2 Efficiency and effectiveness of regulatory impact analysis

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

## 2.1 Introduction

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

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

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

|  |
| --- |
| Box 2.1 Efficiency, quality and effectiveness |
| Efficiency, quality and effectiveness are interrelated concepts. For the purposes of this study the Commission defines *efficiency* in terms of achieving given objectives at least cost or getting the best outcomes with given inputs. A *quality* RIA system is a system that is well designed and implemented, generating ‘good’ outcomes. Thus, a quality system is also an *effective* system in that it is successful in achieving its objectives. A broad definition of quality also encompasses an efficiency element in that an effective, but unnecessarily costly, RIA system would not be considered a quality system. On the other hand, an efficient system will not necessarily be the highest quality system because trade-offs usually need to be made between quality and cost.  For convenience, generally in this report the Commission has used the terms quality and effectiveness somewhat interchangeably and, importantly, considers that an effective and efficient RIA system is also a quality system. |
|  |
|  |

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

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

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

## 2.2 How effective are RIA processes?

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

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

### The Commission’s framework for assessing RIA performance

A starting point for benchmarking RIA processes is the identification of what might be considered to be best practices for RIA. COAG has agreed on a number of best‑practice principles for regulation making and the OECD has provided substantial guidance over many years (appendix C). For example, the OECD Council recently approved the *Recommendation of the OECD Council on Regulatory Policy and Governance* (OECD 2012a), advocating particular practices for RIA. Neither COAG nor the OECD, however, suggest a single best practice model for RIA.

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

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

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

### Influence on policy development and regulatory outcomes

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

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

|  |
| --- |
| Box 2.2 How can RIA influence policy development and regulatory outcomes? |
| **Changing the regulatory culture within departments and agencies** — by, for example, improving awareness amongst regulatory officials of key regulatory quality issues and ensuring greater emphasis in policy development processes on consultation and consideration of the costs and benefits of regulatory and non-regulatory alternatives.  **Stopping poor regulatory proposals or facilitating the removal of regulations** — by providing the evidence and analysis during the policy development process that leads to the withdrawal of a proposal for new regulation or the removal of an existing regulation, for example by:   * providing a better understanding of the nature and magnitude of the problem * causing a reconsideration of the appropriateness of the policy objective to be achieved * identifying a non-regulatory solution to a problem that generates greater net benefits for the community * demonstrating that the status quo is a better solution to the problem.   Where regulation is found to be justified, **influencing the design of the regulation** so as to increase net benefits — either by improving effectiveness, narrowing coverage, reducing stringency or otherwise reducing unnecessary compliance costs.  **Discouraging agencies from putting forward poor proposals** in the first instance — RIA can also create a disincentive for government agencies to put forward regulatory proposals that would be unlikely to withstand rigorous scrutiny:  … the mere presence of an evaluation, along with an evaluation process, may prevent agencies and others from adopting economically unsound regulations in the first place. This deterrent effect will not appear in most statistical analyses, but is nonetheless real, and indeed, could be the most important function of economic analyses. (Hahn and Tetlock 2008, p. 79) |
|  |
|  |

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

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

#### Views from the Commission’s surveys

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

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

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

#### Examples of RIA influence in Australia

With the exception of Victoria, there appears currently to be no systematic reporting of instances of proposals significantly changed as a result of RIA. The Australian Government has reported this information in the past. The Office of Regulation Review (ORR — the predecessor to the OBPR) reported that in 2004-05, the preferred option within a RIS changed in 14 per cent (10 out of the 71) of RISs which were prepared and considered by decision makers (PC 2005).

