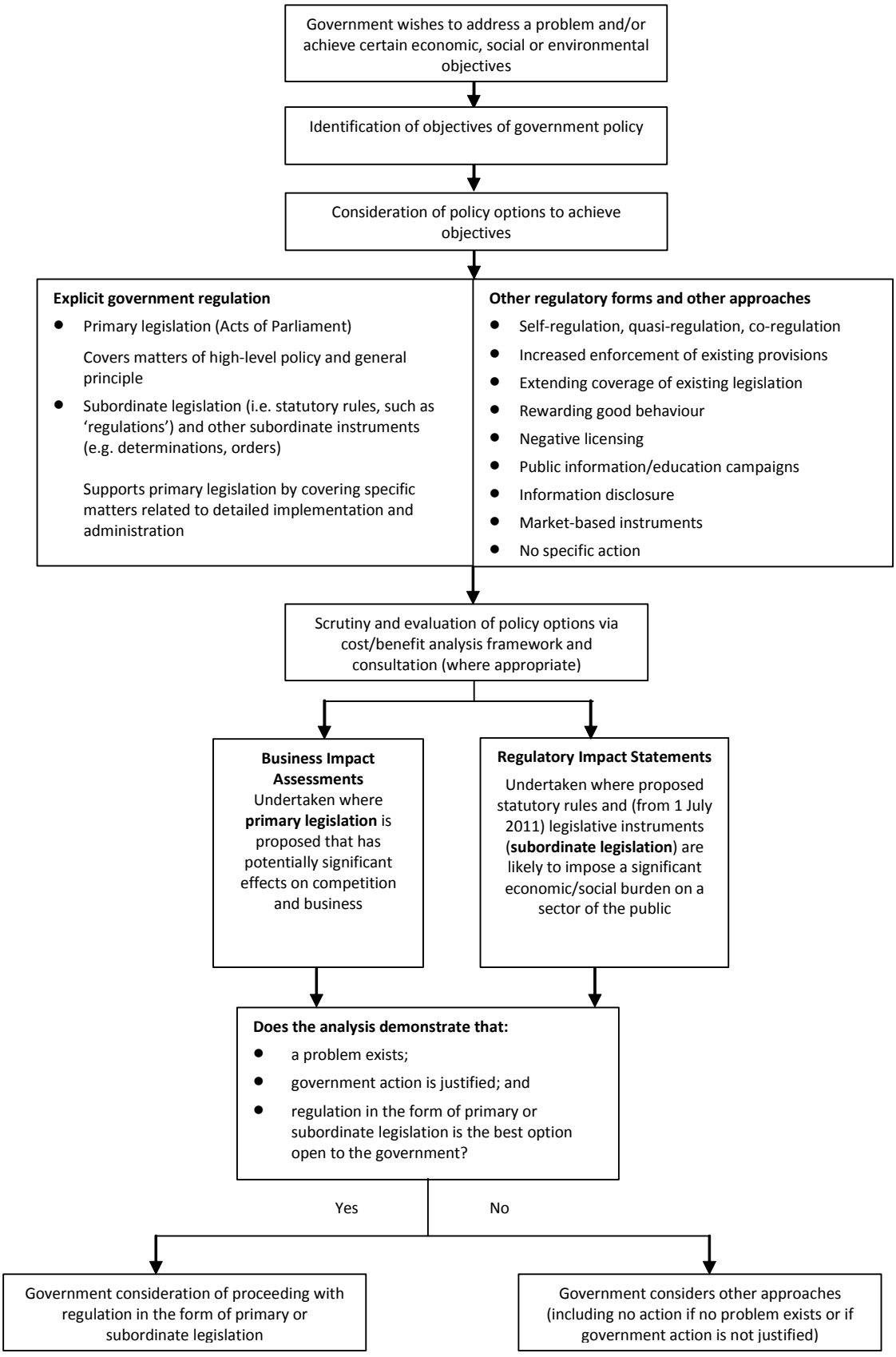
A strong and dynamic economy is critical to delivering increases in living standards, and providing the greatest opportunities to address economic, social and environmental objectives. In the past, governments have typically intervened in markets through regulation where it was considered that market outcomes could be improved – either through correcting market failures, or providing more equitable outcomes. Regulation often provides great benefits. However, it is not without cost.

Increasing regulation, and its growing complexity, can place a major burden on the parties being regulated. Regulation not only creates additional paperwork, but it can distort decisions about inputs, stifle entrepreneurship and innovation, divert managers from their core business activity, prolong decision-making, and reduce flexibility. Furthermore, poorly designed regulation can result in unintended, undesirable side effects.

Put another way, the costs and risks of regulation may sometimes outweigh its intended benefits. To avoid any unnecessary costs to society associated with the introduction of excessive, inefficient or ineffective regulation, best practice principles have been established to assist with the design of regulation. Moreover, cost-benefit analysis techniques are available to ensure that regulatory proposals are subject to careful scrutiny and evaluation to assist in decision making processes.

Given that legislation and regulation can potentially have significant impacts on the parties that it affects, as well as on society, the environment, and the economy as a whole, it is vital that legislative proposals are closely examined to ensure that they represent the best option available to government to meet the relevant policy objective. In Victoria, this is achieved through the adoption of stringent and formalised evaluation processes, which are based on an analytical cost benefit framework that examines the economic, social and environmental impacts of the legislative proposals. (Figure 1.1 provides a high-level schematic summary of the evaluation processes adopted by the Victorian Government.)

Figure 1.1: Summary of government policy decision-making process



For primary legislative proposals that may have significant effects on competition and/or business, Business Impact Assessments (BIAs) need to be undertaken. For subordinate legislation (in the form of statutory rules and legislative instruments) that will impose a significant economic or social burden on a sector of the public, the relevant assessment tool is the RIS process.

Based upon the same methodology, the key components of BIAs and RISs are:

- a description and assessment of the nature and the extent of the problem(s) being addressed;
- a statement of the objectives of the proposed legislation (primary or subordinate);
- a description of the expected impact on affected groups (particularly small business in the case of BIAs), having regard to economic, social and environmental impacts;
- an assessment of the costs and benefits of the proposal (which are quantified, where possible) and other practical means of achieving the objective; and
- an explanation of why the other options are not appropriate.

Thus, the analysis contained in BIAs and RISs informs decisions about whether a problem exists that may warrant government intervention, and whether regulation in the form of primary or subordinate legislation is the best option open to the government to meet the identified objective.

While many of the steps outlined in Chapter 5 of this Guide are mandatory for the preparation of BIAs and RISs needed to support legislative proposals, they are also useful tools to assess all of the options at the early stage of policy development. Departments and agencies are encouraged to use these steps informally during the preliminary stage of decision-making as to whether to pursue a primary or subordinate legislative solution to address an identified problem and/or meet a specific policy objective.

While the Guide is written primarily in terms of assessing new regulation, the same steps and processes apply for review of existing legislation and regulation. This process is already set out for statutory rules, because RISs are required when renewing sunsetting regulations. Departments and agencies will also periodically review primary legislation, and the process for the BIA must be followed.

1.4 Assessing the impact on small business

The burden of regulation is a major issue of concern for the business sector, particularly small business. In addition to the economic impact of regulation (e.g. investment distortions, disincentives), businesses are faced with the burden of administrative and compliance costs, including items such as the cost of new equipment, inspection charges, training, additional record keeping requirements, and the time required to complete the paperwork.

While governments need to minimise the regulatory burden on the business sector as a whole, the impact on small business requires specific scrutiny. With the compliance burden of regulation often a fixed cost, small businesses disproportionately feel its effects as they have fewer resources than larger firms to absorb these costs. Small businesses also have limited resources to interpret and implement compliance requirements and to keep pace with the cumulative burden of regulation and the changing regulatory environment. **Step 4a** of this Guide's checklist to preparing BIAs and RISs (in Chapter 5) requires specific assessment of the impacts of a new legislative proposal on small business, and further guidance material to assist this assessment can be found in **Appendix F**.

2. Purposes and Types of Regulation

This chapter provides policy context, examines regulatory options, and addresses the following issues:

- **Under what circumstances should governments consider intervening in the market? (Section 2.1)**
- **What are the different forms of government regulation? (Section 2.2)**
- **What other measures are available to achieve economic and social policy objectives? (Section 2.3)**

2.1 Rationale for government intervention

Traditionally, government intervention in markets is justified on economic efficiency grounds, or to achieve social and environmental objectives.

From an ***economic*** perspective, freely functioning markets generally provide the most efficient means of allocating goods and services between members of the community so as to maximise the well-being of the community. The market mechanism is also generally the best means of ensuring that a good or service is produced efficiently. In addition to these allocation and production efficiencies, competitive markets encourage innovation and greater consumer choice, thereby maximising society's economic welfare.

2.1.1 Addressing market failure

In some instances, the market does not deliver the best outcomes for society – for example, because of the existence of market distortions or imperfections. In such cases, the market is said to be 'failing' and, in some circumstances, government intervention may be justified on the grounds that economic outcomes could be improved.

Major causes of 'market failure' include:

- The existence of overwhelming ***market power*** – which may arise from uncompetitive market structures (e.g. a monopoly or a small number of market participants) or from anti-competitive conduct (e.g. collusion). In these circumstances, prices may be higher or output lower than they should be, and too few resources are allocated to the production of particular goods and services. In other words, the market does not produce enough of what best meets society's needs. Regulation may be required to ensure this market power is not exploited to the detriment of consumers.
- External costs and benefits, commonly referred to as externalities or spillovers – which occur when an activity imposes costs (which are not compensated) or generates benefits (which are not paid for) on parties not directly involved in the activity. Without regulation, the existence of externalities results in too much (where external costs or negative externalities occur) or too little (where external benefits or positive externalities arise) of an activity taking place from society's point of view. Pollution is the most common example of a negative externality, while immunisation against a contagious disease is an example of an activity that generates a positive externality.
- Insufficient or ***inadequate information***. Consumers may not have adequate access to the information they require to make decisions that are in their best interests. For example, consumers need access to information on the quality or content of products (including

associated hazards). Sometimes, sellers may have access to better information than buyers (often referred to as 'information asymmetries'). Under such circumstances, governments may regulate to require information disclosure, to provide the information directly, or place restrictions on the supply of goods or services regarded as dangerous.

- ***Public goods*** – are goods or services which display both the following characteristics:
  - they are non-excludable, which means that anyone can have access to them once they are provided; and
  - they are non-rivalrous, which means that any person can benefit from them, without diminishing anyone else's enjoyment.

National defence, lighthouses and street-lighting are commonly cited examples of public goods. Once provided, the benefits of public goods can be enjoyed by all parties, although it is not feasible to charge all users for these goods. As a result, public goods may not be provided, or will be under-provided, unless governments intervene.

2.1.2 Addressing social welfare objectives

In addition to addressing market failure, government intervention may be justified in the pursuit of ***social and equity objectives***. Such objectives include the redistribution of income to achieve equity goals; establishing law and order; cultural objectives; and preserving and protecting environmental resources. Key rationales for government intervention of this kind are as follows:

- Governments generally achieve ***redistributive goals*** through the taxation and social security systems. It is a widely held belief that every individual should have access to at least some minimum level of income – hence, taxes are collected and partially redistributed to those who are economically disadvantaged. In addition, there is a strong view within the community that certain goods and services are fundamental or essential and should be provided free of charge to all (or, at least, at concessional rates to those most in need). This helps to explain why governments typically provide financial support for education and health services. Restrictions on the prices charged by firms to certain consumers under Community Service Obligations represent another form of redistribution.
- Regulations may also be imposed to assist in the ***policing of crimes*** or to reduce the risk of criminal activity. Thus, persons in occupations such as second-hand dealers and dealers in firearms may be required to keep detailed records of transactions to assist police in apprehending and prosecuting suspected criminals.
- Other social policies include human rights, protecting the vulnerable and disadvantaged, and relieving geographic and social isolation (e.g. by ensuring adequate community facilities and the appropriate provision of infrastructure).

2.1.3 Addressing the management of public risk

A particular form of social regulation relates to requirements that seek to reduce or manage the risk of harm to health, safety or welfare of individuals or the community. Sometimes referred to as 'protective' regulation, it includes:

- ***measures to promote public health and safety*** – examples include occupational health and safety regulations, which seek to reduce the incidence of injuries and deaths in the workplace; and regulation of product and home safety (e.g. electrical safety standards), which seeks to reduce the risk of accidents causing injury;

- ***reducing the risk of harm to vulnerable sections of the community*** – examples include regulation of minimum quality standards in childcare and supported residential services, which seeks to protect children and aged care residents from poor care; and
- ***restrictions on the practice of certain occupations and professions*** – such as health services, which seek to protect consumers from risky practitioners.

Clearly, it is not possible for governments to provide a completely 'risk-free' society, or to prevent every possible event that might cause harm. While, in many cases, risk regulation will have large and important benefits, the direct and indirect costs imposed by regulatory approaches may not be as immediately obvious. Moreover, it needs to be recognised that regulation consumes scarce resources. Risk regulation that is relatively ineffective or costly will divert resources from other applications.

The decision of when it is appropriate to intervene to reduce or manage public risk is therefore a challenging one. As discussed below, risk assessment can be a particularly valuable tool to assess whether a proposal represents a high priority for government intervention to manage public risks.

2.1.4 Risk assessment

Any problem identified as potentially requiring government intervention will have an element of risk attached to it. Risk refers to the probability that existing hazards will cause harm – i.e. that an undesirable event will occur. For example, measures to address occupational health and safety issues recognise that there is risk of an accident happening in the workplace.

Risk analysis is the process of discovering what risk is associated with a particular hazard, which involves identifying hazards and the mechanisms that cause them, and estimating the probability that they will occur and their consequences. As illustrated in Figure 2.1 below, the 'level' of risk can be assessed by combining the consequences of an adverse event occurring and the likelihood or probability that these impacts will occur[2] (while recognising that there may be a degree of uncertainty surrounding such assessments). In assessing the consequences, consideration needs to be given to the size of the population likely to be affected, and the severity of the impact on those affected. This will provide an indication of the aggregate effect of an adverse event. For example, 'major' consequences may include significant harm to a small group of affected individuals, or moderate harm to a large number of individuals.

Figure 2.1: Assessing the level of risk

Likelihood				
	High	Medium risk	High risk	High risk
	Mod	Low risk	Medium risk	High risk
	Low	Low risk	Low risk	Medium risk
		Low	*Moderate*	*High*
			Consequence	

[2] This is based on the Australian/New Zealand Standard for Risk Management.

Risk analysis is a valuable tool in addressing the threshold issue of whether or not governments should intervene. It can help to determine:

- whether the risks that government intervention is intended to address are of significant magnitude compared with other risks; and
- the extent to which government intervention reduces the initial risk problem (i.e. the effectiveness of the proposed government response).

When combined with an assessment of the extent to which markets fail to manage these risks efficiently, or in line with social goals, and the net cost of the proposed regulation (relative to other approaches), risk analysis can be used to assess the level of priority for government regulation. Table 2.1 provides an illustration of how this might be done.

Table 2.1: Assessing the priority for government intervention – an illustration

Problem	A	B	C	D
Level of risk	High	Medium	Low	High
Extent of market failure	Moderate	Major	Minor	None
Effectiveness	Low	High	High	NA
Cost	High	Medium	Low	High
Priority	**Low**	**High**	**Medium**	**Low**

There may be little justification for government intervention where:

- the likelihood of a particular problem occurring is very small – even where the effects of an adverse effect would be significant; or
- the level of risk is relatively high, but the capacity of regulation to address it in a cost effective way (i.e. effectiveness or expected net benefits) is low.

In other words, efforts at reducing risks are best directed to areas where gains are greatest and the risks are regarded as unacceptable (e.g. regulation of major hazard facilities), rather than cases where efforts will generate only modest gains.

Risk assessment enables decisions to be made about government regulation to ensure it is in proportion to the risks involved. The objective of implementing a proposal to deal with risk should not be to reduce the risk at all costs, or to reduce it to a minimum level, but rather to balance the marginal benefits and costs to society of lowering the risk.

2.2 Forms of regulation and other approaches

There are different forms of regulation and a range of other measures that government may adopt to achieve its policy objectives. It is important to ensure that the regulatory model chosen is consistent with the type of regulatory problem.

In developing good regulation to address problems, it is important to assess the appropriateness of all forms of legislation and other instruments.

2.2.1 Explicit government regulation: primary and subordinate legislation

Explicit government regulation is sometimes known as ‘black letter law’. It attempts to change behaviour by detailing how regulated parties must act under the law, and it generally imposes punitive sanctions (such as fines or even custodial sentences) in instances of non-compliance with these regulations.

The two main types of explicit government regulation are:

- primary legislation, i.e. Acts of Parliament; and
- subordinate (or secondary) legislation, such as statutory rules (e.g. 'regulations' made under an authorising Act), orders-in-council, ministerial orders and determinations, proclamations and notices.

Primary legislation is usually drafted in general rather than specific terms, with a view to avoiding the need to make frequent changes.

The general rule is that matters of policy and general principle should be reserved for primary legislation, whereas matters of detail likely to change frequently should, where possible, be dealt with by subordinate legislation.

As discussed in Chapter 4 of this Guide, primary legislation that may have significant effects on business and/or competition is subject to scrutiny from the Business Impact Assessment process.

While significant matters should not be included in subordinate legislation, subordinate legislation may deal with the same issue in terms of enforcement or related matters of administration or implementation. Subordinate legislation can complete the details of a legislative scheme, but cannot add new aims or ideas.[3]

Subordinate legislation can only cover matters that are permitted by its authorising Act, and must be consistent with the purpose and objective of that Act. Such matters are those that are either:

- authorised by the authorising Act, for instance, by use of the word 'prescribed';
- referred to in the regulation-making powers set out in the authorising Act; or
- within the scope of a general regulation-making or prescription power of the authorising Act and necessary to enable the effective operation of that Act.

Below indicates those matters that should be addressed by primary legislation, and those matters best dealt with by subordinate legislation.

Matters to be addressed by primary and subordinate legislation

Matters that should be included in primary (rather than subordinate) legislation include those:

- of substance or important procedural matters (particularly where they also affect individual rights and liberties – e.g. provisions that reverse the onus of proof, or certify evidentiary matters);
- relating to a significant question of policy (i.e. they introduce new policy or make fundamental changes to existing policy);
- which have a significant impact on individual rights and liberties (e.g. powers of entry and search, arrest warrants, seizure and forfeiture), or which deal with property rights or traditional liberties and freedoms;

[3] Subordinate legislation cannot alter anything in the Act under which they are made, unless the Act expressly authorises a subordinate instrument to do so. However, in practice, this is a power that is seldom conferred and is not considered desirable.

- imposing significant criminal penalties (such as fines exceeding 20 penalty units or imprisonment); and
- provisions imposing taxes.

By contrast, the following matters are more appropriately dealt with by subordinate legislation, including those:

- relating to the detailed implementation of policy, general principles and standards (rather than the policy, principle or standard itself);
- prescribing fees to be paid for various services;
- prescribing forms, where necessary, for use in connection with legislation;
- prescribing processes for the enforcement of legal rights and obligations; and
- timeframes within which certain steps should be taken.

Types of subordinate legislation and legislative instruments

As noted above, there is a wide variety of subordinate legislation and legislative instruments, including statutory rules (commonly referred to as 'regulations'), orders-in-council, ministerial orders and directions. Other forms are general licence or permit conditions, codes of practice, and mandatory guidelines. The variety of forms of subordinate legislation, and the diversity in the requirements for making them, can create additional complexity, both for those within government and the broader community, including those being regulated. Consequently, the decision on the form of subordinate legislation that should be used for each regulatory provision is an important one.

Statutory rules are regulated by the *Subordinate Legislation Act 1994* and thus represent the 'gold standard' for subordinate legislation. Under the Act, proposed statutory rules are reviewed by the Office of the Chief Parliamentary Counsel and the Scrutiny of Acts and Regulations Committee and may be disallowed by Parliament. Proposed statutory rules must be released for public consultation with an accompanying Regulatory Impact Statement (RIS) which weighs up the costs and benefits of alternative proposals and has been assessed by the Victorian Competition and Efficiency Commission, unless an exception or exemption applies (see Section 4.3 in Chapter 4). The responsible Minister must require a Human Rights Certificate to be prepared for proposed statutory rules (see Section 4.5 in Chapter 4). Statutory rules are generally made by the Governor-in-Council and then numbered and printed, with notification about its making published in the Government Gazette. Statutory rules are posted on the Victorian Legislation and Parliamentary Documents website (www.legislation.vic.gov.au). Statutory rules are required to sunset every ten years and are then reviewed and remade if necessary.

From 1 July 2011, legislative instruments are also regulated by the SLA. The SLA was amended in 2010 to require the process for statutory rules to apply to a wider range of legislative instruments that were not previously subject to scrutiny. The effect of these amendments is to ensure that a fuller range of government-imposed instruments that place a significant economic or social burden on the community are subject to rigorous analytical assessment and public scrutiny. These new requirements are explained further in **Appendix E** and throughout the Guide.

These procedures offer clear benefits in that they promote the development of subordinate legislation that recognises the sovereignty of Parliament, promotes well drafted and considered legislation, and facilitates access to legislation. However, the procedures impose costs and delays, which may not be justified for all types forms of subordinate legislation.

In determining the appropriate form of subordinate legislation (or type of legislative instrument) that can be made under each power contained in an Act and the process for making them, the following factors should be taken into account:

- ***Could the instrument impose substantial burdens and, if so, would a formal analysis of options, and the associated costs and benefits, be beneficial?*** Many instruments will cover technical or administrative matters, while others made under the same power may impose substantial burdens on a sector of the public. Where there is scope for a substantial burden (and commensurate benefits), the case for mandating rigorous analysis is stronger.
- ***Would a requirement to consult the community on the proposed instrument be appropriate?*** For most substantial regulatory requirements, consultation with stakeholders and the community after appropriate public notice, with an adequate period for comment and a requirement that comments be considered (as is required under the RIS process for statutory rules and legislative instruments), is likely to lead to better regulation.
- ***Would the judgements involved in deciding on the instrument involve subjective judgements having regard to distributional impacts or trade-offs between competing objectives?*** If so, the instrument would be more appropriately made by a Minister, while technical or objective assessments against specified criteria may be appropriately made by an independent regulator or departmental official.
- ***Should the instrument be tabled in Parliament and subject to disallowance?*** If the instrument is likely to have a significant impact on rights and obligations, there is a strong case for it to be subject to the review and Parliamentary disallowance that applies to statutory rules and legislative instruments.
- ***Are new instruments or changes to existing instruments likely to be necessary frequently or very urgently?*** Some instruments need to be introduced or changed very quickly, such as total fire bans, or bans of unsafe products. Such an instrument should not be made by statutory rule, but if the instrument is likely to impose substantial costs over an extended period, it may be appropriate to have the capacity to make interim bans or other requirements, with a formal review process within 12 months before a permanent ban is put in place.
- ***Is there a strong reason not to mandate a formal review of the instrument every ten years?*** Changes in markets, technology, community attitudes or expectations over time may affect the necessity for regulation, or its effectiveness. In other cases, at the time the regulation is made, there may be considerable uncertainty about its likely benefits and associated costs. A mandated ten-year sunsetting provision (such as that which applies to all statutory rules) is often appropriate to determine the ongoing need for regulation and, if it is still required, how it might be improved to better achieve the desired benefits and/or reduce the costs it imposes.
- ***Is ready access to the instrument important?*** All statutory rules are readily accessible. A notice of making is published in the Government Gazette and the full text of the regulations is available on a central website (www.legislation.vic.gov.au). The Office of the Chief Parliamentary Counsel also ensures they are available in a consolidated form following any amendments and printed copies are also available from Information Victoria. Other legislative instruments are not held centrally and, in the past, Acts did not always include a requirement that the text of a legislative instrument be published in the Gazette, or a notice of its making (although, as a minimum, the latter is now considered

normal practice except in exceptional circumstances). Consequently, many legislative instruments can be difficult for the public and their advisers to find. There is also no requirement for consolidating other instruments following amendment.

The answers to these questions should inform the choice of subordinate legislation when an Act is being drafted. If the answer to any of the above questions is yes, then a statutory rule or legislative instrument may be appropriate. In some cases, the judgement will be straightforward – for example, it would be impractical for total fire bans to be determined by statutory rule. In other cases, judgements will need to be made between the benefits of the statutory rule making process, and its costs in terms of resources and delays. In assessing the factors above, it should also be noted that from 1 July 2011, a wider range of instruments became subject to specific requirements under the *Subordinate Legislation Act 1994.*

For more information, refer to:

- Notes on the Preparation of Statutory Rules, published by the Office of the Chief Parliamentary Counsel (see www.ocpc.vic.gov.au), provides further guidance on matters suitable for statutory rules.

2.2.2 Other forms of regulation

Regulation can be viewed as part of a 'continuum', rather than as distinct categories, with explicit government regulation representing one end of this continuum, and self-regulation at the other extreme (see Figure 2.2).

