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Overview

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

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

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

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

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

* when RIA is required and the factors to be taken into consideration in analysis;
* the mechanisms in place to ensure accountability and compliance with RIA processes;
* how and when decision makers engage with the RIA process;
* specific evidence of where RIA processes have improved regulation;
* whether there are examples of leading practice in RIA that might usefully guide reform consideration by individual jurisdictions.

Figure 1 Stylised schematic of the RIA process

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| Identify  **problem**  **,**  objectives and policy  context  –  establish case for government action  Identify all  **options**  –  regulatory and  non  -  regulatory  .  Can objectives be achieved  by means other than regulation  ?  Assess  **impacts**  of all options  considered  –  costs  ,  benefits and distributional  effects including appropriate quantification  **Design final proposal**  –  including development  of enforcement  ,  monitoring  /  data  -  gathering  and evaluation mechanisms  **RIS published**  –  regulatory oversight body  assessment may also be made public  **Ex post monitoring and evaluation**  of  effectiveness and efficiency  (  Do realised impacts  accord with the RIS  ?  Are revisions needed  ?  )  Definition  Analysis  Transparency  Informed  decision making  Implementation  and review  **Government policy decision**  drawing on RIA analysis  **Implementation of policy**  R  e  v  i  s  e    o  r    r  e  s  c  i  n  d    a  s    r  e  q  u  i  r  e  d  **Trigger**  –  policy issue  ,  idea  ,  challenge or crisis  **Consultation**  **with**  **stakeholders**  –  should take  place throughout  the policy  development  process from  problem  identification to  implementation  and review  **Independent assessment**  of RIS adequacy  Assessment |

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

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

Table 1 Examples of RIA practices by jurisdiction

Fully implemented Partially implemented Not implemented

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|  | *Cwlth* | *COAG* | *NSW* | *Vic* | *Qld*a | *WA* | *SA* | *Tas* | *ACT* | *NT* |
| RIA requirements apply to election commitments |  | .. |  |  |  |  |  |  |  |  |
| Exemptions granted only by head of government |  |  |  |  |  |  |  |  |  |  |
| Agencies determine need for RIS with oversight body monitoring |  |  |  |  |  |  |  |  |  |  |
| Two-stage RIS process |  |  |  |  |  |  |  |  |  |  |
| Guidance requires recommended option give greatest net benefit |  |  |  |  |  |  |  |  |  |  |
| Publish RISs — primary legislation |  |  |  |  |  |  |  |  |  |  |
| — subordinate legislation |  |  |  |  |  |  |  |  |  |  |
| Central listing of published RISs |  |  |  |  |  |  |  |  |  |  |
| Public annual compliance monitoring and reporting |  |  |  |  |  |  |  |  |  |  |
| Adequacy assessments published |  |  |  |  |  |  |  |  |  |  |
| Adequacy assessments include reasons or qualifications |  |  |  |  |  |  |  |  |  |  |
| Oversight body has operational independence |  |  |  |  |  |  |  |  |  |  |
| Ministerial explanation for exempt/non‑compliant proposals proceeding |  |  |  |  |  |  | Ministerial explanation for exempt/non compliant proposals proceeding, Commonwealth, Not implemented |  |  |  |
| PIR required for all exempt and non‑compliant proposals |  |  |  |  |  |  |  |  |  |  |
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a The creation of the Queensland Office of Best Practice Regulation within the statutory body, the Queensland Competition Authority, in July 2012, increased the operational independence of the Queensland regulatory oversight functions and introduced new transparency and accountability features for future RIA activity.

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

## Does RIA improve regulation and policy development?

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

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

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

Consistent with this view of RIA:

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

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

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

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

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

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

### A lack of commitment to RIA processes

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

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

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

#### Reliance on exclusions from RIA requirements

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

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

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

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

### Administrative burden of RIA process

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

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

* subjectiveness of the decision on the need for a RIS — agencies provided the Commission with examples of being asked to prepare RISs where they considered the impacts were not significant; in contrast, industry groups raised instances of agencies not being asked to prepare RISs when the impacts of a proposal were considered to be significant;
* inconsistent advice on the level of analysis required in a RIS and the low value added from multiple iterations with the oversight body;
* additional analysis requested by the oversight body, particularly for non-preferred options, which sometimes necessitates engagement of a consultant and incurs costs that outweigh the benefits.