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

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

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

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

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

|  |
| --- |
| Box 2.3 Examples of the influence of RIA in Australia |
| Proposal stopped, withdrawn or removed  The Regulatory Gatekeeping Unit in Western Australia (RGU WA) reported, in its response to the Commission’s survey, that preliminary impact assessment or RIA had been effective in stopping some regulatory proposals, some at a very early stage:  For a number of proposals, the case for regulatory change fails at this early [preliminary impact] assessment stage, without resort to the more rigorous assessment required through a Regulatory Impact Statement …  In … [the 2010-11] reporting year, RIA resulted in savings to business of $43.1m with two proposals not proceeding to the decision maker  …  In 2011-12, early RIA examination of two proposals revealed costs that could be avoided if amendments were made to the original policy. Assessment of one proposal showed that there would be regulatory duplication resulting in costs to Government of approximately $150,000. This proposal was changed to address regulatory costs. A second proposal was subsequently amended following a preliminary examination under RIA, resulting in savings to consumers of almost $4 million. (Western Australian response to PC RIA Survey 2012, regulatory oversight body survey)  *Do Not Call Register (Cwlth)* — following release of the RIS and consultation, ‘the Government did not proceed with the policy to extend the register to business numbers as the regulatory cost far outweighed the benefits of the proposed regulation’ (Australian Chamber of Commerce and Industry (ACCI), sub. 2, p. 3).  *Bookmaking related registration fees (Vic)* — the Government decided not to proceed with a proposal to introduce a registration fee for ‘key employees’ of bookmakers. (Victorian Competition and Efficiency Commission (VCEC) 2011a, p. 54)  *Public Health and Wellbeing Regulations 2009 (Vic)* — after discussions with the VCEC, and the development of estimated costs as part of the RIS process, the Department of Health decided not to proceed with a proposal to extend existing daily water testing requirements (amongst other regulatory controls) for public swimming pools to private pools in multi-dwelling buildings. This was because the expected benefits were not anticipated to exceed the expected costs. The RIS estimated the incremental cost saving associated with removing this part of the proposal to be $3.1 million per annum or $25.8 million over 10 years. (Abusah and Pingiaro 2011, p. 8)  Design of regulation improved  *Graduated Licensing System for new drivers (Vic)* — VicRoads began considering the RIS … early in the process of developing the proposal. After initial discussions with the VCEC and further analysis of different options, VicRoads decided to change the proposal from requiring a Statutory Declaration with the submission of all learner log books to simply requiring the completion of a form in the log book. This decision reduced the expected costs imposed on learner drivers by $4.84 million over 10 years. (Abusah and Pingiaro 2011, p. 8)  (continued next page) |
|  |
|  |

|  |
| --- |
| Box 2.3 (continued) |
| *Petroleum Regulations (Vic)* — remade (sunsetting) regulations provide ‘greater flexibility to firms to meet their obligations by moving from a prescriptive to an outcome based regulatory framework …’ and ‘reduce the number of “consents” firms are required to obtain …’ (VCEC 2011a, p. 54)  *Second-hand Dealers and Pawnbrokers Regulations (Vic)* — while preparing to remake the sunsetting regulations, the Department of Justice considered the impacts of various elements of the existing framework. The sunsetting regulations contained a requirement for second-hand dealers and pawnbrokers with computerised record‑keeping systems to produce a daily printed and sequentially pre-numbered hard copy of all transactions. The costs of this requirement were estimated in the RIS to be around $2.1 million per annum and $17.5 million over 10 years. After discussions with Victoria Police on the costs and benefits of the existing approach, the Department decided not to require a daily print-out of transactions. (Abusah and Pingiaro 2011, p. 8)  *Taxi driver standards (WA)* — proposed legislative changes were significantly amended during the RIA process, following feedback from SBDC [Small Business Development Corporation], to reduce the cost impacts for small business (SBDC, sub. 25, p. 4)  *Proposed changes to mineral royalties (Tas)* — input from industry resulted in ‘a more equitable apportioning … of the components of the royalty payment points …’ (Tasmanian Parliamentary Standing Committee on Subordinate Legislation (SCSL), sub. 3, p. 4)  Other examples of impact on policy development  The RGU WA indicated that preliminary impact assessment is effective in flagging those proposals that have insufficient information on the problem or issue to be addressed, unaligned objectives (and therefore regulatory options) and inadequate consultation or outcomes that are unsupportive of the recommended regulatory proposal. (PC RIA Survey 2012)  The officers undertaking RIA in the Victorian transport portfolio (sub. 17, p. 3) provided two examples (development of the Owners Corporation Act and Graduated Licensing for Motorcyclists) where early integration of the RIA framework, including consultation at various stages of the process, had influenced policy development, for example by identifying and clarifying issues, and contributing to a better understanding of problems and the impact of solutions. |
|  |
|  |