Explicit government regulation was discussed in Section 2.2.1 above; the main other forms of regulation are summarised below. **Appendix B** provides more detailed analysis of these regulatory forms.

- ***Self-regulation*** is generally characterised by the development of voluntary codes of practice or standards by an industry, with the industry solely responsible for enforcement. The Government's role under this form of regulation is non-existent, or may be limited to the provision of advisory information. Restrictions on alcohol advertising is an example of a self-regulated activity in Victoria.
- ***Quasi-regulation*** refers to the range of rules, instruments and standards whereby governments influence businesses to comply, but which do not form part of explicit government regulation. Governments may assist in developing industry codes of conduct under quasi-regulation (e.g. through official endorsement, representation on monitoring committees, provision of funding), but the Government undertakes no enforcement activity. An example is the Electronic Funds Transfer (EFT) Code of Conduct, which was endorsed by Commonwealth and state/territory governments, and which applies to financial transactions that are effected through the use of a card and a personal identification number. The code is monitored by the Australian Securities and Investments Commission, and requires EFT providers to issue customers with certain information and a transaction receipt.
- ***Co-regulation*** typically refers to the situation where an industry or professional body develops the regulatory arrangements (e.g. a code of practice, accreditation or rating schemes) in consultation with a government. While the industry administers its own arrangements, the Government provides legislative backing to enable the arrangements to be enforced. For example, the Victorian Code of Accepted Farming Practice for the Welfare of Poultry is underpinned by the Prevention of Cruelty to Animals Act 1986. Co-regulation is common in relation to professions such as lawyers and engineers.

Figure 2.2: Regulation continuum

2.2.3 Other approaches

In addition to the various forms of regulation outlined above, a wide range of other instruments may be used to address a problem that is identified as requiring some intervention. Sometimes, other measures may be used in conjunction with some form of government regulation to achieve a particular objective (e.g. improving road safety may be achieved using a package of measures including legislation, education and publicity campaigns).

Examples of other approaches are summarised below. More detailed analysis of these can be found in **Appendix B**.

- ***Increased enforcement of existing provisions.*** This option may be appropriate when there is awareness of relatively low levels of compliance with existing provisions. It may simply involve upgrading existing enforcement mechanisms.
- ***Extending the coverage of existing legislation.*** If essential facilities or procedures are already provided by an existing legislative regime, it may be more efficient to extend the application of that legislation to related concerns, rather than have them duplicated. This approach is also likely to assist in ensuring the consistency of government action in the treatment of issues with similar issues and concerns. An example is the extension of existing enforcement mechanisms (e.g. inspections, reporting requirements) for manufacturers or suppliers of certain types of drugs and poisons to manufacturers of alternative medicines.

- ***Removing other legislative impediments.*** Achievement of a regulatory or legislative objective may be impeded sometimes by other legislative requirements. In such circumstances, consideration should be given to the deregulation or removal of the other legislative requirements.
- ***Rewarding good behaviour.*** Traditional approaches to regulation do not acknowledge or reward compliance with regulations. Accordingly, parties with good track records are given the same penalties for non-compliance as those who frequently breach the law. In order to catch the persistent offenders, regulations may require monitoring and reporting requirements that are too onerous for complying industry participants. To address this problem, regulatory regimes could reward good behaviour, while continuing to penalise bad behaviour. For example, parties demonstrating a consistent record of compliance could be rewarded with a reduction in the number of licences required, fewer random audits, the allowance of self-regulation, or the reduction of other regulatory burdens.
- ***Negative licensing.*** This is designed to ensure that individuals or producers who have demonstrated, by their prior action, that they are incompetent or irresponsible are precluded from operating in a particular industry. This approach ensures that the most serious offenders are removed from the industry without, at the same time, placing an undue burden of registration on the entire industry.
- ***Public information and education campaigns.*** These can be useful where the problem to be addressed results from a lack of knowledge among consumers or participants in an industry. Such campaigns seek to alleviate the problem by changing the quality of the information available, or by better targeting its distribution.
- ***Information disclosure.*** Closely related to public education campaigns, this option requires information about the attributes of products or processes to be disclosed (e.g. food labelling, details of hazardous substances in use). This does not directly seek to prohibit or regulate the consumption of the good or service, but tries to ensure that the public is aware of all the pros and cons of using the products.
- ***Market-based instruments.*** (e.g. taxes, subsidies, user charges, tradeable permits) work by altering the costs and benefits of certain actions, thereby influencing a change in the economic, social or environmental behaviour of individuals and firms. For example, the imposition of a tax or user charge will raise the cost of engaging in a certain activity, thereby effecting a reduction in undesired behaviour, while a subsidy will lower the cost, effectively encouraging the behaviour. Tradeable permits are typically government issued property rights that may be bought and sold in the market. They can be used as an alternative to issuing licences and permits to limit production or consumption activities, and encourage an efficient allocation of resources in relation to environmental and distribution problems. Market-based instruments are particularly useful in addressing externalities from private activities when free markets lead to too little or too much production of a particular good or service.
- ***No specific action.*** This approach relies on the market to provide a solution to the problem, in conjunction with existing laws (such as general liability and insurance laws). This may be an appropriate response where the problem may be temporary and/or will solve itself (e.g. if the market is changing rapidly); where enforcement of existing laws may be sufficient to address the problem; in cases where intervention may exacerbate the problem; or where the costs of intervention outweigh any potential benefits.

3. Development of Good Regulation

This chapter discusses issues related to the development of best practice regulation, and addresses:

- **What are the characteristics of 'good' government regulatory systems? (Section 3.1)**
- **When designing regulation, what factors need to be taken into account to ensure that the characteristics of good regulation are achieved? (Section 3.2)**

3.1 Characteristics of good regulatory systems

While government regulation is sometimes necessary to achieve certain economic, social and environmental goals, excessive or poorly developed regulation can impose costs on society that outweigh the benefits of this regulation. These costs can have negative implications for overall economic performance, including employment and investment opportunities.

To avoid the problems caused by poorly designed regulation, the Victorian Government has given a high priority to regulatory reform. This is based on the premise that government should not resort to explicit regulation unless it has clear, continuing evidence that:

- a problem exists;
- government action is justified; and
- regulation (i.e. in the form of primary or subordinate legislation) is the best option available to government, and the regulatory model chosen is best able to deal with this concern in the most effective and efficient manner.

Once a positive argument for government regulation has been established, it is important that the nature of the regulation meets the following key characteristics:

- ***Effectiveness.*** Regulation, in combination with other government initiatives, must be focused on the problem and achieve its intended policy objectives with minimal side effects. The regulatory system should also encourage innovation and complement the efficiency of markets.
- ***Proportionality.*** Regulatory measures should be proportional to the problem that they seek to address. This principle is particularly applicable in terms of any compliance burden or penalty framework which may apply. This characteristic also includes the effective targeting of regulation at those firms/individuals where the regulation will generate the highest net benefits.
- ***Flexibility.*** Government departments and agencies are encouraged to pursue a culture of continuous improvement, and regularly review legislative and regulatory restrictions. Where necessary, regulatory measures should be modified or eliminated to take account of changing social and business environments, and technological advances. All subordinate legislation must be reviewed regularly and systematically under the *Subordinate Legislation Act 1994*. The Act mandates that subordinate legislation 'sunsets' after ten years. This should be considered as the maximum time period at which the legislation is reviewed. Best practice would require more frequent review periods (although overly frequent changes in the law can place burdens on the community).

Flexibility should also be taken into account when drafting legislation, to ensure that it does not unnecessarily constrain future government responses. For example, if primary legislation requires prices to be specified in subordinate legislation, it makes it illegal to adopt other less prescriptive options (e.g. price monitoring), even if such less prescriptive approaches become more appropriate over time.

- ***Transparency.*** The development and enforcement of government regulation should be transparent to the community and the business sector. Transparency can promote learning and information-sharing within the regulatory system, and can also help to build public trust in the quality of regulation and the integrity of the process.
- ***Consistent and predictable.*** Regulation should be consistent with other policies, laws and agreements affecting regulated parties to avoid confusion. It should also be predictable in order to create a stable regulatory environment and foster business confidence. The regulatory approach should be applied consistently across regulated parties with like circumstances.
- ***Cooperation.*** When appropriate, regulation must be developed with the participation of the community and business and in coordination with other jurisdictions, both within Australia and internationally, to ensure that it reflects the interest of Victorians and takes into account Victoria's major trading relationships. Regulators should also seek to build a cooperative compliance culture.
- ***Accountability.*** The Government must explain its decisions on regulation and be subject to public scrutiny. The same is true of its enforcement agencies. As such, the development and enforcement of regulation in Victoria should be monitored, with the results being reported to the public on a systematic basis.
- ***Subject to appeal.*** There should be transparent and robust mechanisms to appeal against decisions made by a regulatory body that may have significant impacts on individuals and/or businesses.

3.2 Good regulatory design

To achieve 'good' regulation, it is important to consider a number of regulatory issues and other approaches to avoid unnecessary costs to society associated with the introduction of excessive, inefficient or ineffective regulation. The factors that need to be considered in the development of good regulation are indicated in Table 3.1.

Table 3.1: Factors to be considered in good regulatory design

Factor	Refer to:
The nature and extent of the problem to be addressed needs to be clearly identified.	Section 3.2.1
Careful consideration needs to be given to the desired objectives and outcomes of the intervention.	Section 3.2.2
All feasible forms of regulation and non-regulatory measures that could achieve the desired objectives/outcomes should be considered. (This includes the option of taking no action.)	Section 3.2.3
The impacts (costs and benefits) of a regulatory proposal should be carefully assessed (and quantified, where possible) for different groups within the community, as well as for society as a whole.	Section 3.2.4
Any regulatory response should not restrict competition unless it can be demonstrated that the benefits outweigh the costs, and the objectives of the regulation can only be met by restricting competition.	Section 3.2.5
Regulatory measures must be the minimum necessary to achieve the desired objectives.	Section 3.2.6
Generally, a direct approach to an identified problem will ensure a more efficient and effective outcome.	Section 3.2.7
Where appropriate, performance-based, principle-based or process-based regulation is favoured over prescriptive regimes.	Section 3.2.8
Regulation should be evaluated regularly to ensure that it is meeting its specified objectives.	Section 3.2.9
The burden of compliance and administration should be reasonable.	Section 3.2.10
The regulation should be enforceable, and enforcement regimes should be effective and cost efficient.	Section 3.2.11
Effective communication is necessary so that affected parties understand and accept their regulatory requirements.	Section 3.2.12
Where fees and charges are imposed, these should generally be set on a full-cost recovery basis.	Section 3.2.13
Any material incorporated into regulations (e.g. codes of practice) should be readily accessible.	Section 3.2.14
New regulation should be compatible and consistent with other existing laws and regulations.	Section 3.2.15
The regulation should be administered by accountable bodies in a fair and consistent manner.	Section 3.2.16
There should be transparent and robust mechanisms to appeal against decisions made by a regulatory body.	Section 3.2.17

Each of these factors is discussed in further detail below.

3.2.1 Identification of the problem

Identifying the nature and extent of the problem to be addressed is a threshold issue in the process of evaluating the need for government action or for continuing government intervention (e.g. in the case of sunsetting regulations). Unless the source, nature and scale of the problem is fully understood, the proposed policy solution is likely to be inadequate, inappropriate and/or inefficient.

Examination of the following issues can help to determine the nature and extent of the problem:

- Who is affected by the problem?
- What is the source of the problem?
- Is there sufficient evidence that a problem exists?
- Is the extent of the problem identified or is its identification based only on anecdotal evidence?
- What are the economic, social and environmental costs of the problem, and who bears these costs?
- Does the problem exist currently, or is it merely anticipated?
- Is the problem a minor irritant or a significant hazard?
- Are there any technological, economic, political, administrative, social and/or environmental constraints that are relevant to the problem?

The advantages of clearly defining the problem are that it helps focus attention on what needs to change and the magnitude of the required changes; and it will often suggest potential solutions, while eliminating others that are clearly not appropriate.

The assessment and analysis of risk is essential to the identification of the problem. Given the limited resources of government and/or the potential costs of regulation, action should be targeted on those risks or hazards that are significant and/or have significant consequences.

Risk analysis involves identifying the probability and extent of risks arising from a given activity or situation. It can show the relative importance of the various contributors to the overall risk profile, and help identify where work should be focused to reduce that risk.

3.2.2 Clear identification of the objectives

To enable the appropriate government response to the identified problem, careful consideration should be given to the desired outcomes. The objectives should identify the ends to be achieved, or the broad policy outcomes desired, rather than the means by which they will be achieved.

The objectives should be a clear statement of what end is to be achieved. Where regulation is in the form of primary and/or subordinate legislation, the objectives should be explicitly stated in the appropriate legislation. Proper identification of the objectives is important because this will help to identify the best approach to addressing the problem. Unless the policy goals are clearly specified, identification of other appropriate means of achieving them will be compromised. In particular, the objectives should not be specified so as to align with (and thus pre-justify) the particular effects of the proposed regulation).

Clear objectives also enable more effective monitoring to assess the success of the regulation in achieving its stated aim.

In formulating objectives, it is important to ensure that they accord with the objectives, principles, spirit and intent of the authorising act (where relevant); and that they are consistent with the objectives of other legislation, statutory rules and government policies.

For regulations that impose fees and/or charges, the objectives should align with the principles outlined in the guidance material issued by the Department of Treasury and Finance about setting fees and charges (and available from www.vcec.vic.gov.au). Typically, the objective of regulations imposing fees and/or charges is to fund the costs of efficiently administering the specific regulatory system through fees that reflect the costs of regulating the different types of firms operating in the industry. In some cases, such as where the fees are borne by households or not-for-profit organisations, the fee structure may in part be intended to have an equity objective – in which case, the objective is typically to fund the costs of efficiently administering the particular regulatory system through cost reflective and equitable fees.

While not always appropriate, a technique that can be used to set objectives is the SMART approach, which is outlined below.

SMART objectives

The criteria for SMART objectives are as follows:

- Specific – the objective or specified outcome is stated in specific terms (e.g. outcomes may be stated in terms of numbers (such as percentages or frequency); ambiguous or generally stated objectives are less likely to be achieved.
- Measurable – concrete criteria should be established for measuring progress towards attainment of the objective; this might involve setting numerical targets.
- Achievable – the objective or expectation of what will be accomplished should be realistic given the market conditions, resources available, time period etc.
- Realistic and relevant – the objective should be something where government can actually exert an influence over outcomes; the objective should also consistent with other aspects of government policy.
- Time-dependent – the time period over which the objective is to be achieved should be stated.

3.2.3 Consideration of all options

It is important for regulatory authorities to select the most effective tool to achieve the desired outcome. Thus, a fundamental stage in the regulation-making process is to identify and assess all feasible regulatory forms and other measures that could achieve the desired objective. Unless a full and proper assessment of all viable options is undertaken, the proposal adopted is unlikely to represent the best solution to the problem.

The range of regulatory forms and other measures was presented in Chapter 2.

3.2.4 Assessment of impacts (costs and benefits)

In order to assess any regulatory proposal, a careful examination and scrutiny of its costs and benefits must be undertaken. This requires analysis of the impacts for different groups within the community (e.g. business, consumers, governments), as well as for the community as a whole.

Regulations often involve a wide variety of impacts, which may be economic, social or environmental in nature. Where possible, quantitative measures – such as financial and economic costs and benefits – should be identified and compared. In other words, a dollar figure should be assigned to costs and benefits, where feasible. However, the analysis should not be restricted to tangible or monetary items and, where applicable, should include an assessment of less tangible impacts (such as changes in environmental amenity, health and safety outcomes, and other non-monetary outcomes).

The process of systematically evaluating and assessing the costs and benefits of a regulatory proposal is known as cost-benefit analysis. As discussed in greater detail in **Appendix C**, cost-benefit techniques encompass a range of tools to assess economic, social and environmental impacts, including methodologies for evaluating intangible costs and benefits.

By using cost-benefit analysis to quantify and compare the total benefits and costs of a proposal, it is possible to determine whether a proposal has a net benefit, i.e. whether the benefits outweigh the costs. Those proposals with a net benefit result are potentially attractive; the proposal with the greatest net benefit should be selected and implemented. Before a particular regulatory proposal can be implemented, it needs to be demonstrated that the net benefits associated with the proposal are greater than the other approaches available to address the problem.

Cost-benefit analysis should also contain an assessment of risk. Risk assessment enables decisions about regulation to be in proportion to the risks involved. It is important when determining the appropriate regulation to manage the risk of harm to people, property or the environment, and to reduce it within acceptable parameters. Risk assessment should involve consideration of the wider effects of introducing a regulation, since a regulatory regime aimed at reducing one risk may well increase another. (For example, the imposition of unnecessarily strict safety requirements on public transport may push up fares, encouraging people to use cars, where the risks of accidents are greater.)

3.2.5 Impact on competition

The benefits of competition are well-recognised. Competition among business can deliver improvements in production efficiency and promote innovation (leading to the availability of new and better products and services), leading to gains in economic growth and consumer welfare. In short, competition is conducive to greater choice and lower prices. Anything that limits competition, therefore, could jeopardise the achievement of these benefits, and have an adverse impact on growth and welfare.

Thus, good policy design requires that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

Government regulation can have a significant impact on the competitiveness of the economy. By altering the economic environment in which firms operate, regulatory action can readily manipulate market conditions and opportunities for sale. For example, government action can either create or remove barriers to trade and entry (e.g. through licensing requirements), and impose restrictions that limit market entry. Any regulatory proposals that affect competition in this way will need to demonstrate that they will yield net benefits to the community as a whole, and that there is no other way to achieve the objectives of the legislation than by restricting competition or market entry.

For more information, refer to:

- Assess competition impacts – **Step 5** in Chapter 5.

3.2.6 Minimum necessary regulation

The Victorian Government is committed to minimising the overall regulatory burden, consistent with the achievement of generally agreed economic, social and environmental goals. This means that regulatory measures must be the minimum necessary to achieve the desired objectives, while avoiding or reducing the risks of undesirable side effects.

It is particularly important that the regulatory burden on business be minimised. The greater the regulatory burden, the higher the compliance costs, and the more significant the impact on business efficiency and performance. A reduction in unnecessary government regulation would benefit the Victorian economy in terms of increased competitiveness, employment and output.

Given this objective, the onus of proof should be on those advocating regulation to demonstrate that: there is a significant problem; the benefits of the proposed response outweigh its costs; and the proposal represents the best approach to solve the problem.

3.2.7 Direct approach

In general, adopting a direct approach to addressing an identified problem will ensure that a more efficient and effective outcome is achieved as compared with an indirect response (which, for example, may target a contributory cause of the problem). A direct approach will generally cause fewer distortions in the market, and provide a clearer indication of the objectives of the regulatory proposals. Furthermore, the most direct regulatory proposal will relate most directly to that regulatory objective, therefore minimising secondary or unintended effects. The following example (see below) indicates the weakness of adopting an indirect approach to addressing the problem of drink-driving.

Tackling drink-driving – the weakness of an indirect approach (hypothetical example)

An indirect approach to addressing the issue of drink-driving would be to require the early closure of all licensed premises (e.g. before 8pm). Not only would the costs of such an approach be high (e.g. loss of business to licensed premise holders), but it may induce individuals to consume alcohol more quickly than otherwise, and still drive home. This approach would also adversely affect those using the premises who are not drinking alcohol or not intending to drive home.

A more direct and effective approach would be to prevent or discourage drinkers from driving – for example, through the use of educational campaigns against drink-driving or by increasing enforcement of the legislation through increased random breath testing. Of course, these direct approaches would need to be subject to cost-benefit analysis to determine the option with the greatest net benefit.

3.2.8 Less prescriptive regulatory regimes

Regulation may take the form of prescriptive rules, which focus on the inputs, processes and procedures of a particular activity. For example, as part of regulation designed to reduce workers' exposure to noise levels in a particular industry, a prescriptive measure may be to mandate the wearing of ear protection and/or prohibiting the use of certain industrial equipment.

One of the main advantages of prescriptive regulation is that it provides certainty and clarity. By setting out requirements in detail, it provides standardised solutions and facilitates straight-forward enforcement.

However, because of its inflexibility, prescriptive regulation is unsuitable in situations where circumstances are subject to change (e.g. due to technological change). Moreover, prescriptive rules often do not provide incentives for the intended outcomes of regulation to be achieved at least cost. Hence, such a regulatory model should not be used in Victoria if the outcome can be clearly specified, and there are potential technological solutions to mitigate the regulatory problem.

To address these issues, the Victorian Government encourages that – where appropriate and where permitted by the enabling legislation – prescriptive rules should be avoided, and consideration should instead be given to the use of:

- performance-based standards (or principle-based regulation in cases where it is not feasible to set objective performance based-standards); and/or
- process-based regulation, where there are substantial risks that need to be managed simultaneously.

Performance-based standards specify desired outcomes or objectives, but not the means by which these outcomes/objectives have to be met. Taking the above example of reducing workers' exposure to noise levels, a performance-based approach would be to set a required outcome for each firm in terms of the maximum decibels to which workers should be exposed. It would then be left to each firm in the industry to decide how it would achieve this outcome. This allows for different technological solutions to the regulatory problem, and should be the preferred method of regulation when the regulatory standard can be clearly expressed and measured and there are different potential compliance methods.

In some cases, it will not be feasible to set objective performance-based standards, either because any reasonable performance benchmark would depend on the particular circumstances, or because objective standards would need to change over time as knowledge develops on how to address individual risks. However, these issues also make prescriptive regulation unsuitable. ***Principle-based regulation*** addresses these issues by requiring the application of general objectives or principles, rather than specific outcomes. An example of principle-based regulation is the general duty under occupational health and safety legislation of eliminating or reducing risks so far as is 'reasonably practicable'.

Process-based regulation is increasingly adopted when governments are seeking to manage substantial but diverse risks. It is generally best applied when: there are a number of substantial risks that need to be managed simultaneously; there are a range of management measures available; and individual firms within the regulated industry have sufficient capacity to effectively assess risks and develop tailored solutions to mitigate those risks under their control. However, this regulatory model should not be used when there are few risks, and/or the options for risk management are well known.

Examples include requirements to prepare and implement: risk management plans for cooling towers; safety management systems for major hazard facilities under occupational health and safety legislation; risk management plans for water suppliers regarding the quality of drinking water; emergency management plans for public passenger vehicles such as buses; and management plans for electrical distribution and transmission companies regarding electrical line clearance.

Process-based regulation requires certain processes to manage the risk of adverse outcomes, and is generally centred on the key elements of:

- ***Risk identification*** – this involves identifying all hazards (i.e. anything that has the potential to cause harm).
- ***Risk assessment*** – this involves making a judgement about the seriousness of each hazard, and deciding which hazard requires the most urgent attention. An assessment must be made on the likelihood of adverse outcomes, and the impact of such outcomes.
- ***Risk controls*** – this involves identifying ways to eliminate each risk and, where this is not appropriate, how it might be controlled to reduce the impact of adverse outcomes and the likelihood of them occurring. The judgement on the required controls will often be guided by more general principles that underpin the regulatory framework, such as 'as far as reasonably practicable'.

The risk management process is generally required to be documented to demonstrate compliance, and often a risk management plan must be submitted it to government or made available for inspection. Regulations will often require regular audits of the implementation of the plan, and reviews at specified intervals or after specified events.

The main advantages that performance-based standards and process-based regulation have over prescriptive regulation are the greater flexibility afforded to regulated parties in achieving the desired outcomes (which can also encourage the pursuit of low cost solutions), and their ability to be used in situations where circumstances may change over time (e.g. as knowledge improves and/or technology advances). Nevertheless, they do have some disadvantages. For example, the greater flexibility (and freedom) offered by performance-based regulations is often cited as a problem for those being regulated as it can lead to uncertainty as to whether the actions they undertake are sufficient to satisfy the standards set by the regulations. However, this may be addressed by formulating a code of practice that describes the types of actions or procedures which, if followed, satisfy the outcomes specified by the regulation. As a result, regulated parties lacking the confidence to pursue a chosen course of action would have sufficient guidance as to how to fulfil their regulatory obligations.[4]

In the case of process-based regulation, because it gives the regulator (or third party auditor) the flexibility to approve a variety of approaches, there is a risk of regulatory creep whereby the scope of risks covered, or standards of controls required, increase over time to achieve what the regulator considers necessary for an adequate risk management plans. An increase in scope has the potential for regulatory overlap with other general regulation (e.g. if an industry regulator starts requiring controls related to occupational health and safety and/or environmental risks). Consequently, it is important that the objective of risk management regime is clearly specified in the regulation, including the scope of risks covered.

A summary of the advantages and disadvantages of prescriptive, performance-based and process-based regulation is provided in Table 3.2.

[4] Under such circumstances, regulators should ensure that the code of practice does not become a *de facto* set of prescriptive rules.