### Inadequate analysis for many proposals with significant impacts

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

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

All Australian jurisdictions strongly endorse the principle that the depth of analysis undertaken on regulatory proposals be commensurate with the magnitude of the likely impacts. An assessment by the Commission of 182 recent RISs from all jurisdictions revealed that the scope and depth of analysis varied substantially between agencies and across jurisdictions. Overall, Victorian and COAG RISs tended to be more comprehensive than those of other jurisdictions. More generally, the Commission found a wide gap between leading practices on analysis required and analysis undertaken. This gap was evident in identifying the nature and magnitude of the problem, discussion of the rationale for government intervention, consideration of a range of options, the extent of impact analysis and consideration of implementation and enforcement of a regulatory proposal. In particular, there is little quantification and monetisation of impacts in many RISs — although the Commission recognises that quantification is not always feasible or cost effective, and a strong qualitative analysis can still be a valuable input into decision making (figure 2).

Figure 2 Quantification in impact analysis

Per cent of RISs that include quantification

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| Costs | Benefits |
| Figure 2 . Costs - This chart shows whether basic quantification, some quantification or extensive quantification occurred overall and for the Commonwealth, COAG, New South Wales, Victoria and other states and territories. | Figure 2 . Benefits - This chart shows whether basic quantification, some quantification or extensive quantification occurred overall and for the Commonwealth, COAG, New South Wales, Victoria and other states and territories. |
| Legend for Figure 2 . First column, Nil, or very basic, quantification. Second column, Quantification of some aspects, but with gaps. Third column, Extensive quantification for most all aspects. | |

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

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

### Lack of transparency in the implementation of RIA

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

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

Figure 3 RISs undertaken and published in the past two years

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| Figure 3 RISs undertaken and published in the past two years. This chart shows the number of RISs published and the number of RISs completed but not published for the Commonwealth, COAG, New South Wales, Victoria and other states and territories. |

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

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

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

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

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

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

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

### Agency and oversight body roles

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

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

### Targeting of RIA resources

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

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

### Two–stage RIS approach

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

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

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

### RIS content

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

* The inclusion of an explicit competition statement in RISs, as under the Victorian and Tasmanian RIA processes, regardless of whether a competition impact is evident, may facilitate implementation of the COAG *Competition Principles Agreement* in development of new regulation.
* Greater attention in RISs to implementation costs, and monitoring and compliance issues, would alleviate some stakeholder concerns (such as those of local governments implementing state regulation and states and territories implementing COAG regulatory proposals) that these issues are not adequately considered during the development of regulation. Victoria’s RIA guidance material, which notes that full compliance should not be assumed, is a useful first step in this direction.
* COAG–agreed best practice of nominating the option which generates the greatest net benefit for the community, is an important element of sound analysis, increasing the usefulness of RISs to decision makers.

### Enhanced RIA transparency

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

#### Publication of RISs

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

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

#### Ministerial explanations

There are circumstances in which it is appropriate that ministers make quick decisions unencumbered by the administrative requirements of a RIA process. However, to maintain the integrity and commitment to the RIA process more broadly, it is necessary that there be transparency surrounding such decision making, including the provision of reasons why the RIA process was not followed or an exemption was granted. Around 70 per cent of agencies and seven of the eight responding oversight bodies reported to the Commission that their RIA process would be improved if the minister were to provide reasons for proposals that are non–compliant but nevertheless proceed through to decision makers (figure 4).

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

Figure 4 Perspectives on factors which would improve RIA

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| Figure 4 Perspectives on factors which would improve RIA. This figure shows different factors that may improve RIA and the percentage of agencies and oversight bodies who agree with these factors. |

#### Transparency of adequacy assessments and compliance

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

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

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

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

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

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

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

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

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

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

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

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

A recurring point of debate is the impact that the location and governance structure of the regulatory oversight body has on the effectiveness and accountability of the RIA process. Locating the oversight body close to the centre of government is seen by some RIA stakeholders as affording the body (and the RIA process) greater authority and credibility, enhancing its ability to more easily bring concerns to the attention of government, and reducing the risk that it is ‘out of the loop’ on upcoming policy proposals. On the other hand, the Commission found (and submissions claimed) that the central location can make it difficult for the oversight body to resist government attempts to push through poorly considered regulatory proposals, to publish RIA compliance information, or to provide critical feedback on either proposed policy options or the RIA process more generally.