#### Lessons from other studies

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

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

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

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

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

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

It is thus paramount to ‘mind the gap’ between principles and practice. Regulatory policies are often well defined on paper but putting them into effective practice is proving more elusive. Tools and processes may be defined at a strategic level, but considerable work is then needed to give them concrete substance at the practical level of policy and law making. This appears to be especially true of ex ante impact assessment. (OECD 2011, p. 19)

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

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

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

### Is RIA being undertaken when appropriate?

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

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

#### Targeting of RIA resources

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

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

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

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

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

For the majority of proposals, the completion of a basic pro forma checklist may be sufficient to make a judgment on the need for a RIS and to provide a record of the basis for the decision taken. Further information or impact analysis may only be necessary in a small proportion of cases where further evidence is required to clarify the significance of the impacts.

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

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

#### Proposals with significant impacts are bypassing RIA

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

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

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

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

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

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

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

There is also concern amongst stakeholders that RIA processes are often not effectively integrated, or integrated early enough, in the policy development process. The Commission was provided with numerous case study examples of regulations where RIA was conducted, but it commenced too late to integrate proper consultation processes or to have any real influence on policy development. Since RIA provides an assessment of regulatory and non-regulatory alternatives, it is important to integrate it at an early stage of the process — ideally as soon as it is considered that regulation may be necessary (chapter 10).

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

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

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

#### Application of RIA to reviews of regulation

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

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

In such circumstances there is an increased risk that instruments will be remade without adequate impact analysis or proper consultation with stakeholders. At the same time, some agencies noted there are many examples of regulations that are integral to the operation of a particular sector of the economy, but which must nevertheless be subjected to rigorous stakeholder consultation and agency review before being remade. There are also concerns that reviews of subordinate legislation are being conducted in an uncoordinated and inefficient manner — for example, related regulations are reviewed separately and subordinate regulation is reviewed in isolation of the relevant primary legislation, thereby constraining the improvements that can be considered.

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

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

### Quality of analysis

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

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

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

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

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

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

|  |
| --- |
| Box 2.4 Alternative approaches to assessing the quality of RISs |
| **Compliance rates** — what proportion of RISs are assessed by oversight bodies or ministers (where responsible for certification) as adequate/inadequate? The value of this approach to assessing RIS quality relies on the quality of the adequacy assessments that are made (Harrison 2009). Moreover, its use is often limited by the lack of publicly available information on compliance. The level of monitoring and public reporting of compliance with RIA requirements in Australia varies substantially across jurisdictions (chapter 3), with the Commonwealth, COAG and Victoria having by far the most systematic reporting.  **Scorecard/content analysis** — this approach is based on an objective ‘yes/no’ checklist of RIS features and analytical content. The key advantage of this approach is that it does not require a detailed knowledge of, or assessment of the appropriateness of, assumptions, methodologies, calculations, or about the accuracy of results. The main disadvantage of this approach is that a RIS can score well but still be of poor quality. Nonetheless, since the questions generally used in scorecards are quite basic, a RIS with a low score is unlikely to be of high quality.  **In-depth qualitative assessments of RISs** — usually based on individual case studies, this approach can allow judgments to be made about the actual quality and rigour of the analysis. It is, however, more subjective and requires much more time to conduct. Hence, this approach is generally only feasible for examining a small sample of RISs and is therefore not particularly well suited to studies involving multiple jurisdictions.  **Ex post review of RISs** — actual regulatory impacts and outcomes are compared with those predicted in the RIS as the basis for assessing the accuracy of the estimates and the appropriateness of assumptions and methodologies. However, a limitation with such comparisons is that there will very often be other explanations for discrepancies between ex ante and ex post measures of costs and benefits. This would include, for example, the extent to which the implemented policy has deviated from the design, as specified at the time the RIS or other policy changes adopted after the RIS was completed. Hahn (2010) also points out that as long as the reviewer is not the same as the original author of the RIS, some of the difference could be explained by different assumptions being made or the same data being interpreted differently. Even where the original analyst conducts the ex post review their views and judgments regarding the same evidence may evolve over time. |
|  |
|  |

The quality of the RIS document can be assessed using a variety of indicators and analytical approaches (box 2.4). A small number of Australian studies and a more significant number of overseas studies have assessed RIA quality using mainly scorecard analysis, to a lesser extent qualitative assessments and in a few cases ex post reviews. Overall, the findings have been disappointing, with most studies revealing significant deficiencies in the quality of analysis in RIA documents and, in many, little evidence of improvement over time. A summary of the key findings of a selection of these studies is provided in appendix E.