Table 3.2: Prescriptive, performance-based and process based regulation – summary of advantages and disadvantages

	Advantages	Disadvantages
Prescriptive rules	• certainty and clarity – requirements are set out in detail; standardised solutions; ease of enforcement • the decision to prosecute can be made on objective criteria	• inflexibility in meeting regulatory objectives • high administration and compliance costs • unsuitable in industries subject to changing circumstances (e.g. due to technological change), where prescriptive rules may be rendered superfluous
Performance-based standards	• suitable for industries subject to changing circumstances (e.g. due to technological change) • greater flexibility in dealing with technical matters • encourages least-cost means of achieving the outcome • lower compliance costs • may encourage continual improvement through innovations	• may lead to uncertainty as to whether actions undertaken satisfy standards set by regulation • generate uncertainty because circumstances giving rise to prosecutions may be determined subjectively • may require high levels of guidance • increased risk of non-compliance because standards may not be uniform across the industry
Process-based regulation	• suitable for controlling substantial but diverse risks • can be applied to complex areas of different operations subject to technological change • may promote innovation in the development of risk mitigation practices • may encourage greater ownership and accountability for risk mitigation practices	• may be costly to administer (particularly for small firms) • there is a risk of regulatory creep where scope of risks covered or standards of controls required increase over time • potential for overlap with other general regulation

3.2.9 Evaluation of the effectiveness of regulation

Regulation should be evaluated on a regular basis to ensure that it is meeting its specified objectives. If the objectives are not being met, then consideration should be given to changing the nature of the regulation, or to relying on other measures to achieve the desired outcomes. The evaluation of regulations that are due to sunset is particularly important to make sure that ineffective regulation is not rolled over.

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.

The need to review regulation regularly should, however, be balanced against the burdens that can be placed on the community as a result of overly frequent changes to the nature of regulation (for example, the costs incurred with uncertainty or in becoming familiar with new regulatory requirements).

3.2.10 Reasonable compliance and administrative burdens

The compliance and administrative burdens imposed by a regulation should be proportionate to the objectives of the regulation. For example, if a regulation aims to improve the health and safety of workers in an industry where conditions are known to be extremely hazardous, compliance and administrative burdens may be justifiably high. However, if the regulation deals with a matter of less economic or social significance, such as littering or parking regulations, the burdens on affected parties should be commensurately lower.

It is important that aggregate compliance burdens are not excessive. Moreover, regulations should impose compliance burdens consistently across all affected parties. In general, businesses of different sizes should not be burdened disproportionately by the imposition of regulatory requirements, and burdens imposed on individuals should be fair, if not equal. However, there may be instances where the benefits of the regulations clearly override concerns of discrimination or unfair treatment. Therefore, whenever disproportionate sectional impacts are identified, they need to be considered on a case by case basis.

When designing regulation, it is important to minimise the cost to government of administering the regulation, while ensuring it is adequately enforced.

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. Compliance strategies should ensure the greatest degree of compliance at the lowest possible cost to affected parties (see below).

Compliance strategies and incentives for compliance

One common source of non-compliance is the failure of affected groups to understand the law. This may result from poorly drafted or too complex regulations, or from inconsistent interpretations of regulations from enforcement officials. Thus, measures to encourage compliance may be as simple as ensuring regulatory clarity and brevity, pursuing a public education campaign, or consultation with affected parties.

Regulations should also include sufficient incentives to comply. Thus, mandatory regulatory instruments should contain appropriate sanctions to enforce compliance and penalise non compliance, and the administration of regulation should be flexible enough to cope with changing behaviour in compliance.

Features of a good compliance regime include:

- affected parties are encouraged to comply with regulatory requirements voluntarily (i.e. compliance and self interest are aligned);
- compliance strategies are based on the principle of graduated deterrence, with penalties just high enough to achieve compliance; and
- penalties being consciously chosen from a wide possible range, including persuasion, warnings, financial penalties, licence suspension, recommendation for prosecution and prohibition.

Enforcement strategies should also seek to encourage model behaviour through rewards for good compliance, which might take the form of recognition, awards, less monitoring of good performers, financial incentives or research support.

3.2.11 Effective and cost efficient enforcement regimes

The level of compliance with regulations is, in part, related to the effectiveness of enforcement mechanisms. Only those regulations that can be realistically enforced should be put in place or retained. Without adequate enforcement, the credibility of the regulation may be compromised and the desired objectives are unlikely to be achieved. Enforcement strategies are discussed in below.

Enforcement strategies

There is a broad range of monitoring tools – including audits, inspections, self-monitoring, third party monitoring – which may be used (separately or in combination) as part of a comprehensive enforcement strategy. The issues to consider when selecting the approximate mix of enforcement instruments include:

- that enforcement strategies may be improved, without adding to costs, by improving the mix of instruments used;
- the relative effectiveness of various detection systems (e.g. responding to consumer complaints as opposed to systematic inspections; and
- the adequacy of penalties in deterring breaches of the regulations.

Achieving complete (100 per cent) compliance with regulations is often impractical. Thus, priorities may need to be established to promote an efficient allocation of enforcement resources so as to maximise the achieved level of compliance – for example, by focusing enforcement activity on high-risk areas or targeting parties with a poor record of compliance. If the likelihood of detection is increased, and an appropriate penalty swiftly imposed, compliance is likely to be enhanced.

3.2.12 Effective communication of regulations

It is important that affected parties understand and accept their regulatory obligations in order to ensure compliance. This requires the effective communication of regulatory requirements. For example, the text and structure of the regulations should be clear, concise and unambiguous, and education campaigns should be targeted at groups most likely to be affected by the regulations.

A key part of this communication may take place during the development phase of the regulation – for example, during the consultation required as part of the regulatory impact statement process.

3.2.13 Fees and charges set appropriately

Some forms of regulation require the imposition of fees and charges, in which case general government policy is that fees should be set on a full-cost recovery basis. Cost recovery through fees and charges is most often adopted when government services do not directly benefit all Victorians. Many programs benefit only selected groups in the community (e.g. users of particular services of various professions). In these circumstances, fees on the regulated providers provide a mechanism whereby the costs of the regulation are incorporated into the costs of delivering the service.

Both efficiency and equity considerations require the fee to recover the full cost to government (on the basis of an efficient level of regulation that is administered efficiently). A cost recovery approach may indirectly increase the equity of the tax system in that general taxpayers are not required to subsidise specialised programs that benefit particular interest groups. Where fees are deemed appropriate, full-cost recovery will assist the efficient allocation of resources.

In calculating the costs to be recovered by fees and charges, it is important to ensure that the cost base chosen is appropriate. To this end, both direct and indirect costs must be included. Direct costs include labour costs, material costs and operating expenses. Non direct costs include accommodation, corporation overheads and capital related costs (such as depreciation and return on assets). Consideration should also be given to the Government's competitive neutrality requirements to take into account any cost advantages and disadvantages arising from public ownership.[5]

Notwithstanding the general rule, cost may not always be the most appropriate basis for setting fees. There may be circumstances in which fees should be set at levels entailing subsidies (i.e. less than full-cost recovery). This may occur, for example, where the benefits of the activity are not fully restricted to the entity being charged the fee.

Departments and agencies should refer to the Department of Treasury and Finance's guidance material for setting fees and charges for further information (which is available from www.vcec.vic.gov.au).

3.2.14 Incorporation of other documents

In an effort to decrease the size and complexity of subordinate legislation (e.g. 'regulations'), and to avoid duplication of effort, many regulations refer to a pre existing set of standards, rules or guidelines of a technical nature (e.g. Australian Standards or codes of practice). Incorporating such documents into the regulation makes such standards/guidelines legally binding. This is a drafting practice known as 'incorporation by reference'. Without it, the substance of the documents to be adopted would have to be repeated in full in the subordinate legislation, which may be cumbersome.

While incorporation by reference reduces the administrative burden on the regulator, affected parties may be subject to additional compliance burdens.[6] In particular, affected parties are required to obtain the incorporated material, in addition to the regulation itself, in order to fully understand and comply with their regulations.

If incorporated materials are costly or difficult to obtain (e.g. of limited availability), or are lengthy and complex, compliance costs for the regulated parties are likely to increase. This may have an adverse impact on levels of compliance. Therefore, it may be necessary to trade-off a less comprehensive regulatory package for greater comprehension of obligations and higher compliance levels. For example, the use of incorporated and extensive detailed material may be best reserved for regulations covering industries that are familiar with using such material.

Best practice also suggests that, where a decision is made to incorporate other documents into regulations, the relevant regulator ensures that the incorporated material is readily available and is easily understood by interested or affected parties.

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[5] Further details about competitive neutrality can be found in publications available from the VCEC website (www.vcec.vic.gov.au). See, for example, *Competitive Neutrality Policy and Competitive Neutrality Policy Guide to Implementation*.

[6] This is not always the case – for example, where the incorporated material relates to a national scheme. Adoption of national schemes can reduce costs to businesses, particularly those operating in more than one jurisdiction. Sometimes, in order to adopt a national scheme, each state and territory must enact the scheme as a law of its own jurisdiction for it to be nationally enforceable.

For more information, refer to:

- **Appendix D** – Section D.4: Incorporating other material.

3.2.15 Compatibility with other laws and regulations

Efficient regulation requires the avoidance or minimisation of duplication of legislative requirements across government. This means that all new regulations and legislation should be compatible and consistent with existing legislation. Wherever possible, pre existing regulations closely related to the problem identified should be incorporated, modified or used.

In order to avoid overlap and duplication of regulations, collaboration within government should take place to identify the scope and extent of the current regulatory regime. Intergovernmental collaboration also allows the identification of innovative and effective approaches to regulation developed elsewhere.

Because regulated parties are likely to be affected by various different types of regulation, it is important to consider the cumulative impacts of regulation, rather than the impact of individual regulations in isolation.

3.2.16 Administered by accountable bodies

Good regulation is administered in a fair and consistent fashion by an accountable body. Formal reporting responsibilities (e.g. to a Minister or to Parliament) need to be established, and the administrating bodies need to issue clear statutory advice. Other features of good governance include transparency of process and judgement, including clear appeal processes, performance evaluation and public accessibility.

3.2.17 Appeal mechanisms

Where decisions made by regulatory bodies can have a significant impact on affected parties, it is good practice to have an appeal mechanism for the review of decisions that are deemed to be inappropriate. This may occur, for example, where decisions have been based on incomplete or inaccurate information.

The process for making an appeal should be made transparent, and include details of the process by which appeals are dealt with (including who is responsible for making the final decision about an appeal).

4. Processes for Legislative Regulation Making

This chapter examines the processes in place in Victoria to ensure appropriate scrutiny of legislative proposals and the measurement of material changes to administrative burdens. It discusses:

- **Under what circumstances must a Business Impact Assessment be prepared? What are the processes involved in the preparation of a Business Impact Assessment?**
- **What are the purposes of Regulatory Impact Statements and when must they be prepared? What processes must be followed when preparing a Regulatory Impact Statement?**
- **How does the Government's Charter of Human Rights and Responsibilities Act 2006 affect the legislative regulation-making process?**
- **Where it is intended that local government will administer or enforce proposed state government regulation, what consultation is required?**

4.1 Introduction

Having examined the policy context and framework for regulation in the two previous chapters, this chapter focuses on process issues related to primary and subordinate legislative proposals.

The preparation of a Regulatory Impact Statement (RIS) is a well-established and critical feature of the regulation-making process in Victoria. The RIS formalises the steps that should be undertaken in policy formulation, and ensures that all relevant information is documented and that decision-making processes are transparent. It requires an assessment of the costs and benefits of each option, followed by a recommendation supporting the most effective and efficient option.

Good policy-making requires the assessment of all proposed options to determine the best policy response to a perceived problem. Where these options include the making or amendment of statutory rules ('regulations') as part of subordinate legislation, preparation of a RIS is *mandatory*[7] in Victoria if the proposed statutory rule imposes a significant economic or social burden on a sector of the public. This requirement also applies to legislative instruments, such as ministerial directions and orders in council (among many others). The legislative backing for this requirement is the *Subordinate Legislation Act 1994.* The high degree of scrutiny provided by the RIS process – mandated within the *Subordinate Legislation Act 1994* – is necessary because the proposed measures assessed by RISs are not debated in Parliament.

[7] There are limited exemptions, as detailed in Section 4.3.2.

In addition, government scrutiny of regulatory proposals also extends to the making or amending of primary legislation where there is potential for regulatory impacts. In cases where a legislative proposal (i.e. a Bill) has potentially significant effects for business and/or competition, a Business Impact Assessment (BIA) must be prepared. BIAs are based on the same methodology as the RIS process, although the content and processes are not specified in legislation, but rather agreed by Cabinet.

The overall aim of BIAs and RISs is to ensure a rigorous assessment of regulatory and legislative proposals, and other viable options, to better inform government policy decision making. The main differences in the process for preparing BIAs and RISs are the legislative backing, mandatory consultation and scrutiny arrangements (see Table 4.1). RISs provide the avenue for scrutiny of subordinate legislation by the Parliament, ensuring in the process that appropriate and transparent decision-making takes place. Because primary legislation is fully debated in Parliament, the role of BIAs is targeted more towards informing the Government in making its policy decisions.

To promote greater policy coherence, it is beneficial for BIAs and RISs to be prepared by the government department or agency supporting the responsible Minister (possibly with the assistance of appropriately qualified consultants[8] where there is a lack of expertise for some aspects of the analysis required). At times, BIAs and RISs are prepared by regulatory agencies that are arm's length from government. Where this is the case, it is important that the relevant government departments are advised and consulted on any BIA or RIS processes that are being undertaken within their portfolios. It should also be remembered that, in the case of BIAs, the analysis informs Cabinet deliberations and, as such, the information included in a BIA must be treated as confidential to Government.

The independent assessment of BIAs and RISs is undertaken by the Victorian Competition and Efficiency Commission (VCEC), which is also responsible for providing independent advice as to the adequacy of any measurements of the regulatory burden of regulation.) The provision of assistance and advice by the VCEC, including its feedback on BIAs and RISs, combined with VCEC training initiatives, are contributing to a strengthening of BIA and RIS preparation skills within departments and regulatory agencies. The Government expects this to lead to improvements in the rigour and quality of BIAs and RISs over time, along with the standard expected by the VCEC in its assessments.

A broad overview of the processes for RISs and BIAs is presented in Table 4.1. The remainder of this chapter discusses the BIA and RIS processes in more detail. It is essential that departments and agencies allow sufficient time to undertake these processes, and guidance about timing considerations is provided in Section 4.2.5 (in the case of BIAs) and Section 4.3.6 (for RISs)

In addition, this chapter details other new requirements that need to be taken into account during the making of regulation. These requirements relate to:

- the human rights impact assessment required under the Government's Charter of Human Rights and Responsibilities Act 2006 (see Section 4.4); and
- consultation processes that are expected where local government is expected to administer and/or enforce state legislation/regulation (see Section 4.5).

[8] Where consultants are used to prepare or assist in the preparation of BIAs or RISs, they should be engaged according to the policies concerning the engagement and management of consultants, issued by the Victorian Government Purchasing Board.

Table 4.1: Overview of BIA and RIS processes

	Business Impact Assessments (BIAs)	Regulatory Impact Statements (RISs)
Legislative backing	None	*Subordinate Legislation Act 1994 ('the Act')*
Coverage	Primary legislation	Statutory rules (mainly 'regulations') and legislative instruments
Trigger for preparation	Potential 'significant effects' for business and/or competition	Significant economic or social impact on a sector of the public
Who decides when a BIA/RIS is required?	Responsible Minister	Responsible Minister *(Sections 7 and 12E of the Act)*
Exemptions	Exceptional circumstances only, as agreed by the Premier in consultation with responsible Minister	Limited (*Sections 8, 9, 12F and 12G of the Act)*
Preparation	Departments/consultants	Departments/consultants
Analysis required	Similar to RIS analysis, including explicit assessment of impact on small business	Outlined in Section 10 of the *Subordinate Legislation Act 1994*
Independent assessment	The Victorian Competition and Efficiency Commission (VCEC)	VCEC
Certification	The VCEC provides advice on adequacy	Responsible Minister certifies RIS compliance with the Act
Public release	With agreement of the Premier, Treasurer and responsible Minister	Must be publicly released for comment before statutory rule or legislative instrument is made *(Sections 11 and 12I of the Act)*
Reporting	The VCEC reports annually on compliance with published policies applying to BIAs	The VCEC reports annually on compliance with published policies applying to RISs
Scrutiny	BIA is used as a tool to inform government decision-making. The primary legislation to which the BIA relates is fully debated in Parliament.	Scrutiny of Acts and Regulations Committee is supplied with copies of the RIS and VCEC assessment letter, the statutory rule or legislative instrument, all public submissions, and the departmental response to main issues raised in public submissions

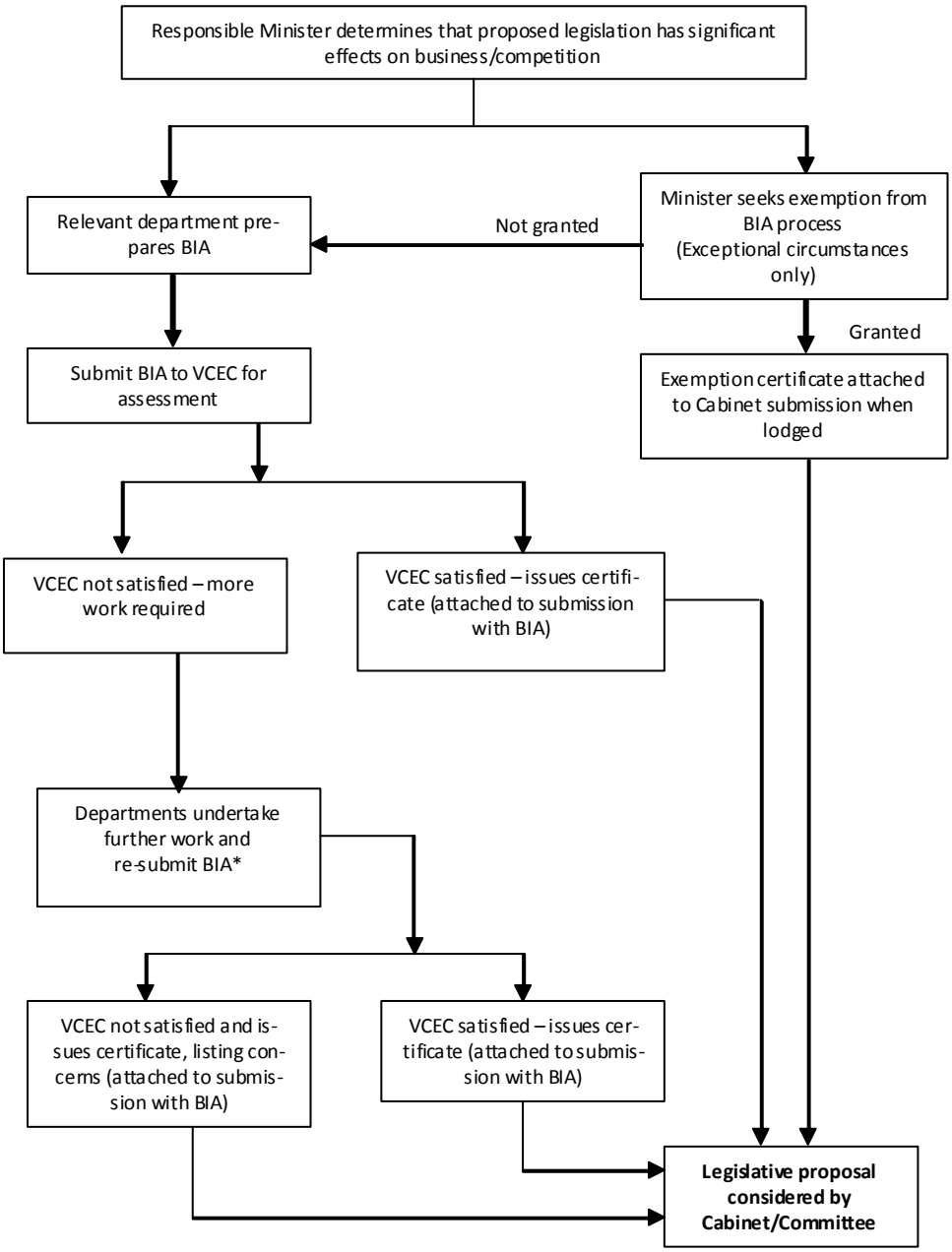
4.2 Business Impact Assessments (BIAs)

This section discusses the various elements of the BIA process. The discussion includes the following:

Discussion item	What is covered?	Refer to:
What is the purpose of the BIA process?	• The role of the BIA process in scrutinising primary legislative proposals	Section 4.2.1
When should a BIA be prepared?	• The circumstances that require preparation of a BIA • What constitutes a 'significant effect' on business and/or competition • Submission of a BIA • Exemptions from the process	Section 4.2.2
The role of consultation in the BIA process	• The benefits of consultation, where appropriate	Section 4.2.3
Assessing the adequacy of the BIA	• Independent assessment of BIAs by the VCEC	Section 4.2.4

Figure 4.1 provides a simplified guide to the various stages involved in the BIA process.

Figure 4.1: Flow chart of the BIA process



* Note: This may be an iterative process – i.e. the BIA may be re-submitted to the VCEC a number of times.

4.2.1 Purpose of the BIA process

To further strengthen its scrutiny of regulation that could potentially impact on business productivity, competition and growth in Victoria, the Government has introduced a requirement for the assessment of new or amended primary legislation (i.e. Parliamentary 'Bills' that become 'Acts' if approved by Parliament).

Primary legislation with potentially 'significant effects' is now subject to a Business Impact Assessment (BIA) process.

A BIA is a formal assessment of the impacts of a proposed primary legislative measure on business and/or competition, and is intended to improve the robustness of policy-making in Victoria. BIAs enhance the identification and understanding of the impacts of a legislative proposal on business and/or competition. The BIA process brings Victoria closer to international best practice in scrutinising legislative proposals.

Information below summarises the details that must be included in a BIA.

Components of a BIA

- A description and assessment the nature and the extent of the problem being addressed.
- A statement of the objectives of the proposed legislation.
- A description of the legislative proposal and its expected effect on key stakeholders.
- An assessment of the costs and benefits of the proposal and other practical means of achieving the objective.
- A description of the distribution of costs and benefits, particularly the impact on small business.

4.2.2 When must a BIA be prepared and submitted?

A BIA must be prepared and submitted where the responsible Minister determines that a primary legislative proposal (either entirely new legislation, amendments to existing legislation) has potentially 'significant effects' for business and/or competition in Victoria. A BIA may also be required if the proposed legislation is enabling rather than enforcing. However, under certain circumstances, exemptions to the requirement to prepare a BIA may be granted.

The key matters to be considered in deciding when a BIA must be prepared and submitted are discussed below.

What constitutes 'significant effects' on business and/or competition?

In most cases, an element of judgement is required when determining whether a proposed legislative measure will have a significant effect on business and/or competition. Consistent with the equivalent RIS guidelines for determining a 'significant burden', the effect must be something real and more than just a theoretical possibility.

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.

Does a BIA need to be prepared for enabling legislation?

The purpose of the BIA process is to encourage better decisions, by improving the understanding and identification of the impacts of legislative proposals. Legislation can enable future burdens to be imposed, rather than directly imposing a burden – i.e. the substantive effect of the legislation may come about through regulations/codes of practice/orders in council/ministerial orders that are enabled by the legislation, but which may not be considered by Cabinet. Consequently, for Cabinet to be adequately informed about the consequences of a legislative proposal, it needs to be aware of the potential impacts of instruments that could be implemented under the legislation, particularly if these may not be subject to a Regulatory Impact Statement (RIS).

A BIA is required when an effect of the legislation would be to enable regulatory instruments that would have a significant effect on business and/or competition. If the instruments are of a type which would not otherwise be subject to a RIS, the BIA must provide sufficient information about the effects of the instruments to enable Cabinet to make an informed decision, bearing in mind that the instruments will not be subject to public scrutiny before they are implemented.

When the sole or primary purpose of the legislation is to enable the making of subordinate legislation that would subsequently be subject to a RIS, a BIA is still required if the regulation or legislative instrument would impose a significant effect on business and/or competition. This is because by formally making provision for regulation, the Government may explicitly or implicitly be constraining the use of non-regulatory options. However, the BIA can be less detailed in this case – although still commensurate with the likely impact – given that there will be subsequent public scrutiny through a RIS.

The BIA must in all cases set out the magnitude and scope of the potential effects resulting from the enabling provision in the legislation (i.e. the number of potential parties expected to be affected, the costs imposed and any flow-on impacts etc).

At what stage must a BIA be submitted?

The BIA must be attached to any submissions made to Cabinet or the relevant Cabinet Committee in order to assist in decision making. The VCEC's assessment of the adequacy of the BIA (see Section 4.2.4 below) must also be attached. Timing considerations are discussed in 4.2.5.

It is also preferable for BIAs to be attached to early drafts of submissions distributed to departments for coordination comments.

