5 Exceptions and exemptions

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| Key points |
| * All jurisdictions exclude certain types of regulatory proposals, or proposals in certain circumstances, either as *exceptions* from regulatory impact analysis (RIA) requirements or as *exemptions* from the requirement to prepare a regulation impact statement (RIS). * There is scope to improve the transparency of exceptions in particular jurisdictions, and/or to reduce the degree of discretion in their application. * Where exceptions clearly apply it should not be necessary to conduct any preliminary impact assessment. * In some jurisdictions excepted proposals are not being filtered out early enough in the process and as a consequence RIA resources are being used inefficiently. * Subjecting election commitments to RIA requirements enhances the integrity of the process. Where the requirement for a RIS is triggered, the impact analysis should ideally reflect the full RIS requirements, but at a minimum include analysis of the costs and benefits of implementing the announced regulatory option. * In all Australian jurisdictions, significant proposals that would otherwise trigger the requirement to prepare a RIS can, in certain circumstances, be granted an exemption*.* * Exemptions should be limited to genuinely exceptional circumstances, such as emergency situations, where a clear public interest can be demonstrated and be granted as soon as possible after the requirement for a RIS has been triggered. * Participants raised concerns about the number of exemptions being granted (particularly at the Commonwealth level); the propensity for more sensitive or highly significant proposals to be exempted; and the lack of transparency around the process. * To ensure independence of the process and improve accountability, the responsibility for granting exemptions should reside with the Prime Minister, Premier or Chief Minister and not the Minister proposing the regulation. * To discourage excessive use of exemptions, particularly where a government’s motivation may principally be to avoid the scrutiny that impact analysis provides, all exemptions granted and the justification should be made public and a post implementation review conducted. |
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## 5.1 Introduction

All jurisdictions exclude certain types of regulatory proposals, or proposals in certain circumstances, either from the requirement to conduct any RIA or from the requirement to prepare a RIS. Generally, these exclusions fall within various categories of exceptions or exemptions, but these terms are not used consistently across jurisdictions. For ease of discussion, in this chapter, the Commission will use the term ‘exceptions’ to cover those categories which exclude proposals from RIA requirements. The term ‘exemption’, on the other hand, is used here to cover exclusions or waivers from the requirement to prepare a RIS. Exemptions are typically sought on a case-by-case basis once impacts have been assessed as significant (and the requirement to prepare a RIS has been triggered). A diagrammatic representation of the process of excluding and filtering regulatory proposals is shown in figure 5.1.

Figure 5.1 A regulatory proposal’s progression through the ‘RIA filter’

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In addition to exceptions and exemptions, proposals assessed as having not significant impacts are excluded from requiring further analysis (chapter 4). Ultimately, only the small proportion of regulatory proposals which have significant impacts, do not fall into an exception category and are not granted an exemption, require a RIS.

It is generally accepted that certain exclusions, or exclusions in particular circumstances, are necessary and appropriate. However, the large number of proposals bypassing RIA, particularly those that business consider to have more significant impacts, is one of the principal complaints about RIA processes in some jurisdictions (box 5.1).

This chapter examines the various exceptions, exemptions and other agreed exclusions in jurisdictions’ RIA systems. It identifies a number of leading practices that could help ensure exclusions are justified and transparent and, in particular, that major or politically sensitive regulatory proposals are subjected to timely RIA. However, there are other explanations for significant proposals not being subjected to appropriate analysis, including a failure to prepare RISs (or RISs of an adequate standard) where required. These non-compliance issues are discussed in chapter 8.

