# 1 Introduction

## 1.1 What is regulatory impact analysis?

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

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| Box 1.1 Types of regulation |
| * *Primary legislation* refers to Acts of Parliament. * *Subordinate legislation* comprises rules or instruments that have been made by an authority to which Parliament has delegated part of its legislative power. These include disallowable instruments such as statutory rules, ordinances, bylaws, and other subordinate legislation which is not subject to Parliamentary scrutiny. * *Quasi regulation* encompasses those rules, instruments and standards by which government influences business to comply, but which do not form part of explicit government regulation. Examples can include government endorsed industry codes of practice or standards, government issued guidance notes, industry‑government agreements and national accreditation schemes. Whether or not a particular measure is deemed to be quasi regulation depends on the nature of government involvement and whether there is a ‘reasonable’ expectation of compliance. * *Co-regulation* is a hybrid in which industry develops and administers particular codes, standards or rules, but the government provides formal legislative backing to enable the arrangements to be enforced. |
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The RIS broadly sets out the policy problem, objective and the impacts of a range of regulatory and non-regulatory options. The RIS can provide a basis for community consultation during policy development. After government decisions are taken, the RIS can enhance accountability by making the reasons for decisions transparent to the community. Chapter 6 describes the elements of a RIS in more detail.

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

Figure 1.1 Stylised schematic of the RIA process

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

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

### RIA in Australian jurisdictions

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

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| Box 1.2 Legal mandates for RIA |
| New South Wales *Subordinate Legislation Act 1989*  Victoria *Subordinate Legislation Act 1994*  Queensland *Statutory Instruments Act 1992*[[2]](#footnote-2)  *Legislative Standards Act 1992*  Tasmania *Subordinate Legislation Act 1992*  Australian Capital Territory *Legislation Act 2001* |
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The interaction of the key elements of RIA with policy development and decision making processes are represented for each Australian jurisdiction in figures 1.2 to 1.11 at the end of this chapter. The schematics show how RIA processes were implemented in practice in each of the jurisdictions, as at January 2012. Despite all ten jurisdictions having similar objectives for their RIA arrangements, there are marked differences in the practical implementation of these arrangements. These are discussed in detail in the remainder of the report, but some principal points of difference follow.

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

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

## 1.2 Recent reviews and changes to RIA processes

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

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| Box 1.3 Jurisdictional reviews and changes to RIA processes |
| Australian Government   * In 2012, the Australian Government RIA process and its administration by the Office of Best Practice Regulation (OBPR) was reviewed by Robert Milliner and David Borthwick. The review found that, although the Australian Government RIA framework was entirely consistent with OECD principles, there was ‘widespread lack of acceptance of and commitment to the RIA process by ministers and agencies’ and ‘substantial dissatisfaction by all major stakeholder groups’ (Borthwick and Milliner 2012, p. 9). The review made a number of recommendations intended to increase agency responsibility for the RIA process and clearly define the role of the OBPR. The final report from the review was released by Government in October 2012, with the Government’s final response to the report recommendations to be released after a period of consultation. * In its review of regulatory reform, the OECD (2010a) found the Australian Government RIA process to be generally strong. The review made recommendations to enhance the process, such as increasing accountability of ministers and other authorities. * The Australian Government RIA process was also revised in late 2006, following the Regulation Taskforce Report (2006), and subsequently modified further in 2010.   Victoria   * In 2011, the Victorian Competition and Efficiency Commission (VCEC) reported on priorities for reforms to the Victorian regulatory system (VCEC 2011b). With regard to RIA, VCEC recommended a move to a single impact assessment process for primary and subordinate legislation, a broadening in the scope of instruments and sectors covered, publication of all VCEC RIS assessment letters and a broadening in the range of options considered in preliminary consultation processes. * As input into the VCEC inquiry, Access Economics (2010) reviewed the effectiveness of the Victorian RIS process. Access Economics found the Victorian system performed well in relation to OECD guiding principles, but identified areas for improvement including greater emphasis on policy development throughout the RIS process, more consideration of non-regulatory options and earlier engagement with stakeholders.   New South Wales   * The Better Regulation Office (BRO) released an issues paper in September 2011 which highlighted scope to improve consistency in the New South Wales regulatory process across different types of regulation, to centralise notice for RIA consultation, to introduce a post implementation review process and to publish RIA compliance information. * The New South Wales system had previously been reviewed by the Independent Pricing and Regulatory Tribunal (IPART 2006). Recommendations of this review led to the creation of the BRO and informed the development of the *Guide to Better Regulation* (NSW DPC 2009). |
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| Box 1.3 (continued) |
| Queensland   * The Auditor-General (2011), in following up on a 2009 audit of the Queensland RIA process, reported the RIA process had been improved to incorporate better regulatory principles and to apply to a broader range of regulations. Amendments to legislation to provide appropriate support for the RIA process were recommended. * In July 2012, the Queensland Office of Best Practice Regulation was established in the Queensland Competition Authority (an independent statutory authority) to assess the adequacy of RISs and report on compliance with RIA (QCA 2012). Previously regulatory oversight was undertaken by the Department of Treasury. Key features of the revised process are noted throughout the report where relevant.   South Australia   * The *Better Regulation Handbook* (SA DPC and DTF 2011), introduced a new and more formalised process for RIA, in line with the 2007 COAG–agreed best practice principles, and for the first time, outlined RIA requirements in a public document (rather than a Cabinet Circular) (pers. comm., SA DPC, August 2012). |
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As detailed in the terms of reference to the Commission’s study, the implementation plan for the ‘regulation making and review’ reform stream in the *National Partnership Agreement to Deliver a Seamless National Economy* (SNE) also required all jurisdictions to review their RIA processes during 2010 and 2011. In particular, jurisdictions considered opportunities for enhancing existing arrangements in areas such as consideration of national market implications, publication of RISs and fostering cultural change in regulation making.