Where a Minister proposes to release an exposure draft of proposed legislation for consultation,[9] a two-stage BIA process must be adopted:

- Stage one: a preliminary BIA would be prepared, assessed by the VCEC, and presented (along with the VCEC's assessment) to Cabinet or the relevant Cabinet Committee at the initial approval stage before the exposure draft is released. The BIA would discuss regulatory options (including the proposed legislative approach and other forms of regulation) as well as non-regulatory measures.
- Stage two: Following the consultation process, the BIA would be revised to include any further evidence received about the costs and benefits of the proposed legislation and other viable options, and to take into account any subsequent revisions to the proposed approach. This revised BIA would again be assessed by the VCEC, and then be attached (along with the VCEC's assessment) to any subsequent submissions to Cabinet or Cabinet Committees.

In all cases, BIAs must be treated as Cabinet-in-Confidence documents. The public release of a BIA can only occur with the agreement of the Premier, the Treasurer and the responsible Minister.

Exemptions from the BIA requirement

COAG/national processes

If a COAG/national RIS has been recently prepared (say, within the last three to five years) and it has been assessed as adequate at the decision-making stage by the Commonwealth Government's Office of Best Practice Regulation, it may be attached to the submission in lieu of a BIA.[10] The RIS would need to have covered all issues required for a BIA (including the impact on small business). As outlined in Section 4.3.2 below, the VCEC must be provided with a copy of the draft COAG/national RIS when it is released for consultation after assessment by the Office of Best Practice Regulation. Any comments on the COAG/national RIS made by the VCEC must be taken into account when determining whether a BIA is required.

Premier's exemption

Even where a legislative proposal does have 'significant effects', there may be exceptional circumstances that require its exemption from the BIA requirement (for example, due to the urgency of the proposed legislation). In such cases, the responsible Minister must gain an exemption from the Premier, who has discretion to exempt legislative proposals from a BIA. A request for an exemption must be made to the Premier in writing, with full details of why an exemption is being sought.

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[9] Exposure drafts are sometimes used to seek feedback from stakeholders, test implementation, check any unanticipated impacts of the proposed legislation etc.

[10] 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. More details about the COAG/national RIS process can be found on the Office of Best Practice Regulation website at www.obpr.gov.au.

Where granted, the Premier's exemption must be attached to the appropriate Cabinet Committee submission.

Exemptions will be granted sparingly. While an exemption will generally be granted where a Bill is urgent, it will not be granted where a department should have foreseen a need to complete a BIA.

All correspondence regarding requests for BIA exemptions must be forwarded to the Economic Policy Branch in the Department of Premier and Cabinet. To assist in the timely granting of exemptions, departments must notify the Economic Policy Branch as soon as an exemption is being sought.

4.2.3 Role of consultation in the BIA process

BIAs are not subject to the same formal consultative arrangements that apply to the RISs (which are stipulated in the *Subordinate Legislation Act 1994* and discussed in Section 4.3.4 below). Nevertheless, it is good practice to consult, where appropriate, since consultation with key affected stakeholders during the initial stages of the BIA process can assist in the examination of costs and benefits of the proposed legislation and the assessment of other options.[11] However, consultation is not always appropriate – for example, there may be instances where consultation may compromise the intention of any proposed legislative measure. In cases where consultation is not undertaken, other sources of information about costs and benefits may be used (see Box 5.4 in Chapter 5).

BIAs are Cabinet-in-Confidence documents. Unlike RISs, there is no public release of BIAs, unless agreed between the Premier, Treasurer and the responsible Minister.

4.2.4 Assessing the adequacy of the BIA

The VCEC independently assesses the adequacy of all BIAs prior to consideration of the associated legislation by Cabinet or Cabinet Committee. The VCEC provides advice on the adequacy of BIAs, and any concerns that remain unresolved. Where the VCEC is not satisfied that the BIA meets the appropriate standards, the BIA is referred back to the originating government department/agency for further work, amendment and re-submission. Government departments and agencies are encouraged to consult with the VCEC early in the BIA process so that the VCEC's assessment process can be planned and guidance can be provided in a timely fashion.

The responsible Minister can still submit the proposal to Cabinet or the relevant Cabinet Committee even if the VCEC is not completely satisfied about the adequacy of the BIA. However, details of the VCEC's concerns must be attached to the submission, and would therefore be taken into account in the Cabinet/Cabinet Committee decision-making process.

The VCEC's role in the BIA process is illustrated in Figure 4.1.

The VCEC is required to report annually to the Treasurer on the nature and extent of compliance with the published policies currently applying to government bodies in relation to regulatory impact statements and business impact assessments. This report, which outlines the number and adequacy of BIAs prepared, is publicly released.

Section 4.3.5 below discusses issues in relation to the VCEC's assessment of cost-benefit analysis that are relevant to its evaluation of BIAs as well as RISs.

Contact details for the VCEC are provided in **Appendix A**.

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[11] Section 4.3.4 below discusses other reasons why consultation may be beneficial.

4.2.5 Timing considerations

Experience to date suggests that the preparation of a BIA will not have any substantive effect on overall timelines when this requirement has been factored into the planning of the policy development process. The time taken to prepare a BIA (which can be undertaken concurrently with other key tasks) will depend on the complexity of the proposal, the available data and analysis, the skills and experience of those assigned to the task (or those of any external resources used), and the planned consultation and clearance processes of each particular department/agency. The quality of the arguments and the evidence presented in any BIA will typically reflect this early planning and the level of resourcing assigned to the task.

Departments and agencies are advised to allow a minimum of four weeks between the VCEC receiving the first draft of a BIA and the VCEC issuing a final assessment. This allows for time for agencies to consider VCEC comments on drafts, and revise the BIA as required, minimising the issues likely to be noted in the final assessment. Experience has shown that the time taken (and number of iterations needed) to complete assessments can differ markedly depending on the quality of a BIA – some have been assessed in one week, while some have taken up to nine weeks before they were assessed as being adequate.

In drafting timelines that encompass the BIA process, departments and agencies should also be mindful of time constraints imposed by the processes for gaining Ministerial approval and for Cabinet/Cabinet Committees, including the possibility of a coordination comments stage. The finalised and assessed BIA must be attached to the associated cabinet submission when it is to be considered by Cabinet/Cabinet Committee. However, if the Submission is to be distributed for coordination comments, it is preferable that the finalised and assessed BIA is attached for consideration at the coordination comments stage.[12] Table 4.2 summarises the timing requirements for the different elements of the BIA process.

[12] Attaching the BIA at the earliest possible stage of the process is consistent with the role of BIAs in informing Cabinet decision-making.

Table 4.2: BIA timing considerations

Element of BIA process	Timing requirement	Comment
1. Development of policy proposal and preparation of the BIA	At beginning of process	The length of time for this step will vary considerably. For example, this stage could include a review of the current legislative requirements, preparation of a discussion/issues paper, implementation of data collection strategies and/or consultation with stakeholders. Consultations with the VCEC at this early stage will help to identify the nature of information that should be collected to inform the subsequent policy making and BIA process.
2. First draft of the BIA provided to the VCEC	At least four weeks before finalised BIA and submission provided to the responsible Minister	Will depend on the quality of the draft BIA. (Experience has shown that some have been assessed in one week, while some have taken up to nine weeks before they were assessed as being adequate.)
3. VCEC provides written comments on draft BIA	Typically, comments will be given three to four full working days after draft is provided to VCEC	Depends on the urgency of the legislative proposal – it may be up to ten working days.
4. Next draft of the BIA provided to the VCEC	Varies	Will depend on the nature of any outstanding issues. Steps 3 and 4 may need to be repeated if outstanding issues remain.13
5. VCEC final assessment received	No later than the day before the submission and BIA will be considered by the responsible Minister	Where the assessment letter is likely to raise substantive issues, the VCEC will aim to provide a draft final assessment letter for comment/feedback.
6. Lodgement with responsible Minister's office for consideration of submission and BIA	Typically one week prior to lodgement for either coordination comments for Cabinet/Cabinet Committee consideration	Time required for this element of the process usually depends on which Minister on the proponent of the Bill.
7. Lodgement of submission and BIA for comments (if required)	Typically two weeks prior to lodgement for Cabinet/Cabinet Committee consideration	Must be lodged with Cabinet Secretariat. Relevant if coordination comments stage is to be used.
8. Final lodgement of submission, BIA and VCEC adequacy letter	Typically one week prior to the date of Cabinet/Cabinet Committee meeting	Must be lodged with Cabinet Secretariat.

[13] In 2004-05, the VCEC saw on average 3.7 versions of a BIA before finally assessing it as adequate.

4.3 Regulatory Impacts Statements (RISs)

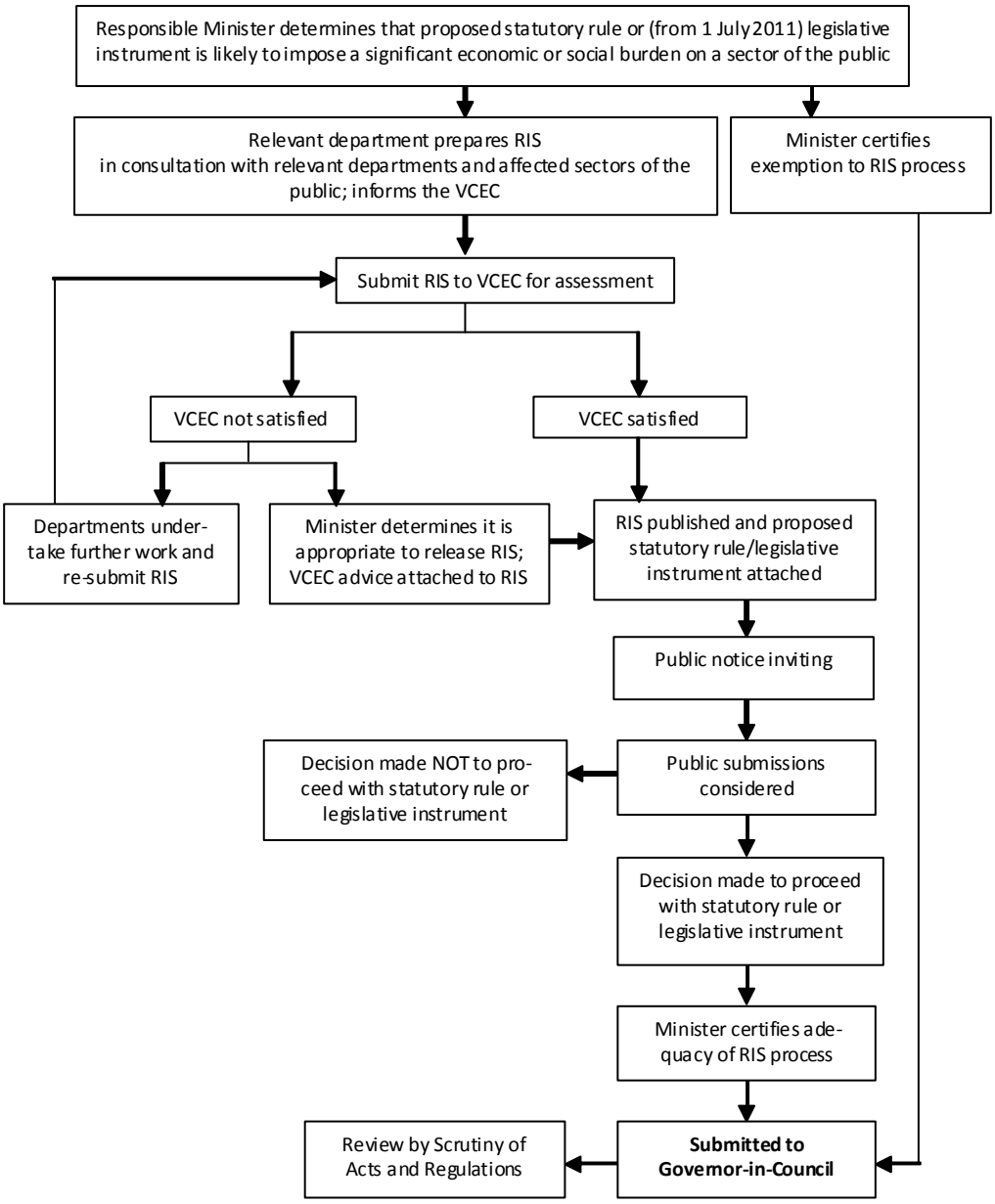
This section discusses the various elements of the RIS process, including the following:

Discussion item	What is covered?	Refer to:
What is the purpose of the RIS process?	• The role of the RIS process in regulatory policy development	Section 4.3.1
When must a RIS be prepared?	• The circumstances that require preparation of a RIS • Definition of statutory rules and legislative instruments • What constitutes a 'significant burden • Exemptions from, the RIS process	Section 4.3.2
Specific RIS requirements for different types of regulations	• Differences in emphasis required when preparing RISs for the different types of regulations, including: – the establishment of new regulations – replacement of sunsetting regulations – amendments to existing regulations – regulations imposing a fee or charge	Section 4.3.3
The role of consultation in the RIS process	• Requirements for consultation during the initial stages of the RIS process • Requirements for consultation after the RIS document is prepared • The benefits of consultation	Section 4.3.4
Assessing the adequacy of the RIS document	• Requirements to check the adequacy of a RIS, including: – independent assessment – Ministerial RIS compliance certification – review by the Scrutiny of Acts and Regulations Committee	Section 4.3.5
Timing considerations	• Guidance about the amount of time that should be allowed for the different stages of the RIS process	Section 4.3.6

For more information, refer to:

- **Appendix D**, which contains a detailed discussion of the statutory rule-making process, and includes details of the documentation requirements when submitting RISs.

Figure 4.2: Flow chart of the various stages of the RIS process (simplified)[a]



Note:

(a) This is a high-level summary of the process. More detailed flow charts of the statutory rule/legislative instrument-making, which include documentation/reporting requirements, can be found in **Appendix D**.

4.3.1 Purpose of the RIS process

The basic purpose of the RIS process is to ensure that: regulation is only implemented when there is a justified need; only the most efficient forms of regulation are adopted; and there is an adequate level of public consultation in the development of regulatory measures.

The RIS process is a critical part of developing regulatory measures because it requires policy makers to consider:

- the appropriateness or otherwise of government regulatory action in any particular circumstance;
- the most effective form that government intervention might take to achieve a desired objective;
- the magnitude of the costs and benefits of regulation; and
- who in the community will reap the benefits or incur the costs of regulation.

For a regulatory measure to represent the most efficient solution to an identified problem, it must be demonstrated through the RIS that the proposed measure:

- is likely to yield benefits greater than the costs it imposes; and
- yields greater net benefits (i.e. total benefits less total costs) than any of the other viable options.

The RIS document must provide enough information and analysis for the costs and benefits of the proposed regulation and other viable options to be understood. The aim of the RIS is not to 'promote' the particular proposal; rather, it should attempt to recognise and consider the views of affected parties where competing interests are involved.

The RIS must contain sufficient information to allow a decision to be made about whether the proposed regulatory measure is justified, and it must adequately explain the reasons for the regulatory change. The RIS must examine other approaches and contain information as to the options that have been considered. (Of course, if a non-regulatory option is determined to be the best solution, this should have been identified in the early stages of the development of the regulatory objective.)

Regulations that have been developed taking into account the factors discussed in Section 3.2 of the Guide are more likely to result in benefits greater than costs – and hence will be able to demonstrate through the RIS process that they represent the most efficient approach to solving the identified problem.

4.3.2 When must a RIS be prepared?

As discussed in Section 4.1, the RIS process provides a useful analytical framework for the development of government policy. If proposed actions to address a perceived problem include the imposition of a statutory rule or legislative instrument, then explanations of these actions must be included in a RIS.[14]

[14] The analysis undertaken as part of the RIS process and consultation with relevant parties may demonstrate that a non-regulatory response is the best solution to address the identified problem. If this is the case, the need to submit a RIS is clearly eliminated.

Section 10 and section 12E of the SLA require that RISs must be prepared for proposed statutory rules or legislative instruments respectively, unless an exemption certificate is issued. One of the grounds for an exemption is if the proposed rule is not likely to impose 'a significant economic or social burden on a sector of the public'.

What is a statutory rule?

The legal definition of a statutory rule, as specified in the SLA, is provided below. As discussed in Section 2.2.1 of this Guide, statutory rules are a form of subordinate legislation – for example, the 'regulations' made under primary legislation. (However, as discussed in the section on exemptions below, not all types of statutory rules require the preparation of a RIS.)

What is a statutory rule?

The definition of a statutory rule, as defined in section 3 of the *Subordinate Legislation Act 1994*, is as follows.

*'**"statutory rule"** means–*

(a) a regulation–

(i) made by the Governor-in-Council; or

(ii) made with the consent or approval of the Governor-in-Council; or

(iii) which the Governor-in-Council has power to disallow –
other than a regulation made by a local authority or by a person or body with jurisdiction limited to a district or locality; or

(b) a rule relating to a court or tribunal or the procedure, practice or costs of a court or tribunal; or

(c) an instrument or a class of instruments prescribed to be a statutory rule or statutory rules under section 4(1)(a); or

(d) an instrument or class of instrument that is deemed to be a statutory rules by the authorising Act –
but does not include an instrument or class of instrument specified in paragraph (a) or (b) which is exempted under section 4(1)(b).'

What is a legislative instrument?

'Legislative instrument' is a term to describe the broad range of subordinate legislation that became subject to the SLA RIS requirements from 1 July 2011. The requirement to prepare a RIS for these instruments, in addition to statutory rules, has been introduced as a number of these other instruments can impose a significant burden on a sector of the public.

What is a legislative instrument?

A legislative instrument is defined in section 3 of the SLA as follows.

*'**"legislative instrument"** means an instrument made under an Act or statutory rule that is of a legislative character but does not include*

(a) a statutory rule; or

(b) a local law made under Part 5 of the Local Government Act 1989 and any other instrument made by a council under that Act or any other Act; or

(c) a proclamation of commencement of an Act or any provision of an Act; or

(d) a planning scheme or an amendment to a planning scheme under the Planning and Environment Act 1987; or

(e) the Victoria Planning Provisions within the meaning of the Planning and Environment Act 1987; or

(f) a practice note or practice direction issued by or on behalf of a court or tribunal or an instrument which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal; or

(g) an instrument of purely administrative character; or

(h) a prescribed instrument or a prescribed class of instrument'

What constitutes 'a significant burden'?

The test as to what constitutes "a significant economic or social burden" is not defined prescriptively; rather, it is a matter for judgement. Nevertheless, the Guidelines produced under section 26 of the SLA (the SLA Guidelines) provide some assistance with this determination. (The SLA Guidelines can be found in **Appendix E**.)

In order to assist judgements of 'significant burden' the SLA Guidelines advise that:

- all potential impacts must be assessed, regardless of how readily quantifiable those impacts are, with scope for analysis to include both quantitative and qualitative dimensions [Appendix E, paras 224-225];
- in general, any quantifiable cost greater than $500,000 per year[15], compared to the relevant base case, is considered to be a significant burden [Appendix E, para 228]; and
- in certain situations, a statutory rule or legislative instrument may impose a significant burden on a sector of the public even if it imposes quantifiable costs of less than $500,000 per year – for example, if the impact is concentrated on a particular group, region or industry [Appendix E, para 229].

It is important to remember that a RIS has to be prepared if any one sector of the public is likely to suffer a significant cost or burden as a result of the proposed statutory rule or legislative instrument. In other words, a RIS is required if any sector suffers a significant burden, with the overall impact of the rule or instrument on the community as a whole to be assessed later as part of the actual RIS process.

Guidelines as to what constitutes a 'significant burden'

In considering whether a proposed statutory rule or legislative instrument imposes a significant cost or burden on a sector of the public, consideration must be given as to:

- the impact of the proposed rule or instrument relative to the base case, which for example:
  - in the case of a new or re-made rule or instrument means the impact if the proposed rule or instrument were not made; and
  - in the case of an amended rule or instrument means the impact of the existing (unamended) rule or instrument;

[15] The SLA Guidelines state this indicative threshold may be reviewed from time to time.

- whether the proposed statutory rule or legislative instrument has the requisite impact on a 'sector of the public'. The rule must have an impact on the whole community or on groups of people within the community, although the question of how many people constitute a 'sector' of the public is a matter of judgement; and
- whether the proposed rule or instrument imposes a significant cost or burden on that sector of the public.

The burden needs to be something of consequence and more than just theoretical. There must be an actual impact. A burden that is very minor, inconsequential or of little importance will not be a significant burden [see Appendix E, para 221].

In considering whether a particular proposed statutory rule or instrument imposes a significant burden or cost, the questions that must be considered include:

- Does it impose a measurable cost impact on any sector of the public of greater than $500,000 per year, or impose other significant but non-quantifiable costs?
- Does it impose significant penalties for non-compliance?
- Does it impact on individual rights and liberties?
- Will business, community groups or individuals have to spend funds or devote time to compliance activities, change current practices or seek external advice?

If the answers to one or more of the questions above (or other questions provided in Appendix E, para 231) is 'yes', then the size of the burden must be considered.

If a fee or charge is imposed by a rule or instrument, consideration must be given to the level of the fee, the impact it may have on an individual, community group or business. As a guide, if the cumulative impact of a new fee (including where a sunsetting regulation is remade) or fee increase is $500,000 or more per year, then is likely to impose a significant burden and require a RIS [see Append E, paras 235-237].

Exemptions to the RIS requirement

Sections 8 and 12F of the SLA specify that a regulation or legislative instrument (respectively) will be exempt from the requirement to prepare a RIS if the responsible Minister certifies in writing that in his/her opinion the proposed statutory rule or legislative instrument satisfies certain conditions. While a RIS may not need to be prepared for full public consultation, some consultation requirements may still apply. For further information on consultation requirements, please refer to the most recent version of the Premier's Guidelines.

Under section 8(1) of the SLA, exemptions from the RIS requirement for ***statutory rules*** may be applicable where the responsible Minister issues an exemption certificate certifying that, in the Minister's opinion:

(a) The proposed statutory rule would not impose a significant economic or social burden on any sector of the public.

(b) The proposed statutory rule relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal.

(c) The proposed statutory rule is fundamentally declaratory or machinery in nature[16]

(d) The proposed statutory rule only increases fees in respect of a financial year by an amount not exceeding the annual rate approved by the Treasurer in relation to the State Budget.

(e) The proposed statutory rule –

(i) only prescribes under section 4(1)(a) an instrument or class of instrument to be a statutory rule; or

(ii) only exempts under section 4(1)(b) an instrument of class of instrument from the operation of this Act; or

(iii) is an extension regulation.

(f) The proposed statutory rule is required under a national uniform legislation scheme, and an assessment of the costs and benefits has been undertaken under that scheme.

(g) The proposed statutory rule deals with administration or procedures within, or between, departments or declared authorities within the meaning of the Public Administration Act 2004 (or its successor) or within the meaning of the Parliamentary Administration Act 2005 (or its successor).

(h) Notice of the proposed statutory rule would render the rule ineffective, or would unfairly advantage or disadvantage any person likely to be affected by the proposed rule. (For example, this exemption would relate to situations such as the requirement for urgent environmental or species protection where advance notice of the statutory rule would allow a scarce resource to be exploited pending operation of the rule.)

In the case of ***legislative instruments***, section 12F of the SLA provides for the responsible Minister to issue an exemption certificate from this requirement, certifying in writing that, in the opinion of the Minister;

(a) The proposed legislative instrument would not impose a significant economic or social burden on any sector of the public.

(b) The proposed legislative instrument is fundamentally declaratory or machinery in nature.[17]

(c) The proposed legislative instrument only increases fees in respect of a financial year by an amount not exceeding the annual rate approved by the Treasurer in relation to the State Budget.

(d) The proposed legislative instrument would only impose a burden on a public sector body.

(e) The proposed legislative instrument is an order made under the Administrative Arrangements Act 1983.

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[16] These refer to 'housekeeping' changes that clarify or correct a provision, without changing procedural requirements (e.g. replacing an obsolete definition/reference, revising opening times for government offices or prescribing addresses for service).

[17] These refer to 'housekeeping' changes that clarify or correct a provision, without changing procedural requirements (e.g. replacing an obsolete definition/reference, revising opening times for government offices or prescribing addresses for service).

(f) The proposed legislative instrument is required under a national uniform legislation scheme, and an assessment of the costs and benefits has been undertaken under that scheme.

(g) The 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 normally required.

(h) The proposed legislative instrument is of not more than 12 months duration and 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.

(i) The proposed legislative instrument deals with administration or procedures within, or between, departments or declared authorities within the meaning of the Public Administration Act 2004 (or its successor) or within the meaning of the Parliamentary Administration Act 2005 (or its successor).

(j) Notice of the proposed legislative instrument would render the proposed legislative instrument ineffective, or would unfairly advantage or disadvantage any person likely to be affected by the proposed legislative instrument.

(k) The proposed legislative instrument is made under a statutory rule and the regulatory impact statement for that statutory rule has adequately considered the impact of the proposed legislative instrument.