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| Box 5.1 Exceptions and exemptions: views of stakeholders |
| The following are illustrative of the concerns raised by participants:  *Master Builders Australia*  Master Builders has a particular concern with the level of exceptions and exemptions under RIA processes. (sub. 19, p. 3)  *Small Business Development Corporation (Western Australia)*  Anecdotally, the SBDC believes there has been a substantial, and disproportionate (which is contrary to its intent), number of Treasurer’s Exemptions granted to agencies. (sub. 25, p. 10)  *The Centre for International Economics*  Presently, some important regulatory changes are escaping the review process (sub. 14, p. 7)  *Australian Chamber of Commerce and Industry*  Businesses are concerned that most of the proposed regulations that proceeded without undergoing the RIA processes often imposed the greatest cost and compliance burden on their businesses. (sub. 2, p. 2) |
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## 5.2 Exceptions to RIA

In all Australian jurisdictions, some specific types of regulatory proposals are excepted from the RIA process. Typically, these exceptions are based on either the specific subject matter of the proposal, or agreed on a case-by-case basis between the oversight body and the relevant agency. These exceptions (in some cases referred to in jurisdictional guidance material as exemptions) typically exclude the relevant regulatory proposals from any requirement to conduct formal impact analysis, not just from the requirement to prepare a RIS document. The Commission recognises that exceptions form part of a well-functioning RIA system, however improvements can be made to their transparency and applicability.

### Commonwealth and COAG exceptions

In the Commonwealth and COAG systems, regulation subject to RIA is defined broadly (chapter 4), however, certain types of proposals are deemed to be outside the scope of RIA:

* Australian Government — the definition of ‘regulation’ does not include grant programs; government procurement of specific goods or services; or government agreements, unless more general regulatory requirements are imposed on the organisations receiving funding or providing goods and/or services.
* COAG — regulation subject to RIA does not include purchasing policies or industry assistance schemes.

#### Commonwealth ‘carve outs’

The Office of Best Practice Regulation (OBPR) has reached agreements with individual agencies on a number of specific regulatory proposals for which RIA is not required. From October 2012, there has been an external guidance note setting out the criteria for the use of RIA carve outs together with a list of the existing carve outs (sub. DR35).

There are currently 49 approved ‘carve outs’ on the OBPR list. The carve out removes the need for the relevant agency to produce an assessment of a proposal’s likely impacts. Potential carve outs need to be regulatory changes that occur on a regular basis and be either minor or machinery in nature. Possible categories of carve outs include:

* routine indexation changes that use an established formula such as the Consumer Price Index
* regular changes consistently assessed as minor or machinery in nature
* routine administrative changes identified as minor or machinery and will continue to not require a RIS for future changes
* machinery changes. (Australian Government 2012c)

Either OBPR officers or relevant agencies can suggest potential regulatory proposals that would benefit from being carved out from the RIA process.

In principle, such exclusions may enhance the efficiency of RIA systems and help to ensure that efforts are targeted where they have the greatest potential to contribute to improved regulatory outcomes. However, before such arrangements are negotiated with agencies, stakeholders affected should be given an opportunity to comment on whether there would be value in subjecting the relevant regulations to RIA.

More generally, the criteria used for carve outs should be consistently applied and made public, together with an up-to-date listing of all such exclusions. The exclusions should also be reviewed periodically to ensure that they continue to be justified.

### State and territory exceptions

State and territory RIA systems (apart from the Northern Territory) identify a much wider range of specific exception categories than do the Commonwealth and COAG systems, and there is a fair degree of commonality across jurisdictions. For example, common exceptions relate to correcting drafting errors, standard fee increases, police powers and rules of court and for the implementation of national reforms (where a suitable national RIS has been prepared).

In all the states there are exceptions for both primary and subordinate legislation, while in the ACT exceptions only apply for subordinate legislation (table 5.1). In the Northern Territory, specific exceptions are limited to taxation and budgetary proposals.

In those jurisdictions with subordinate legislation Acts, general exceptions apply for machinery or transitional regulations.[[1]](#footnote-1) Some additional exceptions are set out in the specific subordinate legislation acts of particular jurisdictions (box 5.2).