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

### Regulatory reviews

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

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

Table 2 Mapping of leading practices to issues raised

|  |  |
| --- | --- |
| Issue | Leading practice component |
| Lack of commitment | * Limit exemptions to genuine exceptional circumstances * Responsibility for granting exemptions to reside with head of government not with responsible minister * Election commitments subject to RIA requirements * Ministers to avoid closing off on options prior to RIS analysis being undertaken * Minister to provide reasons to Parliament for non-compliance and exemptions * Additional independence measures for oversight bodies * PIR for non-compliant proposals and exempt proposals with highly significant impacts to be undertaken through an independent process, paid for by proponent agency * Publication of evidence of RIA influence on regulatory outcomes |
| Administrative burden of RIA process | * Agencies responsible for assessing significance of proposal impacts and need for a RIS * Provide clear guidelines for exception and exemption criteria and determine eligibility as early as possible * Streamline preliminary assessment processes * Preliminary assessment processes should not be necessary for exceptions * Use of agency memorandum of understanding with oversight body on application of RIA requirements, expectations for RISs and dispute resolution * Group sunsetting regulations thematically or with overarching Act for broad based review |
| Proposals with significant impacts bypassing RIA | * All forms of regulations where there is an expectation of compliance to be subject to RIA processes * Broad threshold significance test that considers positive and negative impacts on the community or a part of the community * Presumption that RIS is required unless impacts shown to be not significant * Oversight body to monitor and periodically audit agency assessments of need for a RIS * Target review resources to regulations likely to have highly significant or uncertain impacts |
| Inadequate RIS analysis for some proposals | * Greater consideration in RISs of costs of implementation, monitoring and enforcement * Include jurisdiction impacts in COAG RISs, particularly where these vary across jurisdictions * Include a competition statement in all RISs * Provide greater guidance on identifying national market implications * Use greatest net benefit to the community to identify preferred option * RIS adequacy criteria clear in guidance material * All oversight bodies to formally assess all RISs * Non-compliant and exempt proposals to require a PIR with terms of reference approved by oversight body * Provisions for mandatory review in all primary legislation where RIS requirements are triggered |

(continued next page)

Table 2 (continued)

|  |  |
| --- | --- |
| Issue | *Leading practice component* |
| Inadequate stakeholder engagement | * Two-stage RIS process (initial consultation RIS and a final RIS) for all regulatory proposals * Agency to publish reasons where it assesses a proposal as requiring a RIS |
| Infrequent publication of RISs | * No discretionary power to not publish RISs * Oversight body to publish all final RISs in centralised location at time of regulatory announcement * Table final RISs in Parliament with legislation |
| Exemptions and non-compliance not routinely reported or explained | * Oversight body to * collect and publish agency compliance information * publish reasons for exemptions and RIS adequacy assessments * monitor and report on compliance with PIR requirements and reviews flagged in RISs * Cabinet offices to provide RIA information and all adequacy assessments to Cabinet irrespective of compliance * Audit of oversight functions by body such as the audit office |

## Leading practices in regulatory impact analysis

### Scope of regulatory impact analysis

leading practice 4.1

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

leading practice 4.2

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

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

leading practice 4.3

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

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

### Exceptions and exemptions

leading practice 5.1

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

leading practice 5.2

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

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

leading practice 5.3

For exemptions from the requirement to prepare a RIS:

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

### Regulation impact statement analysis

leading practice 6.1

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

leading practice 6.2

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

LEADING PRACTICE 6.3

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

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

LEADING PRACTICE 6.4

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

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

LEADING PRACTICE 6.5

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

LEADING PRACTICE 6.6

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

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

### Transparency

leading practice 7.1

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

leading practice 7.2

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

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

leading practice 7.3

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

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

leading practice 7.4

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

### Accountability

leading practice 8.1

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

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

leading practice 8.2

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

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

leading practice 8.3

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

### Regulatory reviews

LEADING PRACTICE 9.1

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

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

LEADING PRACTICE 9.2

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

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

LEADING PRACTICE 9.3

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

LEADING PRACTICE 9.4

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

* prioritising sunsetting regulations against agreed criteria, to identify the appropriate level of review effort and stakeholder consultation
* grouping related sunsetting regulations for thematic or package review
* where appropriate, consideration of subordinate regulation in conjunction with its overarching primary legislation.

### Integration

LEADING PRACTICE 10.1

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

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

LEADING PRACTICE 10.2

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

1. The benchmark point for comparison of RIA processes is January 2012. Changes to processes since this point in time are noted, where relevant, throughout the report. [↑](#footnote-ref-1)