## 1.3 The Commission’s study

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

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

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

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

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

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

Figure 1.2 Commonwealth RIA and regulatory development

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| Figure 1.2 Commonwealth RIA and regulatory development. This flowchart shows the interaction of the Commonwealth’s regulatory development processes with RIA processes. |

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

Figure 1.3 COAG RIA and regulatory development

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| Figure 1.3 COAG RIA and regulatory development. This flowchart shows the interaction of COAG regulatory development processes with RIA processes. |

**OBPR** Office of Best Practice Regulation **MC** Ministerial Council

Figure 1.4 New South Wales RIA and regulatory development

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| Figure 1.4 New South Wales RIA and regulatory development. This flowchart shows the interaction of New South Wales’ Commonwealth’s regulatory development processes with RIA processes. |

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

Figure 1.5 Victoria RIA and regulatory development

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| Figure 1.5 Victoria RIA and regulatory development. This flowchart shows the interaction of the Victorian Commonwealth’s regulatory development processes with RIA processes. |

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

Figure 1.6 Queensland RIA and regulatory development

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| Figure 1.6 Queensland RIA and regulatory development. This flowchart shows the interaction of the Queensland Commonwealth’s regulatory development processes with RIA processes. |

**RPC** Regulatory Principles Checklist **PIA** Preliminary Impact Assessment **RAS** Regulatory Assessment Statement **\*** Some consultation may also be undertaken at this stage **#** From July 2012, the provision of advice on RASs and assessment of RAS adequacy is undertaken by the Queensland Office of Best Practice Regulation, rather than Queensland Treasury.

Figure 1.7 Western Australia RIA and regulatory development

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| Figure 1.7 Western Australia RIA and regulatory development. This flowchart shows the interaction of the Western Australian Commonwealth’s regulatory development processes with RIA processes. |

**RGU** Regulatory Gatekeeping Unit **PIA** Preliminary Impact Assessment **#** For proposals likely to be in a RIA ‘exception’ category, a shortened version of the PIA may be submitted to RGU.

Figure 1.8 South Australia RIA and regulatory development

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| Figure 1.8 South Australia RIA and regulatory development. This flowchart shows the interaction of the South Australian Commonwealth’s regulatory development processes with RIA processes. |

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

Figure 1.9 Tasmania RIA and regulatory development

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| Figure 1.9 Tasmania RIA and regulatory development. This flowchart shows the interaction of the Tasmanian Commonwealth’s regulatory development processes with RIA processes. |

**ERU** Economic Reform Unit **MAS** minor assessment statement

Figure 1.10 Australian Capital Territory RIA and regulatory development

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| Figure 1.10 Australian Capital Territory RIA and regulatory development. This flowchart shows the interaction of the ACT’s Commonwealth’s regulatory development processes with RIA processes. |

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

Figure 1.11 Northern Territory RIA and regulatory development

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| Figure 1.11 Northern Territory RIA and regulatory development. This flowchart shows the interaction of the Northern Territory’s Commonwealth’s regulatory development processes with RIA processes. |

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

1. Regulatory impact analysis is also referred to in some jurisdictions as regulation impact analysis, regulatory/regulation impact assessment or impact analysis/assessment. [↑](#footnote-ref-1)
2. As at 21 September 2012, Part 5 of the *Statutory Instruments Act 1992*, which prescribed specific requirements for the preparation of RISs for subordinate legislation, was repealed. [↑](#footnote-ref-2)