Table 5.1 Exceptions to state and territory RIA

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | NSW | | Vica | | Qld | | WA | SA | Tas | | ACT | | NT |
| *RIA process* |  |  |  |  |  |  |  |  | *Pri.* | *Sub.* | *Pri.* | *Sub.* |  |
| *BRS* | *RIS* | *BIA* | *RIS* | *RAS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* |
| Taxation | 🗶 | 🗶 | 🗶 | 🗶 | ✓b | ✓b | ✓c | ✓d | ✓ | 🗶 | 🗶 | 🗶 | ✓ |
| Management of the public sector | ✓ | ✓ | 🗶 | 🗶 | ✓e | ✓e | ✓ | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 |
| Corrects drafting errors, makes consequential amendments or is of a machinery nature | ✓ | ✓a | 🗶 | ✓ | ✓ | ✓ | ✓f | ✓g | 🗶 | ✓ | 🗶 | ✓ | 🗶 |
| Standard fee increasesh | ✓ | ✓ | 🗶 | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | 🗶 | ✓ | 🗶 |
| Police powers, general criminal laws, and administration of courts | ✓ | ✓ | 🗶 | ✓ | ✓ | ✓ | ✓ | ✓i | 🗶 | ✓j | 🗶 | ✓j | 🗶 |
| Electoral rules | ✓ | ✓ | 🗶 | 🗶 | 🗶 | 🗶 | ✓ | ✓ | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 |
| Regulatory proposals previously assessed | ✓ | ✓ | 🗶 | ✓k | ✓ | ✓ | ✓ | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 |
| National reforms with a COAG RIS | ✓l | ✓l | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓ | ✓ | 🗶 | ✓ | 🗶m |
| Substantially uniform or complementary matters of another Australian jurisdiction | 🗶 | ✓ | 🗶 | 🗶n | 🗶 | ✓ | 🗶 | 🗶 | 🗶 | ✓ | 🗶 |  | 🗶 |
| Adoption of international or Australian standards  or codes of practice, where an assessment of the costs and benefits has already been made | 🗶 | ✓ | 🗶 | 🗶 | ✓ | ✓ | ✓ | 🗶 | 🗶 | ✓ | 🗶 | ✓ | 🗶 |
| Notice of the proposed regulation would render  it ineffective or provide unfair advantage/ disadvantage | 🗶 | 🗶 | 🗶 | ✓ | 🗶o | ✓ | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 | ✓ | 🗶 |

a For subordinate legislation, these are defined as an exemption from requiring a RIS rather than an exception to RIA. b Excluding the administration of taxation. c Unless the oversight body requests further RIA assessment. d Or other revenue raising policy measures which are purely budgetary in nature. e Or for the internal management of a statutory body. f Also includes minor legislative amendments. g Only for regulation which provides solely for commencement of all or part of enabling legislation and a RIS has already been completed. h In accordance with actuarially determined assessments or an accepted indexation factor such as the Consumer Price Index. i Unless the proposal impacts on third parties. j Only for rules of court. k For legislative instruments only. l This may include Ministerial Council and COAG processes or other processes undertaken on behalf of government by independent bodies such as the Independent Pricing and Regulatory Tribunal or the Productivity Commission. m A preliminary impact assessment is still required that includes, where necessary, supplementary analysis at the Northern Territory level. n An assessment of the costs and benefits needs to be undertaken as part of the scheme. o In Queensland, this is a Treasurer’s Exemption rather than a RIA exception. Therefore, both the Regulatory Principles Checklist and preliminary impact assessment must be undertaken for the proposal, prior to granting an exemption. ‘Pri.’ Primary legislation. ‘Sub.’ Subordinate legislation.

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

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| Box 5.2 Exceptions specified in subordinate legislation acts |
| **New South Wales**   * A management plan for a share management fishery or a supporting plan made under the *Fisheries Management Act 1994.* * A zoning plan for a marine park under the *Marine Parks Act 1997.* * A regulation under the *Homebush Motor Racing (Sydney 400) Act 2008.*   **Victoria**   * A proposed legislative instrument is required to undergo, or has undergone, an analytical and consultation process which, in the opinion of the responsible Minister, is equivalent to the process for a RIS.   **Queensland**   * Codes of practice made under the *Work Health and Safety Act 2011* s 274; *Electricity Safety Act 2002* s 44; *Workers’ Compensation and Rehabilitation Act 2003* s 486A.   **Tasmania**   * The body is a Government Business Enterprise (GBE) and the Department Secretary certifies that the: * proposal relates to its fees, charges, tariffs or other commercial operations * proposal does not concern its public regulatory functions, powers or administration * commercial operations of the GBE would be impeded if a RIS was required. |
| *Sources*: *Subordinate Legislation Act 1989* (NSW); *Subordinate Legislation Act 1994* (Vic); *Statutory Instruments Act 1992* (Qld); *Subordinate Legislation Act 1992* (Tas). |
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#### Determining the applicability of exceptions