All exemptions require the completion of an exemption certificate, which is to be presented to the SARC and to both Houses of Parliament (see Section D.3 in **Appendix D**). Reasons supporting the Minister's opinion that the rule be exempted must be specified in the certificate.

It should be noted with respect to legislative instruments that a ground for exemption under section 12F(1)(k) is where the proposed legislative instrument is made under a statutory rule and the regulatory impact statement for that statutory rule has adequately considered the impact of the proposed legislative instrument.

It should be remembered that sections 8 and 12F do not require a Minister to exempt any given proposed statutory rule or legislative instrument from the RIS process, but only enable a Minister to do so. The RIS process must still be undertaken if the Minister believes that it is appropriate or desirable.

COAG/national RIS process exemptions

Included among the exemptions are proposed statutory rules or legislative instruments that are required under a national uniformity scheme, and where an assessment of costs and benefits has been undertaken as part of a COAG/national RIS for that scheme. It would be expected that the COAG/national RIS had been recently prepared (say, within the last three to five years) and assessed as adequate at the decision-making stage by the Commonwealth Government's Office of Best Practice Regulation.[18] In determining whether a separate RIS

[18] 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

might need to be undertaken in Victoria, consideration must be given to whether the regulation or legislative instrument to be introduced in Victoria would have the same impacts as were identified in the COAG/national RIS (including the assessment of any fees), and the time that has lapsed since the national assessment was conducted.

It is generally advisable to seek comment from Victorian-based stakeholders on the national RIS assessment when this is released for consultation to assess whether the national RIS adequately reflects the likely impact in Victoria. The VCEC must be provided with a copy of the draft COAG/national RIS when it is released for consultation after assessment by the Office of Best Practice Regulation.

Any comments on the COAG/national RIS made by the VCEC must be taken into account when determining whether to seek an exemption from Victoria's requirements. In particular, where it is considered that the costs and benefits of a regulation or legislative instrument, as adopted in Victoria, are likely to differ substantially from those of the 'model' regulation contained in a national RIS, then a separate RIS must be completed under Victorian processes.

A Victorian RIS will be required for those aspects that were not covered by the COAG RIS.

For more information, refer to:

- Statutory rules and legislative instruments which are exempt from RIS process – Section D.3 in **Appendix D**.

Special circumstances: exemption via Premier's certificate

Sections 9(1) and 12G(1) of the SLA give the Premier the power to exempt a proposed statutory rule or legislative instrument (respectively) from the RIS process where the Premier is of the opinion that, in the special circumstances of the particular case, the public interest requires that the proposed statutory rule or legislative instrument be made without complying with the normal RIS process. This power is for use in cases of emergency or overriding public interest only. Furthermore, such an exemption can only be given if the proposed rule is to expire on or before 12 months after its commencement date (as stipulated in section 9(2)(a) and section 12G(2)(b)of the SLA).

Requests for a Premier's certificate should not be made lightly. The Premier's power to grant exemptions is not intended to operate as an alternative means of making statutory rules or legislative instruments. The purpose of this form of exemption is to ensure that matters of genuine public interest can be made without delay. Accordingly, the application for a Premier's certificate must set out sufficient evidence to enable the Premier to form the requisite opinion. There are no set criteria for determining the public interest, and each case must be argued on its own merits.

If granted, copies of the Premier's certificate must be forwarded to SARC and laid before each House of Parliament (see **Appendix D**).

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.

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similar issues. More details about the COAG/national RIS process can be found on the Office of Best Practice Regulation website at www.obpr.gov.au.

For more information, refer to:

- Statutory rules and legislative instruments which are exempt from RIS process – Section D.3 in **Appendix D**

4.3.3 4.4.3 Specific RIS requirements for different types of regulations

Unless exemptions have been made, RISs will need to be prepared for proposed statutory rules and legislative instruments made under the following circumstances:

- the establishment of new regulations;
- the replacement of sunsetting regulations;
- amendments to existing regulations; and
- regulations imposing fees and charges.

The Act does not specifically differentiate between RIS requirements applying to different circumstances. However, as discussed in the following paragraphs, there are some differences in emphasis that should be taken into account in order to ensure the clarity and usefulness of the resulting document, and to ensure that the requirements of the Act are fully met in the specific case in question.

New regulations

RISs dealing with the regulation of an area not previously regulated should take care to establish the 'threshold question' is adequately answered – i.e. the discussion of the nature and extent of the problem being addressed must make it clear there is an issue which clearly requires public policy intervention. Comparisons with the approaches taken to the same issue in other jurisdictions may be helpful in making this case. Furthermore, the examination of other viable options is particularly important in the assessment of new regulations.

The cost-benefit analysis undertaken in the RIS should be conducted in relation to the base case of there being no regulation.

The issue of the likely extent of compliance will also require careful examination, as there will clearly be little relevant experience upon which to rely. Inter-jurisdictional comparisons may also be helpful here.

Replacement of sunsetting regulations

In order to replace sunsetting regulations, it is important to provide a strong and clear demonstration that each restriction imposed by regulation is still required. When replacing sunsetting regulation, whether in similar or modified form, particular attention should be given to the following requirements during the preparation of the RIS:

- demonstrating that the nature and extent of the problem still require a regulatory response;
- evaluating the actual effectiveness of the existing regulatory regime;
- substantiating that the particular regulatory response remains the best solution; and
- conducting the cost-benefit analysis in terms of a comparison with the base case of an unregulated situation.

Undertaking cost-benefit analysis against an unregulated situation is essential to ensure that the policy development process considers the full impact on society, in terms of costs and benefits, of the regulatory proposal and other viable options. A particular focus here should be to ensure that the RIS does not simply re-state the problem that underpinned the existing regulations, but instead takes account of developments that have occurred over time – for example, in relation to factors such as market structure, technological advances and community expectations. A policy development process that follows this approach will

focus on developing a regulatory proposal that maximises the net benefit to society, rather than simply remaking the previous regulations.

Describing the nature of the problem in the 'unregulated situation' should be possible using the framework set out in Section 3.2.1 of the Guide. Quantifying the extent of the problem in the absence of regulation may be more difficult, particularly where the existing regulations have been in place for some time. Data sources that should be examined to quantify the extent of the problem in the absence of regulation include:

- ***an evaluation of the existing regulations*** – this requires an understanding of the policy and data baseline prior to the regulations being in place as well as comprehensive review of the effectiveness of the existing regulations in addressing the original problem (see below for an example);
- ***consultation with stakeholders*** (for example, on what would happen in the absence of the regulations as part of normal business practices or other regulatory requirements);
- ***experience in other jurisdictions*** – particularly those with different regulatory frameworks; and
- ***academic research*** – which may also evaluate regulatory effectiveness and contain cross-jurisdictional comparisons.

Where amendments are being made to sunsetting regulations, the specific problems that the proposed amendments are intended to address must also be explicitly identified, and the analysis of other approaches must compare the remaking of sunsetting regulations to the proposed amended regulations.

Assessing the unregulated situation through evaluation of existing regulations – occupational licensing example

Occupational licensing is a common form of regulation for certain professional services (e.g. medical services) because consumers may not be able to make fully informed choices regarding the choice of providers and may be unable to effectively monitor the performance of providers. (This problem is sometimes referred to as 'information asymmetries'). As a result, consumers may experience harm or losses in an unregulated environment.

For the purposes of replacing sunsetting occupational licensing regulations, the associated cost-benefit analysis should attempt to quantify the harm or losses suffered under an unregulated scenario. This could be achieved by undertaking an evaluation of the existing regulatory framework. This evaluation could examine enforcement data (including complaints investigated, offences committed, compensation or damages awarded and fines or penalties imposed), focusing on any differences between licensed and (illegally) unlicensed providers. The unlicensed providers could provide a 'proxy' for what would occur under an unregulated environment, with the number of investigations and prosecutions, and the level of damages or fines imposed on unlicensed providers providing a quantifiable indication of the extent of the problem in an unregulated situation.

Amendments to existing regulations and legislative instruments

Where a RIS relates to amendments to existing regulations and legislative instruments, the cost-benefit analysis must focus on the incremental costs and benefits of moving from the existing regulations to those proposed.

In some instances, the benefit may simply be to clarify understanding, which may result in a higher level of compliance or reduce the likelihood for confusion. In such a case, the costs of the amendment may be negligible. It is the change, not the principal regulation that has to be justified.

Fees and charges

The guidelines made under section 26 of the SLA state that statutory rules and legislative instruments that impose fees or charges may impose a significant burden within the meaning of the Act. As a general rule, a RIS is likely to be required for proposals that:

– introduce new fees or remake sunsetting regulations that recover $500,000 or more in fee revenue per year; and

– increase existing fees that generate additional revenue of $500,000 or more per year.

In these instances, the likely impact of a proposal on an individual, community group, or business will need to be considered in determining whether it imposes a significant burden.

Statutory rules or legislative instruments that reduce existing fees or charges would not be expected to impose a significant burden so as to require the preparation of the RIS (provided that the statutory rules or legislative instruments do nothing else that would warrant the need for a RIS). However, there are exceptions where the reduction in fees or charges is the result of shifting costs to other sectors (for example, where a reduction in fees lowers the level of cost recovery, which is then made up through general taxation).

The central issue will be the accuracy of the costing of service provision. The RIS must describe and justify each task involved in providing the service. These tasks must be costed, with both direct and indirect costs, including overheads and capital related to providing the service. For example:

- **direct costs** include direct labour costs, labour on-costs, materials costs and operating expenses;
- **indirect costs** include accommodation and corporate overheads; and
- **capital-related costs** include depreciation and return on assets.

Furthermore, in discussing the allocation of costs, the RIS needs to demonstrate adherence to the Government's competitive neutrality policy.

4.3.4 Role of consultation in the RIS process

Consultation is an integral part of the RIS process. Appropriate consultation is important to determine whether a statutory rule or legislative instrument should be made and, if so, the nature of that rule. The Act requires that consultation take place in appropriate cases at the initial stages of the RIS process (i.e. before the final RIS document has been prepared) and after the RIS has been completed, so that the analysis and assessments contained in the RIS can be tested in the community.

Timing considerations for the various elements of the public consultation process are summarised in Section 4.3.6 below.

Consultation during initial stages of RIS process

Consultation in the early stages of the RIS process is important because the RIS document must address a range of policy options that may not be identified or developed until there has been at least some initial consultation with persons and bodies potentially affected by the proposed statutory rule or legislative instrument.

Consultation is required with:

- **Any other Ministers whose area of responsibility may be affected by a proposed statutory rule or legislative instrument.**

  If a proposed statutory rule or legislative instrument may impinge upon or affect the area of responsibility of another government Minister, department, agency or statutory body, consultation must take place with a view to ensuring that any differences are reconciled, and that there is no overlapping or duplication of, or conflict with, legislation, statutory rules or legislative instruments, or stated government policies administered by that other body. Such consultation must take place before external consultation is undertaken and before a public notice of the RIS is made (see below). Any areas of significant disagreement must be referred to Ministers for resolution, or brought to Cabinet, or the appropriate committee of Cabinet, for consideration.

- **Any sector of the public on which a significant economic or social burden may be imposed by a proposed statutory rule or legislative instrument.**

  If the proposed statutory rule or legislative instrument is likely to impose any significant burden, cost or disadvantage on any sector of the public, consultation must take place with that sector (e.g. business groups, community groups, consumer groups, special interest groups). This consultation should include discussion of the need for and method of the proposed regulation.

The level of consultation required under section 6 of the Act and the consultation procedures adopted depend upon the nature of the proposed statutory rule or legislative instrument, and is a matter for the responsible Minister. Factors to be taken into account when determining the appropriate level of consultation include:

- Is the measure being introduced into a previously unregulated area?
- What is the nature of the industry that will be affected by the measure? Does it have peak bodies that should be consulted?
- Is the proposed measure replacing an existing regime (e.g. a voluntary code of conduct)?
- Will the proposed measure impose criminal or civil penalties?
- Is there likely to be substantial controversy over the acceptability of the proposed measure?
- Are there many different stakeholder groups that will be affected by the proposed measure?
- Are there community or environmental groups or other peak bodies that should be consulted?
- Are the potential impacts subject to considerable uncertainty?

Clearly, more consultation will be required in areas that were previously unregulated than those where the proposed rule or instrument is merely fine-tuning existing regulation.

As RISs are final consultation documents, consultation should occur prior to the advertisement of RISs. Such consultation may take the form of focus groups and briefing sessions with key stakeholders before deciding that a regulatory proposal is the most appropriate response to an issue. It is important that peak industry bodies are notified during the development of regulatory proposals. Issues papers can be used as a preliminary vehicle for communication.

The SARC must be provided with a certificate of consultation once the proposed statutory rule or legislative instrument has been made.

As discussed in Section 4.3.2 above (and detailed in Table 4.3), consultation is also required in most cases where consideration is given to whether a proposed statutory rule or legislative instrument should be exempt from the RIS process.

Consultation after RIS document is prepared

Once the RIS document is prepared and independent advice from the VCEC has confirmed its adequacy (discussed in Section 4.3.5 below), a notice must be placed in:

- the Government Gazette;
- a daily newspaper circulating generally throughout Victoria; and
- in a relevant trade, professional or public interest publication if the responsible Minister considers it appropriate.

As stipulated in section 11(2) and section 12I of the SLA, the notice must:

- state the reason for, and the objectives of, the proposed statutory rule or legislative instrument;
- summarise the results of the RIS;
- specify the locations (including government website) where a copy of the RIS and the proposed statutory rule or legislative instrument can be obtained; and
- invite public comments or submissions.

It is good practice to send a copy of the RIS document, along with the accompanying VCEC assessment letter, to key stakeholder groups, or at least advise them directly of its availability.

Under the Act, there is to be a minimum 28-day period from the publication of the notice about the availability of the RIS to the receipt of public comments and submissions. However, wherever feasible, a longer time period for public submissions is encouraged as part of the Victorian Government's pursuit of a best practice regulatory regime. To this end, a consultation period of at least 60 days is recommended.

To ensure a transparent process, good practice dictates that the RIS should make it clear that submissions are generally considered public documents, and are available to other stakeholders, either on request, or by being posted on the agency's website.

Consideration of public submissions

Sections 11(3) and 12I(4) of the SLA require the responsible Minister to consider all submissions and comments received about a statutory rule or legislative instrument where a RIS has been prepared.

Departments/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 (e.g. the VCEC's website or that of the responsible department/agency) and be made available in hard copy format. The effort of providing detailed explanations for proceeding in a particular direction (and rejecting particular suggestions) can result in the greater community acceptance of the final regulations.

In addition, the Scrutiny of Acts and Regulations Committee (SARC) of Parliament has indicated that it expects departments and agencies to send responses "to those who have taken the time and effort to send in submission".[19] This response should provide a clear demonstration that matters raised in submissions have been considered. Where there are a large number of submissions, a general letter with an attachment covering the various issues raised, and documenting how each issue has been addressed, can be used. Such a considered response contributes to the transparency of the regulatory process.

The failure of a department or agency to adequately address any valid criticisms or suggestions made may be highlighted by the SARC which, under sections 15A(1)(c) and 16C(1)(d) of the Act, must be provided with a copy of all comments and submissions received in relation of the RIS. It is also good practice to forward copies of the public comments and submissions to the VCEC.

After consideration of the public comments and submissions, a notice advising of the decision to make or not make the proposed statutory rule or legislative instrument must be published in:

- the Government Gazette; and
- a daily newspaper circulating generally throughout Victoria.

This notice must be forwarded to the SARC, along with the other documentation listed in **Appendix D**.

In addition, a statement is to be prepared explaining how the general issues raised in the public comments/submissions have been addressed. This statement is to be provided to the SARC and be published on a government website (e.g. the VCEC's website or that of the responsible department/agency). It is up to the discretion of departments/agencies about how to provide responses to authors of individual submissions.

Benefits of consultation

An important role of consultation in the RIS process – particularly with business and community groups – is to gain information to assist the examination of the costs and benefits of the proposed statutory rule or legislative instrument and other options being considered, as well as to identify other methods of achieving the stated objective. For example, the people involved in a particular industry build up a wealth of knowledge about its historical development, current operation and future direction, and the interrelationships with other industries and economic activities. They can greatly assist in the identification of innovative techniques for dealing with the particular concerns about the industry.

Business has extensive knowledge about the costs of regulatory proposals. For example, a firm may be able to estimate the impact of a new statutory rule or legislative instrument on the costs of its operations. Information of this kind greatly assists in evaluating other viable options.

Through consultation, the RIS process gives business and the wider community an opportunity to communicate to government any concerns it may have about regulations affecting its activities. It provides a mechanism to draw on information and comment from the widest possible sources, thereby exposing any subjectivity or faulty reasoning in the regulatory proposal, and ensuring that competing interests are recognised and considered.

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[19] Scrutiny of Acts and Regulations Committee, July 2006, *Annual Review 2005, Regulations 2005*, page 13.

As such, it is important that processes for consultation are designed so they are widely accessible to all sections of the community (including, for example, people with disabilities and those from culturally diverse backgrounds).

4.3.5 Assessing the adequacy of the RIS

The Act requires three levels of checks on the adequacy of a RIS. These are:

- an independent assessment must be sought;
- on the basis of the above assessment, and any other relevant advice, the responsible Minister must certify the adequacy of the RIS; and
- after the regulations are made, the SARC reviews the regulations and the adequacy of the RIS.

These are discussed in more detail below.

Independent assessment

Section 10(3) and section 12H(3) of the Act stipulate that the responsible Minister must seek independent advice to confirm that the RIS adequately meets the requirements of the legislation (i.e. it states the objectives of the regulation; explains its effects; identifies other measures; assesses costs and benefits; and discusses why other options are not appropriate). The guidelines issued under section 26 of the SLA state that the VCEC undertakes the independent assessment of all RISs.

The RIS must not be released for public comment until the responsible Minister has received independent advice from the VCEC regarding the adequacy with which the RIS addresses the matters required to be included in the RIS under the legislation. If the advice of the VCEC is that it considers the RIS to be inadequate, further work may be undertaken on the RIS by the appropriate department or agency, or the Minister may determine it is appropriate to release the RIS for public consultation, in which case the VCEC assessment must be attached to the RIS.

The VCEC has 28 days to assess the adequacy of the final draft of the RIS once it has been received.[20] The VCEC encourages departments and agencies to contact them early in the RIS process so that its assessment can be planned and necessary guidance can be provided in a timely fashion. Independent regulators preparing regulation and RISs must ensure that their Minister's department is briefed on the proposal. The VCEC will often seek the department's assistance on issues arising from its examination of the RIS, particularly in terms of the interaction of the proposed regulatory measure with other regulation and policy initiatives.

Validation of the RIS document by the VCEC should not be taken to mean that the assessment of costs and benefits contained in the RIS is necessarily comprehensive and/or accurate. Rather, the VCEC assesses the analysis of the costs and benefits presented in the RIS as being adequate for consultation (i.e. the data appear appropriate and the assumptions explicit and reasonable), thereby representing the Government's best estimate at that time. Other issues relevant to the VCEC's assessment of cost-benefit analyses are outlined below.

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[20] The 'final' RIS is defined as the version that the relevant government department/agency considers to have addressed all the issues raised by the VCEC in its penultimate version, and where the drafting of the statutory rule has been settled by the Office of the Chief Parliamentary Counsel.

Assessment of moral judgements and technical specifications by the VCEC

Cost-benefit analysis of social regulation may require moral judgements to be made – for example, where the benefits of the regulation include the benefits to the community of prohibiting activities that society considers offensive or inappropriate. In its assessment of such cost-benefit analyses, it is not the role of VCEC to evaluate the validity of the moral/social judgements, or the weights given to the views of various groups in the community; such judgements are the responsibility of government. Rather, the VCEC's concern is to ensure that the RIS:

- transparently provides information on the basis on which those judgements have been made;
- gathers information and evidence to support those judgements, where possible; and
- has a consultation process that is sufficiently comprehensive to canvas the full spectrum of relevant views.

Another issue is the approach taken by the VCEC in its assessment of a cost-benefit analysis where the regulations contain ***technical specifications***. Often, the VCEC would not have the technical expertise necessary to assess the adequacy of an analysis of the costs and benefits of highly technical standards. In such cases, the VCEC would look for the RIS to demonstrate that the process undertaken to set the technical standard was consistent with the requirements of the RIS to demonstrate that the benefits of the proposed regulation outweigh the costs. For example, a process that is likely to generate this outcome would have:

- assessment criteria that are consistent with the objectives of balancing costs and benefits;
- access to the technical expertise necessary to set the standards;
- transparent decision-making processes; and
- an appropriate level of consultation.

As discussed above, an important reason for releasing the RIS for public consultation is to gather feedback from affected parties on the size and nature of potential impacts arising from the proposed approach. This feedback must be taken into account when making the final decision as to whether or not to proceed with the proposal. Copies of the public submissions received on the RIS, and documentation on how these comments have been subsequently addressed, should be provided to the VCEC for information, to assist it in improving its assessment processes in the future.

Copies of the VCEC's assessment of RISs must be forwarded to the SARC, along with other relevant documentation (as detailed in **Appendix D**).

Contact details for the VCEC are provided in **Appendix A**. The VCEC's role in the RIS process is illustrated in Figure 4.2 above.

Ministerial RIS compliance certification

Section 10(4) and section 12H(4) of the Act require the responsible Minister to provide a compliance certificate in writing, specifying:

- the requirements relating to the RIS process have been complied with; and
- in the opinion of the responsible Minister, the RIS adequately assesses the likely impact of the proposed statutory rule or legislative instrument.

Appendix D contains an example of this certificate and details its lodgement process.

Role of the Scrutiny of Acts and Regulations Committee

After statutory rules or legislative instruments are made, the SARC must be supplied with copies of the RIS, the VCEC's final assessment letter for the RIS, the regulations or legislative instruments, all public comments received during the consultation period, and the relevant department/agency's response to the main issues raised in the public comments. The SARC will review the regulations in accordance with the criteria relating to the adequacy of the statutory head of power authorising the regulations; their consistency with principles of justice and fairness; and conformity with the processes for regulation-making specified in the Act.

The Act provides that, if it is of the belief that any of these criteria has not been met, the SARC may make any recommendations to Parliament that it considers appropriate, including the disallowance of the regulation, wholly or in part, and the suspension of the regulation. In practice, however, the SARC has indicated that, where it is considered that a statutory rule can be rectified by amendment, the Committee will approach the Minister privately to seek amendment rather than report to Parliament.

4.3.6 Timing considerations

The time taken to prepare the RIS document is largely in the hands of regulating agencies, and will clearly depend on the complexity of the proposed regulation. The quality of the arguments and evidence presented in any RIS will also reflect the time taken on its preparation. As a rough rule of thumb, departments should allow about three months between commencement of the writing of the document and having it cleared within a department/agency for assessment by the VCEC.

There are also timing considerations for the public consultation process.

Departments and agencies should be mindful that, in general, statutory rules will sunset or expire on the tenth anniversary of their making. It is important, therefore that accurate dates are maintained of the sunset for all statutory dates administered by the Ministers to which departments/agencies reports, and that sufficient time is allowed for the review of the continued appropriateness of the statutory rule and for the completion of the associated RIS, where appropriate. (Further discussion of processes relevant to the sunsetting and extension of statutory rules can be found in Part Eleven of the *Subordinate Legislation Act 1994 Guidelines* in **Appendix E**.)

Table 4.3 attempts to summarise the timing requirements for the different elements of the RIS process. The table identifies those timings that are mandated by legislation (i.e. the *Subordinate Legislation Act 1994*) by referring to the relevant section of the Act.

Departments are advised to allow around six months between the beginning of a RIS process and the making of the associated statutory rule or legislative instrument.

Table 4.3: RIS timing considerations[21]

Element of RIS process	Timing requirement	Comment
Inform VCEC	At beginning of process	To ensure that the VCEC can plan its assessment processes and can provide guidance in a timely fashion, it should be informed of the intention to prepare a RIS at the beginning of the process.
Settle drafting of the regulations with Office of the Chief Parliamentary Counsel (OCPC)	At beginning of process – may take several weeks or months (depending on complexity)	The OCPC should be consulted as early as possible for assistance in drafting the regulations. This is particularly important during peak demand times (e.g. in the lead up to Parliamentary sessions). Even a simple set of regulations make take several weeks to settle; major or complex regulations may take months to draft and settle.
Writing of RIS document (including initial consultations)	Around three months	Will depend on the complexity of the proposed regulation. Discussions with the VCEC and provision of draft RIS documents should occur during this stage to facilitate timely assessment.
Independent assessment of RIS	28 days	The VCEC has 28 days to assess the adequacy of the final draft of a RIS. If assessment cannot be completed within this timeframe, the Minister may seek alternative independent advice.
Notice that RIS has been prepared	*At least* eight weeks before statutory rule or legislative instrument is to be made	Sufficient time is needed to take into account: a minimum public submissions period; consideration of the submissions; and time for the printing and for the Chief Parliamentary Counsel to give a certificate on a statutory rule under section 13 of the Act.
Public comments and submissions	*At least* 28 days, but preferably 60 days	Sections 11(2)(d) and 12I(2)(d) of the SLA mandate the 28-day minimum period. The Victorian Government encourages longer time periods (preferably 60 days), where feasible.
Consideration of public submissions	*At least* one week, but often four weeks	Based on experience. Clearly, this will depend on the number of submissions received and their level of detail.
Notice of a decision *not* to make a proposed statutory rule or legislative instrument	As soon as practicable after the decision has been made	As mandated in sections 12(2) and 12J(1) of the SLA.
Notice of a decision to make a proposed statutory rule or legislative instrument	Before the statutory rule or legislative instrument is made	As mandated in sections 12(3) and 12J(4) of the SLA.

