# 4 Scope of regulatory impact analysis

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

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

## 4.1 Regulation subject to RIA

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

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

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

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

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

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

### Jurisdictional approaches to regulation coverage

#### Types of regulations covered by RIA

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

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

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

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

Table 4.1 Regulatory proposals subject to RIA

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Type of regulation | Cwlth | COAG | NSW | Vic | Qld | WA | SA | Tas | ACT | NT |
| New Bills | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Amending Bills | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| New regulations | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Amending regulations | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Remaking of sunsetting regulations | ✓ | .. | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓a | ✓ | ✓ |
| Quasi regulation | ✓ | ✓ | 🗶b | 🗶c | ✓ | 🗶 | ✓ | 🗶 | ✓d | ✓ |

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

*Source*: Jurisdictional guidance material (appendix B).

The application of RIA to quasi regulation is not a feature of all jurisdictions. For example, quasi regulation is not subject to RIA in New South Wales, Victoria, Western Australia or Tasmania, whereas the Australian Government explicitly states that quasi regulation is subject to RIA.

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

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

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

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

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

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

leading practice 4.1

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

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

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

#### Level of RIS activity

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

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

Figure 4.1 Total number of completed RISs (or equivalent)**a**

2010 and 2011b

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| Figure 4.1 Total number of completed RISs (or equivalent). This chart shows the total number of RISs completed for the Commonwealth, COAG and all states and territories. |

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

*Data source*: PC information request (March 2012).

Table 4.2 Jurisdictional regulatory and RIS activity**a**

2010 and 2011 calendar years

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

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

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

## 4.2 Trigger for RIS requirements

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

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

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

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

#### The level or magnitude of impacts

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

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

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

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

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

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

#### Who or what is impacted?

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

Table 4.3 Threshold test to determine if a RIS is required

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

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

*Source*: Jurisdictional guidance material (appendix B).

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

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

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

### Jurisdiction approaches to the significance test

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

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

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

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| Box 4.1 What is meant by ‘significance of impacts’? |
| Significance has two aspects, breadth and depth:   * Breadth — A regulatory proposal may be considered to impose significant impacts if it impacts on a wide range of activities in the economy * Depth — A regulatory proposal may be considered to impose significant impacts even if it affects only one industry (or even one part of the industry), if the impacts are profound.   Most Australian jurisdictions provide detailed guidance on determining whether impacts are likely to be significant. For example in Victoria, the types of impacts that are likely to be significant require an element of judgment, however the guidebook states:  If the legislative proposal will alter the way the activities of a business, or group of businesses are undertaken, then a significant impact may exist. Consideration should also be given to the size of the sector affected by the proposed measure, whether the proposal will impose any restrictions on entry into, or exit out of, the affected industry, and the change in regulatory burden that would result if the proposed measure were introduced.  The definition of ‘significant effects’ on business and/or competition includes situations where the legislative proposal is likely to produce one or more of the following effects:  • affect a significant number of businesses;  • have a concentrated effect on a particular group, region or industry;  • have a large aggregate impact on the Victorian economy;  • create a disincentive to private investment;  • add significantly to business costs;  • place Victorian businesses at a competitive disadvantage with interstate and overseas  competitors;  • impact disproportionately on the prospects for small businesses;  • impose restrictions on firms entering or exiting a market;  • introduce controls that reduce the number of participants in a market (e.g. because cost  imposts are large enough to result in a significant contraction in the number of  businesses);  • affect the ability of businesses to innovate, adopt new technology, or respond to the  changing demands of consumers;  • impose higher costs on a particular class of business or type of products or services (e.g.  flat rate fees impose a proportionally higher burden on small business);  • lock consumers into particular service providers, or make it more difficult for them to move  between service providers; and/or  • impose restrictions that reduce the range or price or service quality options that are  provided in the marketplace. (Victorian Department of Treasury and Finance   2011a, pp. 37‑8) |
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As in Victoria, several OECD countries also use monetary thresholds as a rule of thumb for determining significance, usually in conjunction with other criteria. A risk associated with relying on such thresholds is that the proposal proponents may have an incentive to understate impacts so that they fall below the threshold or to separate several related proposals in such a way as to avoid triggering the requirements.