In some jurisdictions, proposals covered by exceptions are not excluded from the requirement to undertake preliminary impact analysis (PIA). For example, while the Western Australian PIA template does provide for the completion of a shortened registration process when agencies are making a ‘request for an exception’, this still requires provision of information on the need for government action, objectives of the proposal, options to resolve the issue, consultation undertaken and reasons for the exception. In Queensland, however, agencies self-assess whether a regulatory proposal is covered by an exception to the Regulatory Assessment Statement (RAS) System. Where it is determined that an exception applies, the agency is only required to fill out the section of the Regulatory Principles Checklist (RPC) relating to establishing the case for government action, and the reasons that the regulatory proposal is excluded from the RAS system, rather than undertake a formal PIA (Queensland Treasury 2010).

The Commission considers the requirement to conduct PIA in relation to proposals covered by exception categories to add no real value and may reflect a lack of clarity or certainty in the definition of exceptions.

While states and territories generally have an ‘approved list’ of exceptions to RIA, in many cases the scope and application of specific exceptions is uncertain or open to interpretation. As an example, in determining whether the common exception for ‘regulatory proposals previously assessed’ applies in relation 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 (see next section).

There will always be some degree of judgment involved in determining the applicability of particular exceptions to individual proposals. A very high level of specificity or prescription is unlikely to be appropriate or feasible and inevitably some ‘grey areas’ will exist. However, there is scope for jurisdictions to provide further information and examples in guidance material so as to minimise uncertainty and ambiguity.

Greater clarity around exceptions will contribute to improved compliance with RIA requirements and also reduce the scope for agencies to abuse any discretion they have in their determinations. Where little or no guidance is provided on the types of circumstances that justify an exception, there is an increased risk of subjectivity and inconsistency in determinations. Moreover, there is not a clear and objective basis for challenging determinations.

In Victoria, at least in principle, there is a particularly high level of transparency around exceptions (termed exemptions in that jurisdiction) with certificates, including reasons for their granting by the proposing Minister or Premier, made public (discussed further in relation to exemptions, below). Whereas in Tasmania, the Tasmanian Parliamentary Standing Committee on Subordinate Legislation (TPSCSL) identified the need for additional information to be provided on the reasons for exceptions:

… it would be useful for the Committee to receive more detail when [exceptions] from the RIA process are granted by the Secretary of the Department of Treasury and Finance. … It would be beneficial to the Committee for the [exception] certificate to indicate the particular section(s) [of Part 2 of the Subordinate Legislation Act] that have been determined to apply that remove the requirement for a RIS to be provided. (TPSCSL, sub. 3, p. 3)

### Proposals that have been subjected to prior analysis

In certain cases, the RIA process may have effectively been satisfied through earlier policy development processes, but as discussed above there is often a lack of clarity in guidance material around the type of assessment that would be deemed sufficient in order for a regulatory proposal to avoid RIA. The guidance material in New South Wales provides useful additional information:

… proposals which have already been subject to a detailed assessment against the better regulation principles as part of an earlier Cabinet Minute or Executive Council Minute [may be excepted from RIA]. In such cases, this should be identified and no further demonstration of meeting the principles is required. This … is contingent on adequate and prior assessment of the specific regulatory proposal.

Regulatory proposals developed and assessed through external processes … may include Ministerial Council and COAG processes or other processes undertaken on behalf of government by independent bodies such as the Independent Pricing and Regulatory Tribunal (IPART) or the Productivity Commission. Where these processes demonstrate the elements of good quality regulatory development, which at a minimum includes detailed regulatory impact assessment and public consultation, it is not necessary to duplicate this work when seeking approval at a NSW level. However, a short description of the process undertaken and a web link to relevant supporting information should be provided. (NSW Department of Premier and Cabinet 2009, p. 10)

Other jurisdictions have permitted exclusions to the RIA process to avoid unnecessary duplication of previous impact analysis. These include exceptions covering:

* regulatory proposals previously assessed or reviewed
* national reforms for which a suitable national or COAG RIS has been prepared
* adoption of Australian or international standards, where an assessment of the costs and benefits has already been made.