[21] In addition to the considerations for the RIS process, departments and agencies may need to be allocate time for training and/or informing affected parties about how to comply with new regulations. The length of time to perform this task will clearly depend upon the complexity of the proposals, but could take several months.

Element of RIS process	Timing requirement	Comment
Time for printing and for the Chief Parliamentary Counsel to give a certificate on the statutory rule under section 13 of the Act	*At least* three weeks	Based on guidance notes on statutory rules prepared by the Office of the Chief Parliamentary Counsel, Victoria.

4.4 Charter of Human Rights and Responsibilities Act 2006

The *Charter of Human Rights and Responsibilities Act 2006* ('the Charter Act') provides a framework for the protection and promotion of human rights in Victoria. The range of rights and freedoms that are protected by the Charter Act are shown below.

Human rights and freedoms that are protected in the Charter Act

- Recognition and equality before the law
- Right to life
- Protection from torture and cruel, inhuman or degrading treatment
- Freedom from forced work
- Freedom of movement
- Privacy and reputation
- Freedom of thought, conscience, religion and belief
- Freedom of expression
- Peaceful assembly and freedom of association
- Protection of families and children
- Rights to take part in public life
- Cultural rights
- Property rights
- Right to liberty and security of person
- Humane treatment when deprived of liberty
- Rights of children in the criminal process
- Right to a fair hearing
- Rights in criminal proceedings
- Right not to be tried or punished more than once
- Retrospective criminal laws

The Charter Act is intended to be an integral part of policy development. In addition to legislative proposals, it applies to a broad range of policy proposals, operational guidelines and other programs that are put before Cabinet. Because of this broad scope, separate guidance material has been developed for government departments and agencies by the Human Rights Units of the Department of Justice, and training in the obligations under the Charter Act is being provided to the legal areas of government departments/agencies.

Because the Charter Act applies to the preparation of new Bills, statutory rules and legislative instruments, this section of the Guide provides an overview of the Act's key features and the obligations it imposes, focusing on the implications for primary and subordinate legislation. This overview is intended primarily to raise awareness about the Charter Act, but in no way should be treated as a substitute for the more extensive guidance material that is being developed for government departments/agencies by the Department of Justice (see contact details at the end of this section).

4.4.1 Overview of the human rights impact assessment process

There are a number of steps involved to ensure that a proposal (whether it be a policy proposal, Bill or proposed subordinate legislation) is compatible with the Charter Act. The first is to consider whether the proposal raises any human rights issues, and identify each human right that the proposal might impact upon.

Secondly, the scope of the each human right raised by the proposal should be considered. At this stage, account should be taken of any specific limitation or express exceptions that appear in the section providing for that right in the Charter Act.

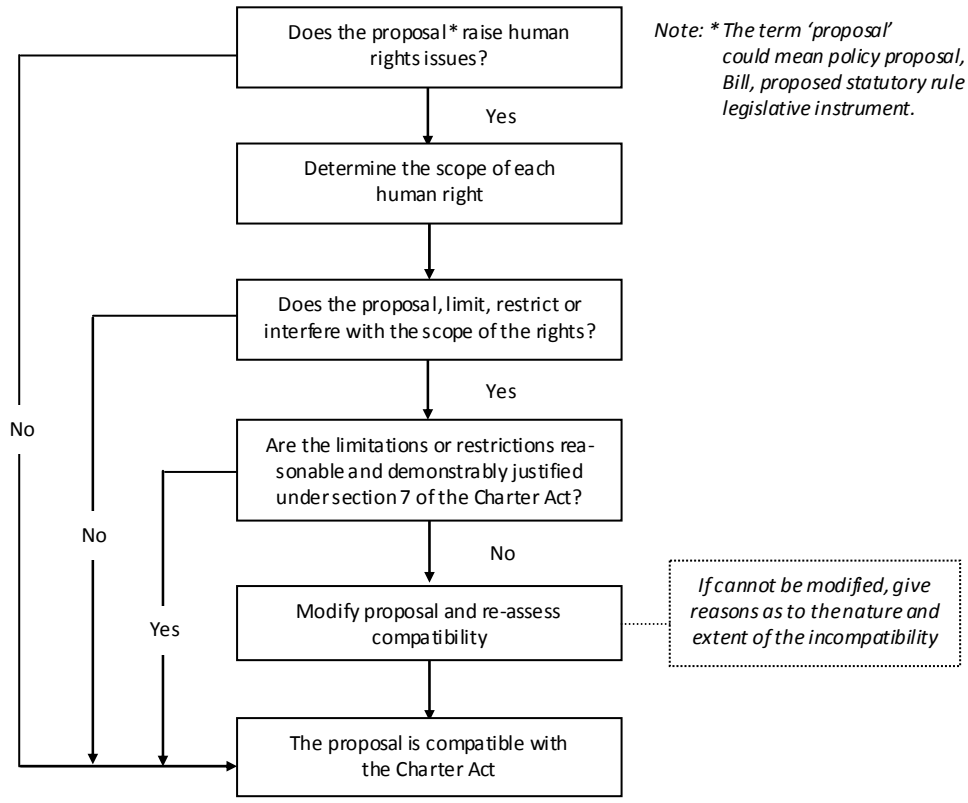
The third step is to consider whether the proposal limits, restricts or interferes with the scope of the right.

The fourth step is to consider whether that limitation or restriction is reasonable and demonstrably justified under section 7 of the Charter Act (see the following sub-section for further details). This would require identification of all the reasons why the limitation or restriction on the right is justified. These may be extensive. This information is required for the preparation of a Statement of Compatibility or Human Rights Certificate (discussed in Section 4.4.2 below).

If it is determined that any limitations or restrictions are not reasonable or demonstrably justified, then the fifth step is to modify the proposal. On some occasions, which are likely to be rare, it may not be possible to modify the proposals. In these situations, reasons will need to be given as to the nature and extent of the incompatibility.

Figure 4.3 illustrates the various stages involved in the human rights assessment process.

Figure 4.3: Flow chart of human rights impact assessment



Reasonable limitations – section 7 of the Charter Act

All of the human rights in the Charter Act are subject to a general limitations clause (section 7 of the Act), which means that the human rights not absolute. In other words, the Charter Act recognises that, under certain circumstances, a human right may be limited, and there may be grounds for a policy or legislative proposal to limit, restrict or interfere with human rights if:

- the limit is provided under law (e.g. an Act, regulation or the common law);
- it is considered reasonable; and
- its imposition on the human right must be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

In determining whether a limit is reasonable, section 7 states that all relevant factors should be taken into account, including (but not limited to) those identified below.

Relevant factors to take into account in determining whether a limit to a human right is 'reasonable'

- The nature of the right: if the right is a robust and important right (e.g. an absolute right in international law, such as the right to life or protection from torture), then more weight should be given to the human right when it is being balanced against the proposed limit, restriction or form of interference.
- The importance of the purpose of the limitation: a specific rather than general area of public or social concern should be addressed by the limit and that area of concern should be important, not trivial.

- Nature and extent of the limitation: it is necessary to ascertain the precise way in which the limit constrains the right.
- Relationship between the limitation and its purpose: for a limitation to a right to be reasonable, there should be a rational connection between the nature and extent of the limitation and the purpose which that limitation seeks to achieve. There should also be proportionality between the purpose of the limitation and the means employed to achieve that purpose.
- Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve: to be reasonable, the limit must impair the right no more than is reasonably necessary. If there is another available way that the purpose for which the limitation has been imposed could be achieved which would have a lesser adverse impact on the human right, then the limit may be deemed to be unreasonable.

4.4.2 Impact of the Charter Act on the preparation of legislation

This section summarises the various process that now have to be followed for both primary legislative proposals ('Bills') and subordinate legislation (in the form of statutory rules and legislative instruments) to demonstrate compatibility with the Charter Act.

It is important that these processes are followed, and that compatibility is adequately demonstrated, because the functions of the Scrutiny of Acts and Regulations Committee now include considering whether any Bill introduced is incompatible with human rights and whether any statutory rule or legislative instrument is incompatible with human rights.

Primary legislative proposals ('Bills')

Cabinet Submissions for ***approval-in-principle*** of a legislative proposal must include a detailed overview of the human rights impacts of the proposal. Officers should identify which human rights issues the proposed legislation raises; whether the department has sought advice in relation to the proposal; and whether the proposal can be developed compatibly with the Charter Act.

At the ***Bill-at-Cabinet stage***, Submissions for final approval of Bills must state whether or not the Bill is compatible with the Charter Act. ***The Statement of Compatibility*** (see below) must be attached to the Cabinet Submission. The recommendations in the Submission must include a recommendation that Cabinet note the Statement of Compatibility.

Statements of Compatibility

All new Bills introduced into Parliament must be accompanied by the ***Statement of Compatibility*** in both Houses. The Statement must set out whether, in the opinion of the Minister (or the Member of Parliament introducing the Bill), the Bill is compatible with the human rights that are set out in the Charter Act. In addition, reasons must be provided in the Statement to demonstrate how a Bill is compatible – or otherwise to explain the nature and extent of any incompatibility. The Statement of Compatibility must be tabled in Parliament before the second reading speech.

If a Bill is amended by Parliament, the Statement will need to be updated before the Bill is introduced into the next House if the amendments raise human rights issues.

A template for the Statement of Compatibility is provided below.

Template for Statement of Compatibility[1]

Charter of Human Rights and Responsibilities Act 2006

Statement of Compatibility

[Insert name of Bill]

In accordance with section 28 of the ***Charter of Human Rights and Responsibilities Act 2006***, I make this statement of compatibility with respect to the [.....] Bill 200X.

In my opinion, the [.....] Bill 200X, as introduced to the Legislative [Assembly/Council], is compatible with the human rights protected by the Charter Act. I base my opinion on the reasons outlined in this statement.

Overview of Bill

[Provide an overview of the Bill and state its general purpose.]

This is the central section of the statement of compatibility.

Human Rights Issues

1. Human rights protected by the Charter Act that are relevant to the Bill

[Identify each human right that the Bill will have an impact upon or engage.]

[For each relevant right, identify the relevant clause or clauses of the Bill that will have an impact upon that human right.]

[Analyse how the clause interacts with the right – e.g. the degree to which it will restrict the operation of the right or whether the scope of the right is unaffected.]

[It may be clear at this stage that the Bill, or a specific clause of the Bill, is compatible with the relevant right or rights it has an impact upon.]

2. Consideration of reasonable limitations – section 7(2)

[If a clause of the Bill limits or restricts or interferes with the relevant human right that has been identified, analyse in detail whether the limitation is reasonable and can be demonstrably justified in a free and democratic society under section 7(2) of the Charter Act. All relevant factors should be taken into account, including:

(a) What is the nature of the right being limited? (E.g. what are the values underlying the human right? Is it an 'absolute' right in international law?)

(b) What is the importance of the purpose of the limitation? (Does the purpose of the limitation or restriction address a public or social concern that is pressing and substantial? Where possible, provide empirical data that demonstrates that the limitation of restriction is important.)

(c) What is the nature and extent of the limitation? (In what ways does the Bill or a clause in the Bill limit or restrict the right? How far does this limitation or restriction go?)

(d) What is the relationship between the limitation and its purpose? (Is there a rational connection between the limitation or restriction on the right and the purpose it seeks to achieve? Is there proportionality between the purpose of the limitation and the means used to achieve that purpose?

(e) Are there any less restrictive means reasonably available to achieve its purpose? (Describe how the rights-limiting clause is within the range of reasonable solutions to the problem, including any safeguards that are incorporated.)

(f) Are there any other relevant factors? (E.g. does the Bill replace previous legislation which provided for a regime with less strict safeguards for the protection of rights?)]

Conclusion

[This section should contain the conclusion about why the Bill is compatible with human rights.]

…….

[Print name and title of Member of Parliament responsible for introducing the Bill]

Note: 1. In the unlikely event that, in the opinion of the member, the Bill is incompatible with the Charter Act, the statement should describe under the headings the nature and extent of the incompatibility.

Subordinate legislation: Statutory rules and legislative instruments

It is important to ensure that subordinate legislation is developed in a way that is compatible with the Charter Act, particularly as the operational matters detailed in subordinate legislation will often affect human rights. Furthermore, if subordinate legislation is inconsistent with the Charter Act, it may be found to be beyond the regulation- or instrument-making power conferred by the principal Act.

Human Rights Certificates

A **Human Rights Certificate** must be prepared for proposed statutory rules and legislative instruments (including amending statutory rules and instruments), unless they are exempt under section 12A(3) or section 12D(3) of the *Subordinate Legislation Act 1994*[22] or Regulations made under the Act. The statutory requirements for this Certificate are set out in sections 12A and 12D of the SLA.

The Certificate must specify, in the opinion of the responsible Minister, whether the proposed statutory rule or legislative instrument does or does not limit any human right set out in the Charter Act. If the statutory rule or legislative instrument does limit a Charter Act right, the Certificate must provide a detailed justification that the limit is reasonable, using the same criteria as set out in section 7 of the Charter Act (as discussed in Figure 4.3 above).
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Templates for the Human Rights Certificate and exemptions for this Certificate have been prepared (see Section D.2 in **Appendix D**)

4.4.3 Further information and advice about the Charter Act

As indicated in the introduction to this Section, more extensive guidance material about the Charter Act for government departments/agencies is being developed by the Department of Justice (see details below).

Where Charter Act issues are identified and there is uncertainty about the scope of a right or the application of the reasonable limitations clause, it is recommended that officers consult with the legal branch within their departments/agencies or with the Human Rights Unit in the Department of Justice (tel. 8684 0859).

[22] An example of an exemption is when statutory rules are being extended that would otherwise sunset under the *Subordinate Legislation Act 1994*.

For legislative proposals, it is anticipated that the legal officer responsible for instructing Parliamentary Counsel or drafting regulations will be the person directly involved in drafting the Statement of Compatibility or the Human Rights Certificate. If policy officers are working on legislative proposals, it is recommended that they consult with a legal officer within their department about preparing the Statement of Compatibility or the Human Rights Certificate. It is best to consult with those officers early in the process, as well as at the time when the proposal is being refined, or during the drafting of the Bill, when many of the human rights issues will emerge more clearly.

For more information, refer to:

- The Human Rights Unit in the Department of Justice – Tel. 8684 0859
- A template Human Rights Certificate and Human Rights ¬Exemption Certificate can be found in Sections D.2 in **Appendix D**.

4.5 Consultation with local government

In some cases, local government can play an important role in administering and enforcing state legislation/regulation for which state ministers are ultimately accountable to the Parliament of Victoria. (Food safety and planning regulations are good examples of where local governments play a key role in the administration and enforcement of state regulation/legislation.)

In this context, the resources available to, and capability of, local governments, particularly the availability of staff with appropriate training and skills, to efficiently administer and enforce state regulation is of utmost importance to the Government.

Accordingly, where the Victorian Government intends for local government to administer or enforce new primary legislation, or new or revised regulation, the relevant lead department should consult with local government on:

- the resources required for the efficient administration and enforcement of the regulation;
- how those resources will be funded;
- the training and assistance which will be made available to local governments;
- how the performance of the local governments in the efficient administration and enforcement will be assessed;
- how the responsible state minister will account for local government performance; and
- an appropriate mechanism to publish the agreed resourcing, funding, training and performance monitoring arrangements.

How these matters are to be addressed should be detailed in associated ministerial briefings and Cabinet submissions, and included in relevant steps of an associated BIA or RIS.

For example, the costs associated with the administration and enforcement of the regulation, along with the costs of the training and assistance that would need to be provided to local governments, would be included in the cost-benefit analysis undertaken as part of an associated BIA and RIS (and subject to scrutiny by the VCEC) – see **Step 4** in Chapter 5. Furthermore, implementation issues affecting local government would be discussed in **Step 7**.

5. Preparation of BIAs and RISs: Step-by-step guide

This chapter provides a step-by-step guide to the preparation of Business Impact Assessments and Regulatory Impact Statements, covering:

- **What issues must be considered?**
- **What sort of information and analysis must be included in each of these steps?**

5.1 Checklist of steps

This chapter is designed to assist policy officers in the writing of BIA and RIS documents by providing step-by-step guidance to the different elements of analysis that are required in BIAs and RISs.

Table 5.1 below identifies the steps involved in writing a BIA and RIS. It represents a checklist that can be used as a guide in the writing process of a BIA and RIS. It outlines a format that meets the legislative requirements of the *Subordinate Legislation Act 1994* (for the purposes of preparing RISs), and the Government's stated requirements for BIAs. It also reflects past experience in best practice preparation of BIAs and RISs.

Table 5.1: Steps involved in the writing of a BIA and RIS

Step	Description	BIAs	RISs
	Introductory steps		
1	Identify the problem or issue to be addressed	✓	✓
2	Specify the desired objectives of intervention	✓	✓
3	Identify viable options to achieve the objectives	✓	✓
	Analytical steps		
4	Assess the costs and benefits of the options	✓	✓
	4a Assess the impact of the options on small business	✓	Good practice
5	Undertake competition assessment	✓	✓
6	Identify the preferred option and describe its effect[23]	✓	✓
	6a Measure material burdens in administrative burdens	Refer to Section 4.4.3 in Chapter 4	Refer to Section 4.4.4 in Chapter 4
	Implementation and review steps		
7	Consider detailed implementation and enforcement issues	Good practice	✓
8	Detail the evaluation strategy	Good practice	Good practice
	'Housekeeping' steps		
9	Document the consultation undertaken	Not mandatory	✓
10	Include appropriate attachments		
	• technical appendices	If necessary	If necessary
	• copy of proposed regulations for the purposes of public consultation	Not mandatory	✓
	Summary step		
Summary	Summarise key findings as an overview for the front of the document	✓	✓

Note: The ✓ symbol indicates that the step is mandatory.

[23] In the case of a RIS prepared for fees or charges, this step should describe the basis and calculation of the proposed fees/charges.

Step 1 – Identify the problem or issue to be addressed

The first step of a BIA and RIS is to identify the nature and extent of the problem to be addressed. This is an important threshold step in evaluating the need for government intervention. This section must specify the social, environmental or equity goal that needs to be addressed by government intervention, and/or identify the nature of any problem or market failure. Information must be provided on the nature and the magnitude of the problem.

A useful checklist for developing this step includes:

- background to the problem/issue and its incidence (i.e. who is affected, what is the source of the problem, and what evidence exists?).
- discussion of why the market will not provide a satisfactory outcome, where this is not apparent (e.g. description of any market failures that may exist, as well as social and/or environmental problems that result from the operation of the market);
- assessment of the risk associated with non-intervention; and
- quantifying the extent of the problem (i.e. what is the likelihood/risk of a detrimental event occurring and the consequences?). Data must be provided, either from Victoria or elsewhere.

This section of the BIA or RIS must be written so that it can be readily understood by anyone with no prior knowledge of the topic. Industry jargon should be avoided and any technical discussion should belong in an appendix.

In the case of a RIS prepared for the purposes of remaking sunsetting regulations, this section must demonstrate that the nature and extent of the problem still require a regulatory response. The focus here should be to ensure that the RIS does not simply re state the problem that underpinned the existing regulations, but instead takes account of developments that have occurred over time – for example, in relation to factors such as market structure, technological advances and community expectations. Doing so will encourage policy makers to focus on developing a regulatory approach that maximises the net benefit to society, rather than simply remaking the previous regulations.

Where amendments are being proposed to sunsetting regulations, the specific problems that each of the proposed amendments is intended to address must be explicitly identified.

For regulations imposing fees or charges, this section of the RIS needs to demonstrate the need for the government provision of services or regulatory activity that will give rise to the need for cost recovery.

For more information, refer to:

- Rationale for regulation – Section 2.1.
- Identification of the problem – Section 3.2.1.
- Specific RIS requirements for different types of regulations – Section 4.3.3

Step 2 – Specify desired objectives

Section 10(1)(a) and section 12H(1)(a) of the *Subordinate Legislation Act 1994* requires a statement of the objectives of the proposed statutory rule or legislative instrument to be included in a RIS. The objective specified should be closely related to the objectives of the Act (primary legislation) authorising the statutory rule (or 'regulations') or legislative instrument. For BIAs, the objectives should be stated in terms of the objectives of the proposed primary legislation.

It is important that the objective is stated in terms of the ends to be achieved rather than the means of its achievement (i.e. the strategy). In other words, the objective must be specified in relation to the underlying problem identified in **Step 1**, rather than being specified so as to align with – and therefore pre-justify – the particular effects of the proposed measure.

If the objectives are inappropriately specified, the identification of other means of achieving them will be compromised (see below for an example).

Passenger vehicle safety regulations

The compulsory introduction of seat belts in motor vehicles in Victoria provides a useful example of the appropriate specification of objectives.

The objective of introducing seat belts was to reduce death and injuries by enhancing passenger and driver safety in motor vehicles. The strategy was to make seat belts compulsory.

If the objective were to be wrongly specified as the introduction of seat belts in motor vehicles, the identification and consideration of other relevant regulatory options (such as compulsory airbags, strengthened passenger compartments or primary safety devices) would have been compromised

It is also important that the objectives are consistent with, or contribute to, the achievement of the Government's strategic policy aims. Thus, where appropriate, this section must also identify any pre-existing policy authority for the proposed measure – for example, a relevant government decision or policy announcement.

Some proposed measures may have several objectives. Where this is the case, the primary objective must be identified and separated from any secondary objectives. The emphasis must be on the primary objective, as this should represent the fundamental rationale for the proposed government intervention.

Where appropriate, objectives should be stated in terms of the SMART criteria discussed in Section 3.2.2 of this Guide. In addition, the following questions may also assist in the development of the objective:

- What are we trying to achieve? What would constitute a successful outcome?
- Have similar objectives been set in other contexts that could be adapted?
- How might the objectives and outcomes be measured? Are the objectives defined in such a way that progress can be measured?
- Are the objectives consistent with the Government's strategic aims?

For more information, refer to:

- Clear identification of the objectives – Section 3.2.2.

Step 3 – Identify viable options that will achieve the objectives

The next step of the BIA or RIS process is to identify and consider a range of options that could feasibly be used achieve the stated objectives of the intervention (as specified in **Step 2**).

To assist in the process of identifying options, below contains a broad list of different approaches. However, the options actually considered in the BIA or RIS may be different to cater to the specific circumstances of the problem to be addressed.

Examples of different forms of regulation and other non-regulatory measures

- Self-regulation, quasi-regulation or co regulation
- Increased enforcement of existing provisions
- Extending the coverage of existing legislation
- Removing other legislative impediments
- Rewarding good behaviour
- Negative licensing
- Public information and education campaigns
- Information disclosure
- Market-based instruments (e.g. taxes, subsidies, user charges, tradeable permits)

At this stage, the focus of the analysis should not be to find the one, 'perfect' strategy to solve the problem and achieve the stated objectives. Apart from the fact that the final strategy may be a hybrid of a number of possible options, a narrow search at this stage will prematurely restrict the range of possibilities selected.

A preliminary analysis of the various options should be undertaken as part of this step to discard those that are clearly inappropriate or unworkable. In undertaking this analysis, consideration should be given to a range of factors, including enforceability and compliance considerations, as well as cost implications.

As part of this preliminary analysis, consideration should be given to approaches adopted in other states and territories to deal with the same or similar problem. Where a less onerous regime is in place in other jurisdictions, evidence should be provided as to why such an approach would not be appropriate for Victoria.

Discarding options that are clearly inappropriate or unworkable will enable a more rigorous and comprehensive analysis of the remaining, viable options (which will be undertaken as part of **Steps 4** and **5** of the BIA and RIS). However, care must be taken not to reject an option before its viability has been properly considered (which may include its combination with one or more other measures). Options should only be discarded where deficiencies are found to be compelling (and not because full consideration would be complicated and/or time-consuming). Section 10(1)(c) and section 12H(1)(d) of the *Subordinate Legislation Act 1994* requires that non-regulatory options must be considered as part of a RIS.

The appropriate number of viable options to be considered further will vary according to the nature of the problem, and the objectives that need to be achieved. For straight-forward problems where there may be a single, simple objective to be achieved, consideration of two to three different options may be deemed appropriate. However, more complex problems, where multiple objectives need to be achieved, requiring a package of different measures would require the consideration of a larger number of viable options.