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

#### Is RIS analysis proportionate?

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

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

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

### Capacities to undertake RIA

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

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

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

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

### Transparency and community understanding of regulatory issues

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

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

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

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

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

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

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

### Effectiveness of RIA process oversight

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

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

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

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

In addition, performance information provided in VCEC and OBPR annual reporting (see, for example, VCEC 2011a and OBPR 2011a) suggests a high level of satisfaction with the training and advice provided by these oversight bodies. Both these bodies regularly survey agencies undertaking training or preparing RISs to obtain feedback on perceptions on the quality of the service the oversight body provides, a practice others might consider adopting.

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

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

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

* Agencies in several jurisdictions suggested that on occasions oversight bodies had been inconsistent in their advice or that the advice and expectations with respect to the level of analysis appeared to vary depending on the particular officer an agency dealt with.
* On occasions it was felt that the costs of additional analysis (sometimes necessitating the engagement of a consultant) demanded by oversight bodies outweighed the benefits (Officers undertaking RIA in the Victorian transport portfolio, sub. 17; PC RIA Survey 2012).
* A concern raised both by agencies and business groups relates to the subjectivity involved in decisions about whether or not the RIS requirements are triggered. Agency questioning of the judgment of the oversight body typically related to being asked to prepare a RIS where they considered the impacts were not significant enough to warrant one (WA Department of Transport, sub. 12). On the other hand, industry groups raised instances of agencies not being asked to prepare RISs when the impacts of the proposal were considered to be significant (Accord Australasia, sub. 26; ACCI, sub. 2).
* The need in some instances for greater efficiency and discipline in the provision of comments on RISs, to ensure expectations are made clear earlier in the process of engaging with the agency and unnecessary iterations are avoided (Department of Climate Change and Energy Efficiency (DCCEE) 2012).
* Some stakeholders suggested that the analysis in particular RISs was deficient and should not have been cleared as adequate by the oversight body. Others went further, saying the oversight body acts as a ‘rubber stamp’ or is ‘not able to identify or challenge many of the key assumptions contained within the analysis’ (CropLife Australia, sub. 7, p. 3).

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

## 2.3 Costs of RIA

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

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

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

### Agency costs associated with preparing RISs

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

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

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

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

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

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

### Costs associated with oversight of RIA processes

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

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

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

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

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

### Other costs

Other costs of RIA can include the costs to business and other stakeholder groups that are consulted — for example, costs associated with participation in meetings, focus groups or public hearings, or devotion of resources to reviewing RISs or preparing submissions on draft RISs. To the extent that these costs are greater than consultation-related costs that would be incurred in the absence of a RIA process, they can be considered to be part of the overall costs of RIA. A number of consumer groups indicated to the Commission that the cost of consultation and data gathering can place considerable pressure on their limited resources — to the point that they cannot participate in some consultation processes (see for example, Queensland Consumers Association sub. DR28 and Consumers Federation of Australia, sub. DR34). In practice, there is very little information on costs of participating in RIA consultation, let alone estimates for incremental costs of such activity.