#### Previous reviews

The Commission considers that where comprehensive and rigorous reviews have been conducted that have established the case for a regulatory proposal, it could be appropriate to waive the requirement to undertake any further RIA. However, judgments need to be made on a case-by-case basis and should be limited to those instances where the review and the regulatory proposal meet certain criteria, including that the:

* review is recent, say within the last two to three years (the Commission notes that Victoria uses three to five years as a rough guide (Victorian Department of Treasury and Finance 2011a)) — with older reviews, there is a risk that the analysis has become irrelevant or misleading, but to ignore or repeat earlier analysis could be costly and inefficient
* conduct of the review and the analysis in the review report are consistent with all the essential elements of the RIA framework, including with respect to adequate consultation
* review contains sufficiently detailed analysis relevant to the specific regulatory proposal
* proposal is largely consistent with the recommendations of the review.

Ideally, the review would also have been public and independent — that is, it would have been conducted at arm’s length from the agency proposing the relevant regulation.

Where previous reviews have been conducted, consideration could be given to parts of these reviews substituting for specific aspects of the RIS requirements. This would include, for example, public discussion papers or exposure drafts which address the same problem as that conducted in the RIS, and potential options for resolving it. Nevertheless, at a minimum, the RIS should summarise what was presented in the review, as well as feedback from stakeholders. If there was no, or only limited opportunity for affected parties to provide input into the review, then consultation with stakeholders would still be necessary to meet the RIS requirements.

The Commission understands that previous reviews have been accepted by the Western Australian oversight body on occasion as a substitute to the requirement to undertake a consultation RIS. The Western Australian Department of Treasury noted that ‘prior analysis is a ground for exception from full RIA examination’ (sub. DR37, p. 3). Accordingly, it reported that of the concerns expressed over the number and frequency of Treasurer’s exemptions granted in Western Australia, the majority related to proposals which had been subject to previous policy development.

#### Agreed national reforms

All states and the ACT have a specific exception for regulatory proposals that have been assessed as part of national reform (COAG) processes.

As noted above, the Northern Territory permits exceptions where ‘a sufficient level of analysis’ has been undertaken in other national reform processes. In Queensland, Western Australia, South Australia and the ACT, jurisdictional–specific impacts need to have been identified and assessed in a national RIS for the exception to apply. In addition to assessing jurisdictional impacts, Victoria and New South Wales explicitly require that the national RIS satisfy their respective state RIS requirements. Further issues in relation to the content of COAG RISs and, in particular, the extent to which they consider jurisdiction-specific impacts, are discussed further in chapter 6.

In most jurisdictions, there are examples of primary legislation containing clauses that expressly exclude the application of RIA to regulations that are subsequently made under the relevant Act. In some cases these exclusions relate to the implementation or subsequent amendment of national framework laws and have the objective of preserving uniformity and avoiding duplication of national RIA processes. A recent example of such an exclusion surrounded the introduction of the National Energy Retail Law (NERL) in the ACT (Standing Committee on Justice and Community Safety (SCJCS) 2012a).

While production of an ACT RIS was considered ‘unnecessarily duplicative’, the Commission notes that when the NERL was adopted in NSW, the adoption Act included provision for further analysis to meet NSW RIS requirements (SCJCS 2012b).

Where national reforms are adopted by individual jurisdictions, it is important that the RIS give adequate consideration to jurisdictional impacts. Individual jurisdictions would need compelling reasons for pre-emptively excluding the application of their own RIA processes to their jurisdiction adoption of such national reforms. The RIA requirements of RISs for national reforms are discussed in chapter 6.

#### Adoption of an international or Australian standard

Another common exception relates to proposals adopting international or Australian standards or codes of practice, where an assessment of the costs and benefits has already been made. For example, in Western Australia and the ACT, no national RIS is required in order to adopt an international or Australian standard or code of conduct.