Having identified the viable options, these should be described in sufficient detail to provide a solid basis for a formal cost-benefit analysis (which will be undertaken in **Step 4** of the BIA or RIS). This will need to cover key implementation factors and, where relevant, the proposed enforcement strategy (including an assessment of the likely level of compliance.)[24]

[24] More detailed information about implementation and enforcement issues are to be provided in **Step 7**, after the preferred option has been identified.

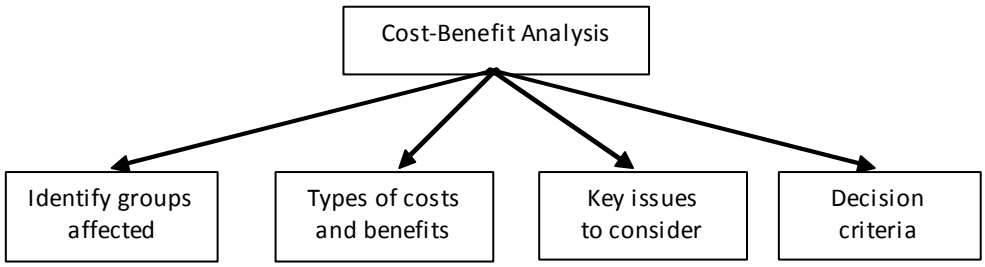
In the case of RISs prepared for fees and charges, the range of different options will be narrower than for other types of regulations, and is likely to include consideration of different levels of service provision or regulatory activity that are to be funded through fees and charges; different types of fee structures; and different levels of cost recovery (although it is important to include the option of full-cost recovery considered since this represents general government policy).

For more information, refer to:

- Forms of regulation and other approaches – Section 2.2.
- Consideration of all the options – Section 3.2.3.

Step 4 – Assess the costs and benefits of the options

Overview



Will include assessment on small business. Refer to **Step 4a**

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 sunsetting 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.

Identifying the base case may not be a straightforward exercise where the existing regulations have been in place for sometime, and there is limited direct evidence regarding the behaviour of the affected parties in the absence of that regulation. Nevertheless, as outlined in Section 4.3.3, it should be possible to describe and quantify the 'unregulated situation' using a range of data sources – including an evaluation of the existing regulations, consultation with stakeholders, examining the experience in other jurisdictions, and reviewing academic research.

Sometimes, the viable options may consist of a diverse package of proposals with a number of different elements, in which case the costs and benefits of the different 'groups' of regulation must be assessed. The appropriate grouping will depend on the type of regulation, but may involve examining those elements of the proposal that are designed to address a particular problem, or the groups that govern a particular activity or process.

The examination of the costs and benefits of the options must include an assessment of the financial, economic, environmental and social impact, including administration and compliance costs. Consideration must also be given to the impacts of the various costs and benefits on the different groups affected by the options, and for the community as a whole.

Often, until a measure is actually implemented, it is not possible to be certain about the nature and extent of any associated costs and benefits. Thus, it is important that the CBA gives an indication of the risks and probabilities associated with the identification and estimation of the costs and benefits of each option, including explicit statements of the assumptions made.

A quantitative analysis must be undertaken, wherever feasible, and a monetary value must be assigned, so that costs and benefits of the options can be compared with one another. However, in some circumstances, it is recognised that it can be difficult to collect quantitative data and/or assign monetary values. The additional effort and expense incurred by preparing these estimates of the costs and benefits must reflect the likely size of those impacts. Where a proposal will impose significant costs (and thus would only be warranted if it generated substantial benefits), then it is particularly important that the proposal can be demonstrated to generate both a net benefit, and one that is superior to all other viable options.

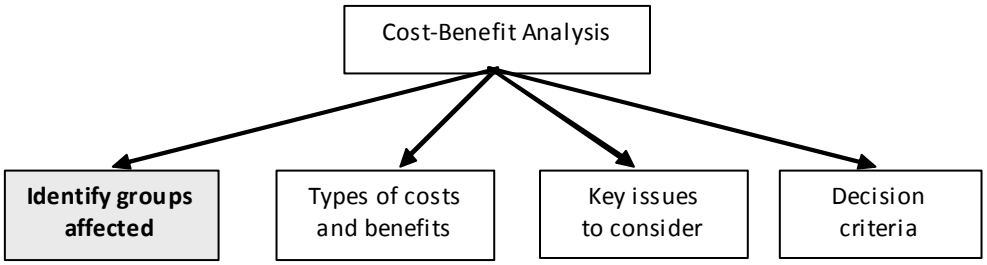
Less significant proposals should attempt to quantify costs and benefits, where possible, but as a minimum requirement, there must be a qualitative assessment of all the types of costs and benefits, and the expected effects of a proposed measure, including a description of how different groups will be affected.

The VCEC assesses whether sufficient rigour has been demonstrated in preparing the estimates of costs and benefits and departments/agencies are encouraged to consult with the VCEC early for advice on what is likely to be considered appropriate.

Because the CBA is often based on various assumptions, these need to be highlighted in this step – particularly if they may have a significant impact on outcomes – to allow for the checking and refining of the analysis, and to provide some indication of the uncertainty surrounding the results of the CBA.

For example, 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 for 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. (However, when assessing the predicted level of compliance, it is important to note that this in no way condones non-compliance, or suggests that the department/agency will not make every effort to ensure the highest possible level of compliance.)

Further information about CBA techniques is contained in **Appendix C**. The remainder of this step focuses on the key elements of the four board headings.



Identifying groups that will be affected

The groups of society that are likely to be affected by the viable options need to be identified, so the impact (both costs and benefits) on these groups can be highlighted. This will assist in:

- improving understanding about the potential impacts of the options, including unintended consequences;
- identifying key stakeholders; and
- gathering information on the costs of the options.

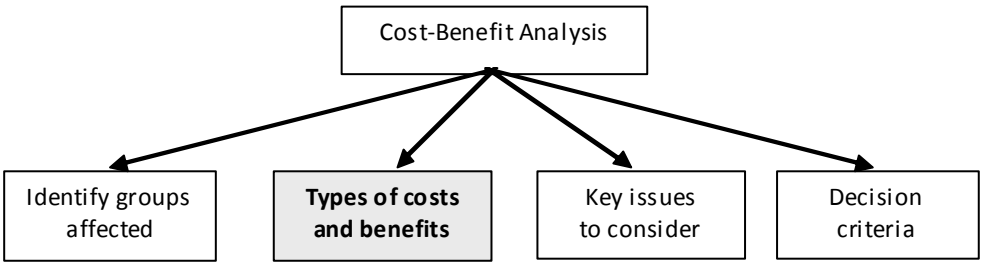
The primary groups that should be considered are business, consumers/individuals and government. As indicated in Box 5.3, these groups may be broken down into sub-groups where there are likely to be differential effects from a proposed measure – for example, there may be differences between the impact on consumers in urban and rural areas, or for small firms relative to large firms.

Indeed, assessing and highlighting the impact on small businesses is particularly important and is mandatory as part of the BIA process, and strongly encouraged for the preparation of RISs. Accordingly, a small business assessment is the subject of a supplementary CBA step, and separate guidance material for this supplementary analysis is provided below (see **Step 4a**).

Examples of different sub-groups for group impact analysis

- Business: large, medium, small businesses; importers, exporters and/or firms supplying the local market; business located in urban areas; businesses with regional and/or interstate or international operations
- Consumers/individuals/groups: individuals with different age, language, physical, cultural, location (urban/regional), gender, family or income/wealth characteristics; consumers with different levels of information; community groups such as sporting clubs, charities, churches
- Government: Commonwealth, state/territory, local government; statutory bodies

It should be noted that under section 6 and section 12C of the SLA, a RIS requires consultation with any sector of the public on which a significant economic or social burden may be imposed by a proposed regulatory measure.



Types of costs and benefits

An assessment of the costs and benefits (the 'impacts') arising from the viable options is the central analytical component of the RIS and BIA. It is this assessment that provides evidence that the benefits of government intervention outweighs the costs, and helps identify which of the options is likely to provide the greatest net benefit to society as a whole.

Clearly, it is important to identify the full range of costs and benefits that could potentially arise from the different options and, where possible, assign dollar values to these costs and benefits. Details below provides examples of possible sources of information to help with this task.

Possible sources of information on identifying and valuing costs and benefits

- Consultation with those likely to be affected
- Experience in other jurisdictions
- Knowledge and experience of government departments (e.g. based on similar regulations in other areas)
- Surveys – either existing or commissioned
- Consultants and academics
- Research documents, market reports, internet searches about the affected sector
- Data held by agencies, such as investigations of complaints, audits
- Insurance claims data
- National statistics on economic indicators (e.g. size of the economy, number and sizes of firms, earnings, hours worked, production, consumption, regional trends, social trends, imports and exports)

In general, the amount of work undertaken to assess costs and benefits should reflect the expected size of the impacts. For example, where impacts are expected to be relatively minor, then the analysis can rely on all currently available data, facts and/or information. Where impacts are more significant, then it may be appropriate to collect new information and undertake new analysis (e.g. in the form of surveys or consulting with industry experts) as part of the cost-benefit evaluation. 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 (e.g. through general equilibrium modelling).

Even where scant information is available, an indication of impacts can be modelled on the basis of certain assumptions. In such cases, all assumptions must be made explicit and all data used must be made transparent – if necessary in a technical appendix.

In identifying the impacts, it is useful to make a distinction between the following different categories of costs and benefits (while recognising that there may be overlaps between the categories):

- economic and financial impacts (within this category, the costs associated with administration, compliance and enforcement must be identified separately);
- social impacts; and
- environmental impacts.

The guidance material below also includes information about the full range of possible costs to consider when examining options to deal with public risk.

Economic and financial impacts

Economic and financial impacts represent the broadest category of costs and benefits. They typically relate to goods or services exchanged in the marketplace (or for which a market value can be derived directly).

While the impacts will clearly depend on the specific nature of the option being assessed, Table 5.2 below lists some examples of economic/financial costs and benefits that may need to be considered in the CBA.

As shown in Table 5.2, the costs of administration, compliance and enforcement associated with the proposed options can also be included within this category. The methodology outlined in the Regulatory Change Measurement Manual may be used to measure the regulatory costs of the different options.

Table 5.2: Examples of economic/financial costs and benefits

Group	Examples of costs	Examples of benefits
Business	• Additional costs incurred arising from changes required to production, transportation and/or marketing procedures • Licence fees or other charges levied by government • Higher input costs, including the additional costs of shifting to other sources of supply • Costs resulting from delays in the introduction of goods or services to the marketplace and/or restrictions in product availability • Costs associated with lower productivity because the proposed measure causes diversion from 'core' business activities • Costs of time and legal/consultancy fees required for familiarisation with regulatory requirements • Additional reporting requirements and other paperwork associated with administrative burden • Costs of internal inspection, monitoring, audit fees and legal fees to ensure compliance	• Benefits arising from increased efficiency/productivity as a result of the measure, which may emerge in the form of reductions in costs due to the removal of restrictions on competition and/or removal of marker power of an input supplier • Reductions in workplace accidents and injuries, and healthier workforce (increased human capital) • Improvements in market information • Ability to take greater advantage of economies of scale
Consumers	• Higher prices for goods and services • Reduction in the quality or choice of goods and services • Delays in the introduction of goods and services and/or restrictions in product availability • More difficult or more expensive options for seeking redress	• Lower prices for goods and services (e.g. due to the removal of restrictions on competition) • Improved safety of goods and services • Increases in the quality and choice of goods and services • Provision of greater information about goods and services
Government	• Same as costs listed under 'business' to the extent that the proposed measure applies to the government sector • Administration costs (e.g. processing of permits and applications, publicity and guidance, advice lines)[25] • Enforcement costs incurred by regulator (including any legal expenses) • If local government is to administer/enforce regulation, costs of training and assistance that will be made available to local government	• Improvements in public health, resulting in lower costs to the public health system and worker compensation payments (e.g. where regulation is to improve health and safety) • Improved information to the government

[25] Double-counting should be avoided here. Sometimes, fees may be charged to cover administrative costs. Thus, these costs should only be included to the extent that the fees charged do not cover the cost of administration.

Social impacts

While consideration of the economic and financial impacts of the viable options tend to dominate the CBA – not least because they lend themselves more easily to quantitative analysis – it is important to recognise any social costs and benefits that might arise.

The following examples are the types of questions that can assist with the identification of potential social impacts:

- Does the proposed measure create opportunities for increased leisure time?
- Will the proposed measure affect the health of the community?
- How will the proposal affect levels of skills and education?
- Will the proposal affect the provision of facilities or services that support community cohesion or in other ways that affect the quality of life in the local community?
- Will the proposal affect the rate of crime or crime prevention, or create a new offence/opportunity for crime?

Valuing social impacts presents a challenge because it is often difficult to assign a market price to them. However, it is often possible to derive notional market prices via indirect means. For example, valuing the cost of an increase in crime could be derived from increases in insurance premiums to cover theft.

Even in those cases where it is difficult to value social impacts, it may be possible to provide an indication of the impact by looking at impact measures other than value. For example, this might involve the provision of information such as: how many people will be affected; what type of people might be affected; and the nature and impact of some the effects.

Such analysis can allow notional indicators of impacts to be provided. In other words, effects may be categorised as 'small', 'medium' or 'large', to enable comparison and weighting of various social impacts.

Sometimes, it may be difficult to assign dollar values to benefits, while cost estimates are more readily available. In such cases, benefits may be expressed in terms of physical units (e.g. the number of lives saved, the number of accidents prevented), while costs are expressed in dollar terms. As discussed in more detail in **Appendix C**, this type of analysis is sometimes referred to as cost-effectiveness analysis – i.e. it assesses the comparative cost of achieving a given level of a desired outcome.

In assessing social impacts, care should be taken not to include redistributive effects as a social benefit where these are merely redistributing from one group in society to another, unless there is some indication that a dollar is more valuable for one group than another. (This issue of transfers is discussed further below.)

Environmental impacts

Consideration must also be given to any **environmental impacts that** may arise from the proposed measure. For example, will the proposed measure:

- lead to a change in the emission of greenhouse gases?
- involve the utilisation of a substantial volume of natural, non renewable resources, including land?
- result in a change in air pollutants and/or the population affected by air pollution?
- result in water pollution and/or the population affected by water pollution?
- disturb habitats or species?

- have impacts on natural, cultural and/or heritage values?
- affect the number of people exposed to noise or the level of such exposure?

As with social costs and benefits, assigning values to environmental impacts presents a number of methodological challenges. Nevertheless, analytical techniques have been developed to assist with such valuations, and this may be useful in certain circumstances (e.g. hedonic pricing, contingent valuation, damage cost avoided – see **Appendix C**).

Costs of public risk regulation

In the area of public risk regulation, policy-makers arguably face pressure from the public to quickly respond to risk with prescriptive forms of regulation without fully considering all the costs associated with such approaches. This may be due to difficulty or resistance to discussing the cost of reducing harm to individuals in financial or economic terms.

Public demand for regulation may also challenge the development of policy that is based on the full evaluation of costs and benefits where public perceptions of the magnitude (likelihood and consequences) of different public risks varies from an objective evaluation and ranking of these. There is considerable evidence to suggest that people may systematically overestimate some risks and underestimate others. People are likely to experience disproportionate anxiety about, and demand strong regulatory responses to, risks that are 'dreaded' and 'unknown', including those that are highly visible or publicised. By contrast, those risks that are well known, less frightening or more routine, such as car accidents or health conditions caused by lifestyle factors, are likely to be more easily accepted, despite the actual risk of harm they pose. Demand for public risk regulation is likely to reflect these biases. For example, the occurrence of a tragic accident could give rise to demands for swift and decisive regulatory intervention to eliminate future accidents, even where the probability of such incidents is relatively low or the likely effectiveness of regulation in achieving risk reduction is limited.

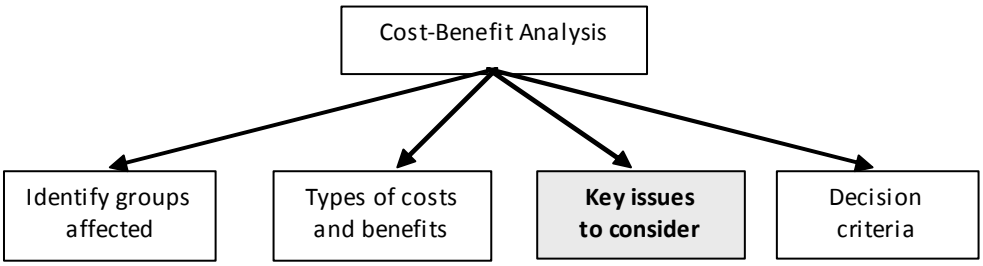
In the context of these pressures, it is important that policy-makers do not fail to consider the full range of possible costs when examining the need for public risk regulation, and in considering the relative impacts of other approaches to dealing with public risk.

The costs of public risk regulation include **market distortion costs** that may take a number of different forms, including:

- ***costs of constrained innovation***: prescriptive public risk regulations – which define how producers operate or the types of products/services they offer – restrict the ability of producers to develop new goods and services, or adopt new production techniques (e.g. new technology). Regulations that place conditions on the way goods or services are provided, or which mandate the use of particular techniques, can 'lock in' old approaches and make the adoption of innovative approaches or development of new goods and services difficult. This effect is sometimes known as the 'dynamic cost' of regulation;
- ***restrictions on consumer choice***: often, public risk regulations restrict the ability of consumers to choose the price or quality, range, or location of the service they use. This could prevent consumers from choosing a lower standard, cheaper service in cases where they do not need the higher quality service. It can also disadvantage consumers that do not have access to regulated locations. Minimum quality regulation of supported residential services and child care both clearly fall in this category. Importantly, the costs of complying with quality regulation can flow through to higher prices. If changes to relative prices are significant, consumers may respond by changing their consumption. This could potentially lead to perverse outcomes if it causes consumers to substitute less preferred and potentially more dangerous alternatives; and

- ***costs of reduced entry and exit in the regulated market***: by imposing the need for licences, accreditation, or by otherwise increasing the cost of establishing or operating a new enterprise, public risk regulations can represent impose a barrier to entry, and allow existing operators to enjoy a significant competitive advantage over new entrants. By reducing the likelihood that new players will enter a market and attract customers away from incumbent operators, such restrictions weaken the incentives of existing providers to improve efficiency and minimise prices, and respond to the demands of customers.

Risk regulation may also impose ***costs on third parties*** – i.e. those not directly involved in the transaction between the customer and the provider of the good or service. Sometimes referred to as 'indirect effects', these costs are typically unrelated to the objectives of public risk regulation. Examples include the additional costs incurred in education and training sectors, arising from requirements to employ minimum numbers of qualified staff; and indirect financial impacts on other levels of government, where quality regulation diverts clients into other, higher cost government services.



Key issues to consider

In assessing costs and benefits for the purposes of undertaking a CBA, the following issues should be taken into account:

- **Include direct and indirect costs and benefits.** Direct impacts are those clearly related to the purpose of the proposed regulation, while indirect impacts are incidental to the main purpose, although they may be of significant magnitude, and should therefore be taken into account in the CBA. For example, the direct benefits of occupational health and safety legislation can be measured in terms of the reduction in the costs of injuries and damage to production equipment. However, there will also be indirect benefits in terms of a reduction in industrial disputes, and improved productivity (because of fewer disruptions and a 'healthier' workforce).

Where possible, the estimates of costs should also try and recognise deadweight losses that can result from changes to resource allocation that arise due to government intervention.

- **Future costs and benefits must be discounted.** The costs and benefits arising from regulation are typically spread out over time. In general, society is not indifferent with respect to the timing of costs and benefits – typically, people prefer to receive benefits as early as possible and pay for costs as late as possible. It is therefore important that the valuation of costs and benefits takes explicit account of the time at which they occur. The need for such an adjustment – which is known as 'discounting' – arises because the value of a dollar received today is more than the value of a dollar received some time in the future. To take these factors into account, the stream of future costs and benefits is discounted using an interest rate (known as the 'discount rate'). Discounting allows impacts to be valued in today's dollars, which, in turn, can be used to compare the costs and benefits of different options on a consistent basis.

There is much literature on the 'correct' discount rate to use when weighing up costs and benefits of regulation that accrue over time. (This is discussed in further detail in **Appendix C**.) Using a consistent discount rate across all regulatory proposals allows the total costs and benefits of different proposals to be compared, and assists in the prioritisation of regulatory action. Unless a compelling case can be presented for a different figure, it is recommended that the discount rate used should be the real (i.e inflation-adjusted) risk-free opportunity cost of capital estimated by the Department of Treasury and Finance for use in the Partnerships Victoria process. At the time of writing, this real discount rate is 3.5 per cent.[26]

- **Consider intangible as well as tangible impacts.** The distinction here is essentially between those costs and benefits which can, at least notionally, be quantified (tangible), and those which cannot (intangible). Both types of impacts must be included in the CBA, even though, by definition, the intangible impacts can only be assessed on a qualitative basis (e.g. the number of people who value some aspect and the strength of those feelings).

  An example of an intangible cost is the loss of entrepreneurial spirit and behaviour that may arise if the core focus of managers is diverted away from core business activities as a result of the regulatory requirements.

- **Be aware of transfers and avoid double** counting. When assessing costs and benefits, it is important to identify those that are purely transfers (or redistribution) from one group of the community to another, and those which do not lead to an overall increase or decrease in costs/benefits when considered from the viewpoint of society as a whole. A transfer is a payment of money for which no good or service is received in return. Typical examples of transfers are welfare payments, which represent a cost to governments but a benefit to the recipients, and, in the other direction, taxes. (Regulatory fees are not transfers because regulatory services are received in return for the fees.) While the costs and benefits to the different parties should be identified in the CBA, care should be taken that they are not included in the overall net impact.

  A similar issue relates to the double-counting of costs and benefits, which can often occur due to a failure to recognise the redistributive impacts of particular measures. For example, if firms' costs increase as a result of the measure, they may pass this increase onto consumers in the form of higher prices. While it is important to identify both impacts in the CBA, the effect must not be double-counted in the overall assessment of costs.

- **Assumed effectiveness of regulations.** An additional variable in determining the costs and benefits of a proposed regulation is the assumption made as to the effectiveness of the regulation in achieving the defined objective. It is rarely, if ever, possible to completely eliminate the identified problem (e.g. because of uncertainty as to scientific or technical variables, or because of compliance issues). Hence, there is a need to make a realistic assessment as to what is likely to be achieved. The nature of this assumption will have a major impact on the benefits and costs attributed to the proposal. (In particular, there will be an interdependent relationship between the assumptions made regarding enforcement effort and the associated costs of enforcement.)

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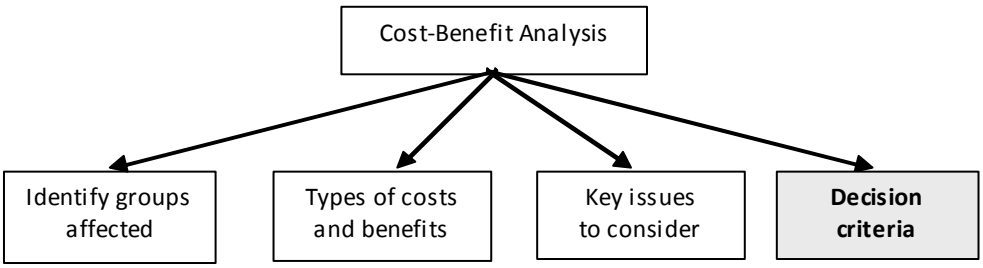
[26] This rate is published in the circular titled *Current Rates Advice*, which can be found at www.partnerships.vic.gov.au.



Decision criteria

The final important aspect of CBA is the selection and application of appropriate decision criteria to determine whether a regulatory option is attractive (i.e. its benefits outweigh its costs). These criteria also allow the 'ranking' of different the different options to assess which will yield the greatest net benefit to society. The basic tools to be used here include:

- net present value;
- benefit-to-cost ratio;
- break-even analysis; and
- multi-criteria analysis.

The choice of criteria will vary according to a number of factors and the particular circumstances of the options being considered. However, it is important to be explicit about which decision criterion/criteria is/are being used to assess the various options. The choice of decision criteria should be consistent with the objectives of the proposed measure,[27] and with any evaluation strategy that is used to monitor the subsequent effectiveness of the regulation (see **Step 8**).

The most commonly used tool is the **net present value** (NPV), which represents the total excess of benefits over costs. Where impacts occur over time, the value of costs and benefits is 'discounted' (as discussed below) to ensure that they are assessed in constant dollar terms. In the case of NPV, the basic decision criterion is that NPV must exceed zero (i.e. total benefits exceed total costs, so that there is a net benefit). However, there may be circumstances in which it is appropriate to set a higher NPV requirement as the criterion that determines the attractiveness of an option. This might be the case, for example, where there is a high degree of uncertainty as to the size and/or timing of the benefits of the proposal.