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

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

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

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

### Are RIA processes cost effective?

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

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

|  |
| --- |
| Box 2.5 Study of RIA cost effectiveness in Victoria |
| Abusah and Pingiaro (2011) estimated that between 2005-06 and 2009‑10, the RIA process achieved gross savings, from reduced regulatory costs, of $902 million (in current dollar terms) over the 10 year life of the regulations and that for every dollar incurred by the key parties involved in the RIA process, gross savings of between $28 and $56 were identified. The Commission notes, however, that the study makes the assumption that changes that occurred during the policy development process could be attributed to the RIA process. To the extent that any such changes might also have been made in the absence of RIA, net benefits will have been overstated. The study acknowledges a number of other important limitations of the methodology, including:   * the analysis did not consider offsetting reductions in benefits that may have resulted from the changes (for example, removing or reducing regulatory requirements) that generated the savings in the costs of regulations — although costs savings were only included where it was considered that the changes to regulatory proposals led to cost reductions that exceeded the regulatory benefits forgone * estimated cost reductions are gross savings as they did not include any offsetting increases in the costs imposed by regulations over the period — it was assumed that any increases in the regulatory burden would have also occurred in the absence of the RIA process * additional benefits likely to flow from RIA, for example, preventing low quality proposals being put forward in the first instance, are not included in the estimates.   The authors therefore appropriately caution that the overall cost effectiveness measure is only partial and the results should be taken as indicative only. |
| *Source*: Abusah and Pingiaro (2011). |
|  |
|  |

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

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

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

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

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

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

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

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

## 2.4 Conclusion

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

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

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

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

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

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

## Annex RIA practices by jurisdiction

Table 2.1 Features of RIA practices by jurisdiction**a**

|  | Examples of positive features | Examples of possible areas for improvement |
| --- | --- | --- |
| Cwlth | * RIA applies to all regulation types * Publication of RISs at time of regulatory announcement * Central RIS register with published RISs * RIS tabled with legislation * ‘Real time’ and annual compliance monitoring and reporting * Updates to guidelines reported on website * Post Implementation Reviews (PIRs) for all exempt and non-compliant proposals | * Inadequate justification for exemptions * No consultation RIS * RIS not required to recommend option with greatest net benefit to community * Published adequacy assessments do not include reasons or qualifications * No public ministerial statement of reasons for non-compliance or exemptions * No consequences for failure to do a PIR |
| COAG | * RIA applies to all regulation types * Threshold test requires consideration of positive and negative impacts on any group in the community * Publication of RISs at time of regulatory announcement * Central RIS register with published RISs * ‘Real time’ and annual compliance monitoring and reporting * Two stage RIS approach (consultation and final RIS) | * Policy announcements close off options before RIA is undertaken * Limited analysis in RISs of jurisdiction‑specific impacts and implementation costs * No public ministerial statement of reasons for non-compliance or exemptions * Published adequacy assessments do not include reasons or qualifications * No PIR required for non-compliant proposals |
| NSW | * Publication of all RISs * RIS presumed to be required for all proposals, unless demonstrated that impacts are not significant (subordinate only) * Agencies determine need for RIS with oversight body monitoring * No discretion over publication of RISs (subordinate only) | * RIA does not apply to all regulation types * No consultation RIS (primary) * No final RIS (subordinate) * No compliance reporting * No public ministerial statement of reasons for non-compliance or exemptions * Oversight body adequacy assessments not published * No PIR required for non-compliant proposals |
| Vic | * RIS presumed to be required for all proposals, unless demonstrated that impacts are not significant (subordinate only) * ‘Real time’ and annual compliance monitoring and reporting * Central RIS register with published RISs * Published evidence of RIA impacts and influence * Ministerial explanations for some exemptions and for proceeding with a proposal assessed as inadequate | * RIA does not apply to all regulation types * No consultation RIS (primary) * No final RIS (subordinate) * RISs (primary legislation) not published * No PIR required for non-compliant proposals |

(continued next page)

Table 2.1(continued)