Some stakeholders are of the view that RIA should generally not be required if a proposal is merely adopting an international standard. For example, the Australian Accounting Standards Board (AASB) considers that:

if … adopting an IFRS [International Financial Reporting Standard], there could be a presumption that RIA processes are not required because of the established benefits of remaining IFRS-compliant (and therefore remaining consistent with our international peers). Alternatively, if the AASB is contemplating not adopting an IFRS, there could be a presumption that a rigorous RIA process would be needed. (AASB, sub. 15, p. 2)

While the Commission has previously stated (see for example, PC 2006a) that there should be a presumption in favour of adopting international standards because they facilitate trade, promote competition and potentially provide consumers with greater choice, they will not always be the best option for adoption in Australia. Any decision to reference an Australian Standard in regulation or to align with an international standard must be based on a case-by-case assessment of whether there are net benefits to the Australian community as a whole. It is therefore appropriate that RIA be conducted before any such decisions are taken, unless suitable previous assessments have demonstrated the case for such adoption in Australia. There may additionally be merit in a memorandum of understanding between the oversight body and the proposing agency specifying the criteria that would need to be satisfied before adopting international standards (chapter 10).

### International treaties

Australia’s participation in international treaties is currently subject to the Commonwealth RIA requirements. The Australian Government Handbook states that:

At [the negotiation] stage, the RIS should focus on the nature of the problem being addressed, the objectives of the proposed treaty and a preliminary discussion of options and their respective costs, benefits and levels of risk … When endorsement is sought to sign the final text of a treaty, the RIS would need to include a more detailed analysis that assesses the likely impacts … A further RIS is not required for domestic legislative changes that are required to implement a treaty if the terms of the treaty determine the action required to implement it. However, a RIS may be required for the domestic legislation if there is any discretion about the nature of the action to be taken to implement the treaty. (Australian Government 2010a, p. 22)

Some stakeholders suggested that international treaties should not be subject to RIA requirements, or should be subject to only one RIS. For example, the Department of Infrastructure and Transport submitted that:

[t]he treaty itself does not impose any rules on any parties other than the state parties. In such a circumstance, current RIA requirements (in theory) subject both the treaty and the subsequent implementing “regulation” (e.g. legislation, regulation, quasi-regulation) to RIA requirements, creating a situation where multiple RIA processes may be required. (sub. DR36, p. 1)

In principle, the approach to treaties as outlined in the Handbook is broadly appropriate. The decision maker ought to be informed — prior to making a decision — that there is in fact a problem, and the potential avenues to resolve it. Nevertheless, it is foreseeable that in certain circumstances this would be difficult to operationalize. For example, it would be difficult to adequately describe the range of feasible options to address a problem if negotiations are yet to take place, and there is no available information as to what may be negotiated. Moreover, assessing the benefits, costs and risks of the various options prior to negotiations taking place is likely to prove unworkable. Therefore, at the negotiation stage, the RIS should be required to outline the problem, objectives and alternative options — and any information on impacts if available. Once negotiations have been finalised, the remaining RIS elements should then be completed.

### Election commitments

Some stakeholders raised particular concerns about election commitments avoiding RIA (see, for example, Centre for International Economics, sub. 14).

There appears to be a widely held misconception that RIA requirements generally do not apply to election commitments. However, an exception applies only in Western Australia ‘[w]here options for the implementation of the commitment would not benefit from a RIA style options analysis’ (WA Treasury 2010a, p. 6).

Since 2010, the Commonwealth has required a modified RIS for election commitments — ‘the RIS should focus on the commitment and the manner in which the commitment should be implemented, not on the initial regulatory decision’ (Australian Government 2010a, p. 15).

Although there is often little prospect of RIA conducted for an election commitment influencing policy outcomes in the short-term, there can be an important transparency benefit from a full disclosure in a RIS of the impacts of the announced policy relative to alternative options that may or may not have been considered. The Commission recognises that there may be a strong disincentive for agencies to show the Government’s preferred option in a bad light. However, with appropriate oversight, transparency and accountability measures in place, a requirement for a full RIS for election commitments could actually work to force agencies to release rigorous assessments and in turn to discourage ill-considered commitments being made during election campaigns or implemented thereafter.

leading practice 5.1

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

### Taxation and other commercially sensitive proposals

In Queensland, South Australia, Western Australia, Tasmania and the Northern Territory, regulatory proposals relating to budgetary matters are not subject to RIA. In the other jurisdictions the normal RIA requirements apply, including the preparation of a RIS document. The Commission notes though that Commonwealth taxation proposals have, under previous RIA arrangements, been subject to separate ‘Taxation RIS’ requirements (that focus primarily on implementation aspects and compliance costs, rather than policy alternatives).