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

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

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

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

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

Alternatively, jurisdictions could consider beginning with the presumption that a regulatory proposal is likely to have significant impacts and therefore requires a RIS. Such an approach has been adopted in New South Wales and Victoria for subordinate legislation and necessitates that the proposing agency demonstrate that no RIS is needed because either an exception applies (chapter 5) or impacts are not significant. This presumption allows for a better integration of the RIA process into agency culture as agencies are forced to consider the relative level of impacts of *all* regulatory proposals (chapter 10).

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| Box 4.2 Stakeholder views on a ‘significance of impacts’ tests |
| Tasmanian Parliamentary Standing Committee on Subordinate Legislation:  It is not clear what tests are applied to determine the significance of any impact, but it does seem that the assessments made are subjective. (sub. 3, p. 2)  Australian Logistics Council:  … what constitutes a ‘minor’ or ‘machinery’ amendment to regulation is a question of fact and degree. In many circumstances, what is regarded as a ‘minor’ change can have significant effect on business and flow-on effects on the supply chain. (sub. 10, p. 1)  Department of Environment and Conservation (WA):  There is insufficient guidance as to the level of impact at which higher level RIA processes (such as the requirement for a RIS) are triggered … As a result, there are concerns that any negative impact will require a RIS, rather than this being limited to significant impacts … the process would benefit from clear guidelines on the types of impacts that would trigger the requirement for a RIS (for example, indications of the proportion of impacted businesses in a given region, and the financial scale of the impact on businesses or consumers). (WA State Government, sub. 24, attachment 3, p. 2) |
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Nevertheless, moving to such an approach is not costless for agencies. If resources required to analyse a regulatory proposal were higher than that proposal’s impacts, then this would create an unnecessary regulatory burden for agencies and negate the overall net benefit of the proposal to the community. Thus, the Commission has advocated the use of a streamlined preliminary impact assessment process (see discussion below) to assess the likely impacts of regulatory proposals, to help avoid an increase in unnecessary regulatory burdens.

leading practice 4.2

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

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

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| Box 4.3 Stakeholder views on proposals introduced without RIA or assessed as having minor impacts |
| Australian Food and Grocery Council:  Menu board labelling in Quick Service Restaurant…The NSW [Food Amendment] Bill was gazetted with unseemly haste at the end of 2010 with very limited stakeholder consultation and with no formal RIA being conducted with stakeholders. Indeed, many businesses only found out about the new regulatory requirement when called to an industry consultation after the Bill was gazetted. (sub. 5, p. 9)  Australian Trucking Association:  … a RIS was not undertaken due to the apparent nature of the changes to the charging system involving only minor and machinery changes. The changes are not minor, as they will have huge impact on operators. (sub. 23, p. 9)  Accord Australasia:  Exemptions can be obtained if the matter is a minor administrative or technical matter. It has been Accord’s experience that regulatory agencies are able to successfully argue that matters are minor because of the technical nature within which the legislation is based. Accord has had to raise this issue with OBPR [Office of Best Practice Regulation] on a number of occasions to demonstrate that the changes while appearing to be minor would have had a significant detrimental effect upon industry and as such required a RIS. In some cases we have been successful as the insistence of a RIS has dampened the enthusiasm of the regulator for any such reform at that particular time. (sub. 26, p. 8) |
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### Documentary or other requirements to establish significance