|  |  |  |
| --- | --- | --- |
|  | Examples of positive features | Examples of possible areas for improvement |
| Vic (c’td) | * Ministerial explanations for changes to proposal post consultation * Adequacy assessments of RISs published including reasons and any qualifications * No discretion over publication of RISs (subordinate only) * Competition impact assessment explicitly required, and routinely included, in RISs * Oversight body has operational independence |  |
| Qldb | * RIA applies to all regulation types * Streamlined preliminary assessment process * No preliminary assessment necessary for exceptions * Two stage RIS approach (consultation and final RIS for primary legislation) | * No consequences for submitting inadequate RIS to decision maker * No compliance reporting * No central access point for all RISs * No final RIS (subordinate) * Final RIS (primary) not published * No public ministerial statement of reasons for non-compliance or exemptions * Oversight body adequacy assessments not published * No PIR required for proposals with an inadequate RIS |
| WA | * Scope to use other suitable reviews in place of consultation RIS * Most adequacy assessments published * Two stage RIS approach (consultation & final RIS) | * RIA does not apply to all regulation types * Preliminary assessment process overly burdensome for both agencies and oversight body * No compliance reporting * Published adequacy assessments do not systematically include reasons or qualifications * No public ministerial statement of reasons for non-compliance or exemptions * No PIR required for non-compliant proposal |
| SA | * RIA applies to all regulation types * Explicit guidelines on considering national market implications in RISs * Agencies determine need for RIS with oversight body monitoring * Adequacy assessment process draws on expertise of multiple agencies * Publication of RISs at time of regulatory announcement * Central RIS register with published RISs * No discretion over publication of RISs | * Guidelines do not appear to relate to non-Cabinet proposals * No compliance reporting * No consultation RIS * No public ministerial statement of reasons for non-compliance or exemptions * Oversight body adequacy assessments not published * PIR not required for most exempt or non-compliant proposals |

(continued next page)

Table 2.1(continued)

|  |  |  |
| --- | --- | --- |
|  | *Examples of positive features* | *Examples of possible areas for improvement* |
| Tas | * Competition impact assessment explicitly required, and routinely included, in RISs * No discretion over publication of RISs | * RIA does not apply to all regulation types * Consultation RIS prepared comparatively late in policy development process and focuses on justifying regulation to Parliament * No final RIS * Excessive documentation required for proposals with insignificant impacts * No central access point for all RISs * No compliance reporting * No public ministerial statement of reasons for non-compliance or exemptions * Oversight body adequacy assessments not published * No PIR required for exempt and non-compliant proposals |
| ACT | * RIA applies to all regulation types * RIS tabled with legislation * No discretion over publication of RISs (subordinate) * Central RIS register with published RISs | * Implementation of RIA processes is comparatively unstructured and guidance material is dated * For primary legislation, no significance threshold to exclude proposals with insignificant impacts from RIS process * No consultation RIS (primary) * No final RIS (subordinate) * No compliance reporting * No public ministerial statement of reasons for non-compliance or exemptions * Oversight body adequacy assessments not published * No PIR required for exempt and non-compliant proposals |
| NT | * RIA and preliminary assessment apply to all regulation types * Threshold test requires consideration of positive and negative impacts on any group in the community * Adequacy assessment process draws on expertise of multiple agencies | * Guidance material does not accord with current practice and does not include information on exceptions/exemptions * No consultation RIS * No RISs are published * No compliance reporting * No public ministerial statement of reasons for non-compliance or exemptions * Oversight body adequacy assessments not published * No PIR required for exempt and non-compliant proposals |

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

1. The Office of Best Practice Regulation (OBPR), as the regulatory oversight body for both the Commonwealth and COAG, did not complete the perception based survey questions as they considered that such matters represent policy questions for government. [↑](#footnote-ref-1)
2. See for example — Australia (Carroll 2010, Carroll et al. 2008, Deighton-Smith 2007); United Kingdom (NAO 2010a, Russel and Turnpenny 2009); United States (Shapiro and Morrall 2012, Morgenstern 2011, Hahn 2010, Farrow 2000); Europe (European Parliament 2011, European Court of Auditors 2010, Renda 2010). [↑](#footnote-ref-2)
3. Proportions were calculated by the Commission based on OBPR published data (OBPR 2008a, 2009, 2010) on compliance and exemptions granted, for the more significant proposals, in each of the three years. The OBPR changed its terminology for more significant proposals, using the term ‘highly significant’ in 2007-08 and the term ‘major regulatory initiatives’ in 2008‑09 and 2009‑10, but the Commission understands that the methodology for classifying such proposals did not change. [↑](#footnote-ref-3)
4. The converse, however, does not apply — a cost effective RIA process is not necessarily an economically efficient process — as there may be other approaches that achieve the same objective but provide higher net benefits. [↑](#footnote-ref-4)