The **benefit-to-cost ratio** is calculated by dividing the present value (i.e. discounted) benefits of an option by the present value of its costs. Clearly, in order to generate a net benefit, the criterion must be that the ratio would exceed one. The benefit-to-cost ratio provides a useful indication of the riskiness of the option. Because the rule is influenced by the ratio of benefits to cost, measures that rate well against the benefit to cost rule are those that are likely to be least affected by unexpected increases in costs or decreases in benefits.

[27] For example, if the primary objective of the proposed intervention is to improve environmental or social welfare outcomes, then the multi-criteria analysis approach may be a more suitable decision criterion than the net present value tool (which is more appropriate where economic efficiency objectives are being pursued).

If the magnitude of the likely benefits is difficult to determine, **break-even analysis** can be a useful tool. This technique involves dividing the costs of the option by the minimum amount of benefits required for the option to break-even. By estimating the minimum benefits required, this approach allows a judgement to be made about the likelihood of those benefits actually being achieved.[28]

Whereas the three tools outlined above require the quantification of costs and benefits, **multi-criteria analysis**[29] is useful where it is not possible to quantify and assign monetary values to all the impacts of an option. However, this approach, while helpful, is still a second best method of analysis compared to quantitative estimates of costs and benefits, particularly in areas where adequate data should be available.

This technique requires judgements about how proposed options will contribute to a series of criteria that are chosen to reflect the benefits and costs associated with the proposals. A qualitative score would be assigned, depending on the impact of the option on each of the criteria measured relative to the base case. In its most simplest form, a score of '–1' might be assigned if the impact is negative/undesirable/poor compared to the base case; '0' if there is no impact or if the effect is neutral; and '+1' if there is a positive/desirable/good impact. More complex scoring schemes, with a greater number of point scales, could also be devised, and these would provide more rigorous and useful analysis. For instance, each criterion rating scale could have a range of –10 to +10, and a score of 10 would indicate that the option has twice the impact of an option with a score of 5 (and five times the impact of an option with a score of 2 etc). For example, if one option incurred costs of $3.5 million per year, and another option $7 million, then the former option might receive a rating of –5, while the latter would score – 10. A scale from 1 to 10 is preferred as it is easier to include more information on the choices made, and this results in a greater understanding of the proposal. When evaluating options, the reasons for assigning different scores should be clearly articulated.

When selecting the criteria to be used in the multi-criteria analysis, consideration should be given to the objectives of the proposed regulation – i.e. the criteria should be linked to, and be consistent with, these objectives. Weightings may be assigned to each of the criterion by the agency responsible for the proposal, reflecting the agency's understanding of the relative importance each criterion in the policy decision making process by government, and an overall score can be derived by multiplying the score assigned to each measure by its weighting and summing the result. Cost criteria should be defined as 'cost' (and not 'cost minimisation'), so that an option that is more costly than the base case will receive a negative score. In the case of the simple version described above, an overall score that is positive would represent an attractive option (and if a number of proposals were being compared, the option with the highest score would represent the preferred approach under this technique).

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[28] For example, VicRoads used this approach to demonstrate that the saving of 13 lives associated with heavy vehicle fatigue-related accidents would offset the compliance costs of a regulatory proposal to limit the maximum number of hours that a heavy vehicle driver could drive. Although no research existed to estimate the likely reduction in accidents attributable to the proposal, the saving of 13 lives appeared achievable given that such a target would account for only 40 per cent of road deaths that are linked to heavy vehicle fatigue-related accidents.

[29] This is sometimes known as the 'balanced scorecard approach' (which is how it was referred to in the previous version of this *Guide*).

The weightings assigned to criteria can have a significant effect on outcomes. It is therefore desirable for neutral weights (i.e. a total of 50 per cent for cost-related criteria and 50 per cent for benefit related criteria) to be applied.

Provided below is a simple example of how multi-criteria analysis can be used to evaluate two options.

Example of the multi-criteria analysis approach

To achieve a reduction in road-related accidents, two options may be considered and evaluated based on the following simplified multi-criteria analysis, with the assignment of scores ranging from –10 for negative outcomes to +10 for positive outcomes. (Neutral outcomes would receive a score of zero.)

		Option 1		**Option 2**	
Criteria	Weighting (%)	Assigned score	Weighted score	Assigned score	Weighted score
Reduction in road-related accidents	40	+10	+4	+5	+2
Costs of compliance and administration	50	-5	-2.5	-3	-1.5
Better outcome for low income earners	10	0	0	-10	- 1
Total	**100**		**+1.5**		**-0.5**

The assigned scores indicate that Option 1 is considered to reduce road-related accidents by twice as much as Option 2. Meanwhile, the compliance and administrative costs of Option 1 are higher than for Option 2. Option 1 has no expected impact on low income earners.

In this example, Option 1 is the preferred approach because it yields a positive score (of +1.5). Option 2, on the other hand, returns a negative result (-0.5) and would therefore be considered to be an undesirable proposal.

When presenting the results of multi-criteria analysis in BIAs and RISs, it is important to provide some commentary to explain the approach, particularly in terms of providing justification for the choice of criteria, the weightings of the criteria, and the scores assigned to the different options for each of the criterion. A brief explanation of the role of multi-criteria analysis is also useful – particularly in RISs, where the reader may be unfamiliar with this type of analysis.

For more information, refer to:

- VCEC Guidance Note on Multi-criteria Analysis - available at: www.vcec.vic.gov.au
- Assessment of impacts (costs and benefits) – Section 3.2.4.
- Cost-benefit analysis techniques – **Appendix C**.

Step 4a – Assess the impact on small business

Because small firms typically lack economies of scale and bargaining power, they face disproportionately higher costs of complying with most forms of government regulation compared with their larger counterparts. Thus, to ensure that government regulation does not unduly impact on business productivity and growth in Victoria, particular emphasis needs to be given to how proposed measures will affect small businesses.

BIAs are required to include specific consideration of the impact of new legislative proposals on small business. While there is no mandatory requirement for RISs to include a specific assessment of the impact of the proposed statutory rule or legislative instrument on small business, it is highly desirable and good practice to include such a consideration.

A major source of the compliance burden of regulation on small businesses is the continuing need to adapt to changing regulatory requirements, and the cumulative impact of regulation. Thus, this section of the BIA or RIS must highlight what recent (e.g. over the past two years) significant regulatory changes have affected the industry in question.

Consultation with Small Business Victoria (SBV) within the Department of Business and Innovation is recommended early in the process to obtain assistance with proposals that may have a significant impact on small businesses. SBV has prepared the Small Business Regulatory Impact Assessment Manual to assist policy officers to identify and assess the impact of regulation on small business. This Manual can be found at **Appendix F** of this Guide. This Manual also provides practical tips for undertaking consultations to assess small business impacts.

The assessment of the impact on small business contained in the BIA or RIS must consider matters such as the following:

- The **variation in the compliance burden** between a typical small business and a large business. In other words, consideration should be given to the extent to which the lack of economies of scale and/or resources disadvantages small businesses in complying with the proposed measure (e.g. because of the lack of dedicated legal or human resources departments that could support compliance activities). Where possible, estimates should be provided of typical compliance costs for small, medium and large entities, with details of how these estimates are derived.
- Whether any **compliance flexibility options** have been considered that will assist small businesses to meet the requirements of the proposed measure. For example, small firms may be given additional time to adjust their production processes to meet the new requirements. Also, consideration should be given to small firms having some flexibility in how the requirements are met, while still ensuring that the objectives of the proposed measure are satisfied.
- The likely **extent of compliance** by small versus large business. Over-regulation can be counterproductive, particularly with respect to small businesses. If small businesses are unable to cope with the compliance burden, they may either withdraw from the industry, or stay in the industry, but fail to comply with the regulation.
- The **distribution of benefits** arising from the proposed measure. Will small business receive disproportionately lower or higher benefits than larger organisations as a result of the measure?
- The relative impact of penalties and fines for non-compliance. Where these are not determined on a sliding scale (i.e. according to the size of the firm being prosecuted), then sizeable penalties could potentially have a dramatic effect on the viability of small business.
- Any other implementation issues – including the longer term implications of the impacts for small business. (Are they one-off or ongoing costs? Will they reduce over time?) There may be negative or unintended impacts for small business (e.g. higher taxes could result in small firms facing greater competition from illegal traders). If so, consideration may need to be given on steps to overcome these.

The nature of the consultation undertaken – i.e. the number, size, sector and locations of the businesses consulted (or membership details for representative bodies), along with the consultation approach (face-to-face, organised forum, etc) – must be documented in this section of the BIA or RIS. The issues and outcomes arising from the consultation must also be detailed.

For more information, refer to:

- Small Business Regulatory Impact Assessment Manual – **Appendix F**.

Step 5 – Undertake competition assessment[30]

As a matter of good public policy, it is a fundamental principle in Victoria that any new legislation (both primary and subordinate)[31] will not restrict competition unless it can be demonstrated that:

- the benefits of the restriction, as a whole, outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

Demonstrating that the above principles have been met is known as the 'competition test', and this assessment needs to be included as part of **Step 5** of the BIA or RIS whenever a particular legislative option may have the effect of restricting competition.

It should be noted that the competition test assessment must be also undertaken for primary legislative proposals that do not require preparation of a BIA. In such cases, the assessment must be included in the body of the Cabinet Submission supporting the legislative proposal. However, statutory rules or legislative instruments that are exempt from the RIS process under sections 8 or 9 or sections 12F or 12G of the SLA are not required to complete the competition test.

A legislative measure is likely to have an impact on competition if any of the following questions can be answered in the affirmative:

- Is the proposed measure likely to affect the market structure of the affected sector(s) – i.e. will it reduce the number of participants in the market, or increase the size of incumbent firms?
- Will it be more difficult for new firms or individuals to enter the industry after the imposition of the proposed measure?
- Will the costs/benefits associated with the proposed measure affect some firms or individuals substantially more than others (e.g. small firms, part-time participants in occupations etc)?
- Will the proposed measure restrict the ability of businesses to choose the price, quality, range or location of their products?
- Will the proposed measure lead to higher ongoing costs for new entrants that existing firms do not have to meet?
- Is the ability or incentive to innovate or develop new products or services likely to be affected by the proposed measure?

The required level of discussion about broader competition impacts in BIA or RIS will depend upon the magnitude of the impact on competition: where there is only a minor impact, a simple assessment will suffice; where there is a significant impact, then a more detailed assessment must be provided.

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[30] This replaces the *Guidelines for the Application of the Competition Test to New Legislative Proposals* that were formerly overseen by the Competition Policy Task Force (Victoria).

[31] As such, the competition test applies to Acts of Parliament, enactments, ordinances, statutory rules and Ministerial Directives.

In addition to describing the broader impacts on competition (including consideration of any 'macro' impacts that may result if Victorian industry is put at a competitive disadvantage to other jurisdictions), it is important that all legislative proposals are assessed against the three-stage competition test assessment described below.

Stage 1: Identify the restriction on competition

All proposals for legislation must be examined to identify restrictions on competition contained within any of their provisions. This includes legislation that:

- allows only one participant to supply a good or service (i.e. a monopoly);
- requires producers to sell to a single participant (i.e. a monopsony);
- limits the number of producers of goods and services to less than four (e.g. duopoly or oligopoly);
- limits the output of an industry or individual producers;
- discourages entry by new persons into an occupation or prompts exit by existing providers;
- imposes restrictions on firms entering or exiting a market (e.g. through a licensing or accreditation scheme);
- introduces 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);
- affects the ability of businesses to innovate, adopt new technology, or respond to the changing demands of consumers;
- imposes 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);
- locks consumers into particular service providers, or makes it more difficult for them to move between service providers; and/or
- imposes restrictions that reduce the range or price or service quality options that are provided in the marketplace.

A potential restriction may also be identified by considering whether there will be changes to the way a market functions as a result of the implementation of the proposed legislation. If entry to the market will be limited, made more costly or the number of firms will be reduced, then the proposed legislation contains a restriction on competition.

Further guidance is provided in Box 5.6, which summarises work undertaken by the Secretariat of the OECD's Working Party No.2 on Competition and Regulation in relation to incorporating competition assessment in the analysis of regulatory proposals.

Identifying restrictions on competition

1. **Limits the number or range of supplies** – for example, if the proposed measure:
    - grants exclusive rights for a supplier to provide a good or service;
    - establishes a licence, permit of authorisation process as a requirement of operation;
    - limits the ability of some types of suppliers to compete;
    - significantly raises the cost of entry or exit by a supplier; or
    - creates a geographic barrier to the ability of companies to supply goods or services, invest capital or supply labour.

Potential justification	Potential anti-competitive impacts
– Encourage investment – Consumer protection objectives – Instrument of regional or industry policy	– Market power created and competitive rivalry reduced – Reduced price competition – Reduced innovation and lower incentives to meet consumer demand (lower quality)

2. **Limit the ability of suppliers to compete** – for example, if the proposed measure:
   - controls or substantially influences the price at which a good or service is sold;
   - limits freedom of suppliers to advertise or market their goods or services;
   - sets standards for product quality that provide an advantage to some suppliers over others or that are above the level that many well-informed customers would choose; or
   - significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants).

Potential justification	Potential anti-competitive impacts
– Protect small producers from 'unfair' competition – Consumer protection objectives	– Can reduce the intensity and dimensions of rivalry – Higher prices for consumers – Less product variety

3. **Reduce the incentive of suppliers to compete vigorously** – for example, if the proposed measure:
   - creates a self-regulatory or co-regulatory regime;
   - requires or encourages information on company outputs, prices, sales or costs to be published;
   - exempts the activity of a particular industry or group of companies from the operation of general competition law; or
   - reduces mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers.

Potential justification	Potential anti-competitive impacts
– Ensure technical standards are appropriate and advance with technology – Improve consumer information and efficiency of markets	– May encourage cartel-like behaviour, restricting output and raising prices

Source: Based on work undertaken by OECD Working Party No.2 on Competition and Regulation, October 2006.

Stage 2: Show that the restriction is necessary to achieve the objective

If Stage 1 suggests that a proposed legislative option will restrict competition in some way, then a second stage of analysis is required to demonstrate that the objective of the proposed measure can only be achieved by restricting competition. Thus, in this stage, it is necessary to:

- articulate the objective that is to be achieved by restricting competition in the context of the proposed legislation; and
- assess all practicable means of achieving the objective, including non-legislative means, rather than by the restriction on competition.

This stage is important because it requires demonstration of a specific and unique link between a desired objective and the restriction. A vaguely asserted link, or an objective that could be achieved by means other than restricting competition (e.g. by introducing more competition, amending other legislation to remove the need to restrict competition, or altering market structures) will not be sufficient.

Stage 3: Assess whether the benefits of the restriction outweigh the costs

The final stage of the analysis is to demonstrate that the benefits to the community of the restriction to competition outweigh the costs. This will clearly draw upon the cost-benefit analysis undertaken in **Step 4** of the BIA or RIS, focusing on those costs and benefits that are linked directly to the restriction on competition (i.e. any impacts that are expected to result from any other aspects of a proposal should not be included in the competition test assessment). As with the cost-benefit analysis in **Step 4**, the results of this assessment must be presented in quantitative and monetary terms as far as is possible.

Process issues

In the Cabinet submissions that accompany primary legislative proposals, Ministers must certify that the competition test has been satisfied, and refer to the assessment of the competition test in the accompanying BIA. (In cases where BIAs are not required, the assessment of the competition test must be contained within the body of the Cabinet submission.)

For subordinate legislation requiring completion of a RIS, the Minister must issue a certificate of compliance with the competition test, as detailed in Section D.2 of **Appendix D**.

Step 6 – Identify the preferred option and describe its effect

Having undertaken the CBA (**Step 4**) and the competition assessment (**Step 5**), the next step of the BIA or RIS is to identify the preferred option to proceed with. This step will simply draw upon and summarise the analysis of the preceding steps.

In identifying the preferred option, this step must summarise:

- the reasons for the choice, referring to size and nature of the net benefit to the community. It is important to be explicit about which CBA decision criterion/criteria has/have been used to reach the decision;
- the result of the competition assessment to confirm that the preferred option does not unduly restrict competition; and
- the reasons for rejecting the other options considered.

The effects on society of the preferred option must be described in this step, which will include:

- a summary of the groups in society that will be affected, giving a brief description of these groups (e.g. in the case of industry, an indication of the number of businesses in the industry, where they are located; the proportion of small businesses, etc); and
- a broad indication of how the groups will be affected.

This step must describe how the preferred option will function in practice (e.g. in terms of achieving the specified objective). In cases where the measure includes a package of different elements, this section must describe each of the elements – not just those that are considered to impose a significant economic or social burden or have a significant effect on business and/or competition.

This section might include discussion of how consistent the proposed measure is with general Victorian Government policy, and with actions in other jurisdictions.

For RISs, the specific act being relied upon to authorise the making of a proposed statutory rule or legislative instrument must also be identified – in particular, the specific section(s) of the act permit(s) regulations or legislative instrument to be made.

This section must also clearly state whether the proposed measures are new, or replace, update or consolidate existing regulations. For sunsetting regulations, any amendments to those regulations must be clearly identified.

To ensure that the preferred option does not conflict with, or duplicate, any existing regulations or requirements (at the federal, state or local government level), this step should describe how the preferred option will interact with any existing regulation.

In the case of RISs prepared for fees and charges, this step must discuss the methodology behind the calculation of the proposed fees/charges, including the basis for cost recovery. As discussed in Section 3.2.13, general government policy is for any regulatory fees or charges to be set on a full-cost recovery basis.[32] Thus, where a RIS relates to proposed fees and charges, it is generally important to demonstrate that total costs are being recovered.

The analysis must:

- clearly explain the cost base, demonstrating that it is based on an efficient level of activity and that the costs of the organisation delivering that activity are not excessive;
- demonstrate that the cost base has been appropriately allocated between the activities being cost recovered and the other activities of the organisation;
- demonstrate that the price structure is appropriate, including that the prices, as far as practicable, reflect the incidence of regulatory costs associated with different types or groups of businesses or individuals; and
- demonstrate that the method of collecting the charge is efficient and appropriate.

Step 7 – Consider detailed implementation and enforcement issues

If they have not already been considered, this section of the BIA or RIS must consider the detailed, practical implementation and issues that will need to be addressed before the preferred option is adopted. Full details of the proposed enforcement regime must also be presented in this step. This information will support the assessment of predicted compliance outlined in the analysis of the cost and benefits of the proposal at **Step 4**.

The type of information to be provided in this step will include:

- identifying all the departments and agencies that will have a role in administering and/or enforcing the preferred option, with an indication of relevant resource requirements;
  - where local government is expected to administer and/or enforce the preferred option, the resources that be required, how these resources will be funded, and any training and assistance that will be made available;
- any actions that regulated parties will be required to take as a result of introducing the preferred option (e.g., maintaining extra information, completing forms, undertaking competency assessments, etc);

[32] Departments and agencies should refer to the Department of Treasury and Finance's Cost Recovery Guidelines.

- any transitional arrangements that may be necessary to minimise the initial impact of the preferred option in stakeholders (e.g. gradual introduction of new requirements, provision of information and other forms of assistance to the regulated parties, etc); and
- how the preferred option will be enforced, including details of the compliance strategy and (e.g. anticipated numbers of inspections, audits, investigations of complaints, etc) and proposed penalties for non-compliance;
  - where it is deemed appropriate to have flexible compliance options (e.g. for small business, arising from the analysis conducted in **Step 4a**), these should also be discussed.

Step 8 – Detail the evaluation strategy

An important feature of best practice regulation is that it is reviewed regularly to ensure that it still represents the most appropriate means of meeting the specified objectives. In order to monitor the effectiveness of the preferred regulatory option, an evaluation or review strategy is required. Such a strategy is particularly important for significant pieces of primary legislation or regulation (or legislative instruments), and it is highly desirable for the details of the evaluation/review strategy to be included in the BIA or RIS.

In terms of the ongoing evaluation of regulation, the BIA or RIS should identify:

- the baseline data and/or information that will be collected to judge the effectiveness of the measure, and how frequently this information will be collected;
- the key performance indicators (KPIs) that will be used to measure the success of the measure, and the nature of the reporting of these KPIs (e.g. through annual reports); and
- details of other measures that will be used as part of the ongoing evaluation process – for example, the arrangements for ongoing consultation with groups affected by the regulation.

The elements of the proposed evaluation strategy should be consistent with the objectives of the proposed legislative measure (**Step 2**), and with the decision criteria used to determine the preferred measure (**Step 4**).

A hypothetical example of an evaluation strategy is provided below.

Hypothetical example of an evaluation strategy

In an attempt to reduce the incidence of smoking-related deaths and diseases, legislation is introduced to require health warnings to be placed on packets of cigarettes. The evaluation of such a measure could include the following elements:

- Data and information to be collected to judge the effectiveness of the measure: changes in the incidence of smoking-related deaths and diseases (such as lung cancer, heart disease and respiratory problems) since the introduction of the legislation; surveys showing the changes in the incidence of smoking among the population (e.g. numbers of people that smoke, number of cigarettes they smoke each week); surveys indicating changing awareness of the health warning labels.
- KPIs to measure success: a target percentage reduction in reported smoking-related deaths and diseases; statistically-significant reductions in the incidence of smoking that are linked to high levels of awareness of the health warnings – these KPIs will be published each year by the health department in its Annual Report.

- Other measures: establishing a stakeholder forum (comprising representatives from government, the medical profession, cancer support groups, anti-smoking groups, and the tobacco industry), which will meet annually to discuss the effectiveness of the regulation.

In addition to the on-going evaluation, it is also desirable to undertake a comprehensive review of regulation after a specified period of time. (This is particularly important for significant primary and subordinate legislation that is not subject to sunsetting arrangements.) The BIA or RIS should indicate the timing and nature of such a review.

Key issues to consider when reviewing regulation

- Is there still a problem that requires government intervention? Have there been any relevant changes or developments since the regulation was implemented?
- Are the objectives of the regulation being met?
- Are the impacts of the regulation as expected? Are there any effects or problems that were not anticipated?
- Is the regulation currently in place still the most appropriate for of action? Does experience with the measure suggest ways that it can be improved to meet the objectives? Is a different regulatory approach now warranted?

Step 9 – Document the consultation undertaken

Where consultation has been undertaken (which is mandatory in the case the RIS process), a statement must be included, detailing who was consulted, and a summary of their views. The consultation that has been undertaken with small business must be highlighted.

It must also describe the future consultation process, outlining which stakeholders will be directly informed about the availability of the RIS, and who will be targeted in future consultation activities. The length of the consultation period after the RIS as been prepared (i.e. from the publication of the notice about the availability of the RIS to the receipt of public comments and submissions) should be indicated. It is recommended that this be at least 60 days (and must be a minimum of 28 days for RISs).

Departments/agencies must provide reasons for the direction taken in final regulations or legislative instruments that broadly address any general issues raised in submissions. This statement of reasons must be published on a government website (e.g. the VCEC's website or that of the responsible department/agency) and be made available in hard copy format.

In the case of RISs, it is good practice for departments and agencies to provide responses to individual submissions. This provides a clear demonstration that matters raised in submissions have been considered, and contributes to the transparency of the regulatory process.

For more information, refer to:

- The role of consultation in the BIA process – Section 4.2.3.
- The role of consultation in the RIS process – Section 4.3.4.

Step 10 – Include appropriate attachments

To ensure full transparency of information and key assumptions, while improving the presentation of the BIA or RIS document by avoiding cluttering it with detail, appendices may be attached.

These appendices may cover the following supplementary information:

- **Technical discussions.** This ensures the main body of the BIA or RIS document remains relatively clear and intelligible to the layperson.
- **Description of assumptions and methodology adopted in cost-benefit analysis.** Explanation of the assumptions and methodologies used in the cost-benefit analysis is critical if the findings are to be transparent and enable informed comment by the public. The calculations, modelling, analytical methods and assumptions used in measuring impacts are critical to the acceptability of a BIA or RIS.
- **Bibliography/listing of information sources.** All the main sources of data/information, including quoted research, should be listed in an appendix.

In addition, in the case of RISs, a copy of the proposed statutory rules ('regulations') or legislative instrument must form an attachment to the RIS for the purposes of public consultation, as required under section 10(1)(g) and section 12H(1)(h) of the SLA.

A copy of the proposed regulations or legislative instrument will also need to be made available to the VCEC for its independent assessment on the adequacy of the RIS.

Summary – Summarise key findings

The front of the BIA and RIS must provide a succinct overview of the analysis proposal contained in the document. It must cover the main findings the BIA and RIS processes, presenting the broad conclusions rather than discussing detailed, complex issues.
In particular, the overview must include the following key elements of the BIA and RIS:

- the objectives of the proposed measure;
- the nature of the problem being addressed;
- a summary of the main costs and benefits of the proposed measure, and which groups of society will be affected; and
- why other means of achieving the objective are not appropriate.

In the case of RISs prepared for fees and charges, the summary must also include a table comparing current fees with the proposed fees

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