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

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

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

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

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| Box 4.4 Elements of the formal PIA processes |
| **Queensland**  The PIA is an initial assessment requiring:  … a brief assessment of the potential economic (including competition), social, environmental and compliance impacts on business, community and government. These impacts should be quantified where possible. The PIA must include an estimate of compliance costs unless they are considered to be negligible or trivial. (Queensland Treasury 2010, p. 25)  The four-page pro forma for the PIA requires an outline of: the case for action; the proposal’s objective; options analysis; impact assessment of policy options; the preferred proposal; key stakeholders and consultation; and an overall assessment on whether the impacts are likely to be significant.  **Western Australia**  The PIA seeks an early assessment of the costs and other likely impacts to enable determination of a proposal’s likely impacts. The seven page template requires a short description of the proposal and responses to a series of questions on specific elements such as: consideration of small business impacts; whether the proposal relates to a COAG or other intergovernmental agreement; problem identification, objectives and options; consultation; market and competition impacts; and compliance and ‘other’ costs on business, consumers or the Government. Additionally, a PIA is required for an agency to apply for an exception from RIA (chapter 5).  **Northern Territory**  The PIA is used to establish whether the proposal is likely to impact significantly on the community, and therefore whether a full RIS is warranted. ‘[A] secondary function of the [PIA] process is for early policy consideration to take place’ (Northern Territory Department of Treasury and Finance, sub. DR30, p. 5). The PIA requires analysis of the problem, likely impacts (a one-page ‘yes/no’ competition and business compliance cost checklist), whether the proposal satisfies the ‘clear and obvious public interest’ test, and to outline the proposed consultation processes. |
| *Sources*: Queensland Treasury (2010); Western Australian Treasury (2010a, 2010b); Northern Territory Treasury (2007a). |
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Provided that the PIA process is streamlined and the minimum necessary to establish that a proposal is unlikely to have significant impacts, the PIA process can be an effective early screening mechanism. However, if the PIA process requires extensive impact assessment — then the cost of this assessment for the vast majority of proposals is likely to outweigh the benefit. The Commission understands that in some jurisdictions, most evidently in Western Australia, a substantial amount of departmental and oversight body resources are being devoted to assessing what turn out to be regulatory proposals with ‘insignificant’ impacts.

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

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

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

Table 4.4 Preliminary impact assessment by relevant jurisdiction

January 2010 to December 2011

|  |  |  |
| --- | --- | --- |
| Jurisdiction | Number of PIAs | Number of RISs |
| Queensland | 437 | 14 |
| Western Australia | 778 | 6 |
| Northern Territory | 173 | 12 |

*Source*: PC information request (March 2012).

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

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

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

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

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

Table 4.5 Australian Government preliminary assessment activity**a**

20 November 2006 to 30 June 2011

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

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

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

### Analysis required for proposals with no significant impacts

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

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

* the costs and benefits of the restriction on competition;
* the impact of the legislation on business; and
* whether the restriction(s) on competition or the impact on business is warranted in the public benefit.

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

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

## 4.3 Who assesses whether a RIS is required?

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

### Oversight body assessment

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

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

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

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

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| --- |
| Figure 4.2 Responsibility and steps for assessing whether a RIS is required. This flowchart compares the assessment processes across the jurisdictions of the Commonwealth, COAG and all states and territories. |

aFrom late 2012, responsibility for assessing whether a RIS is required is to move from agencies to the Queensland Office of Best Practice Regulation.

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

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

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

### Agency or ministerial assessment

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

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

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

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

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

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

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

### The merits of alternative assessment approaches

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

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

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

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

* reducing any documentary and analytical requirements to the minimum necessary through the use (for most proposals) of a pro forma or checklist-based preliminary assessment system
* agencies undertaking and publishing annual regulatory plans to highlight forthcoming regulatory proposals (chapter 7)
* where impacts can be assessed as prima facie significant, the RIS process should immediately commence
* where impacts are assessed as not significant, the decision with accompanying reasons should be made public with a periodic audit of decisions to not undertake a RIS.

leading practice 4.3

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

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

1. For the Commonwealth, this is consistent with an estimate for 2007-08 that around 2 per cent of regulatory proposals tabled required a RIS (OBPR 2008a, p. 15). [↑](#footnote-ref-1)