Given taxation proposals typically have significant impacts on businesses or individuals and indirectly on consumers and other groups in the community, it is important that they are subjected to rigorous RIA. Unrestricted consultation and wide dissemination of information to stakeholders are important principles of effective policy making processes. That said, because of the sensitive nature of taxation proposals and the scope to induce speculative or avoidance behaviour, it may not always be appropriate to widely publicise draft proposals. Hence, special considerations may need to be taken into account in designing consultation processes (such as the need for confidentiality agreements with stakeholders). Similar considerations may apply more generally to financial measures or other sensitive proposals, where advance notice of intended changes can lead to responses in markets that can undermine their effectiveness and/or increase associated costs.

However, it is important that any exception processes that might allow agencies to adopt more restrictive practices are applied only in very limited circumstances to proposals that are clearly in the public interest, rather than being applied in a blanket way to broad categories of proposals.

It has also been argued that changes in rates of taxation (as opposed to more substantive policy changes) should be excluded from the requirement to undertake RIA, in the same way that standard fee increases are excepted (Borthwick and Milliner 2012). The Commission considers that generally the case for special treatment for any taxation proposals should be considered on a case-by-case basis as an exemption to RIS requirements (see below) instead of an exception to RIA.

leading practice 5.2

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

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

## 5.3 Exemptions from RIS requirements

In all jurisdictions, regulatory proposals assessed as significant that would otherwise trigger the requirement to prepare a RIS can, in exceptional circumstances, be granted an exemption. However, Tasmania and the ACT do not permit exemptions for ‘exceptional circumstances’ for primary legislation. New South Wales has no process for exemptions for either primary legislation or for amending regulations. In Western Australia, the Treasurer can grant an exemption in a range of specific circumstances (WA Department of Treasury, sub. DR37).

The Australian Government guidance material has no definition of what constitutes exceptional circumstances. In practice, exemptions have been granted for a wide range of situations — occasionally natural disasters but more commonly for what would appear to be non-time critical proposals that are politically sensitive in nature (see later discussion).

Guidance material in other jurisdictions typically limits the granting of exemptions to circumstances where an urgent response (for example to an emergency situation) is required and/or where an exemption is in the public interest.

In South Australia, for example, exemptions relate only to:

… exceptional emergency matters relating to the administration of justice or the protection of personal and public safety, where the impact of the regulatory proposal on business costs (either one-off or ongoing) is not significant. (SA DPC and DTF 2011, p. 6).

Given that the South Australian RIA system was only fully implemented in 2011, it remains to be seen how the exemption will be interpreted in practice.

The criteria for the granting of an exemption from a Regulation Assessment Statement in Queensland incorporate a broader unfair advantage/disadvantage test in addition to an emergency element whereby:

* an immediate regulatory response is required
* notice of the proposal may render the rule ineffective or unfairly advantage or disadvantage any person likely to be affected by the regulation (Queensland Treasury 2010, p. 28).

In jurisdictions with subordinate legislation Acts which embody RIA requirements — New South Wales, Victoria, Queensland, Tasmania and the ACT — the ‘public interest exemption’ is available where ‘[i]n the special circumstances of the case, the public interest requires that the regulation be made without a RIS’. In Victoria, for legislative instruments only, an additional exemption may be granted (but the instrument must expire within 12 months — see below) where it is necessary to respond to:

1. a public emergency; or
2. an urgent public health issue or an urgent public safety issue; or
3. likely or actual significant damage to the environment, resource sustainability or the economy … (*Subordinate Legislation Act 1994* (Vic), s. 12F (h))

It is appropriate that the types of circumstances that would justify an exemption are limited so as to constrain the degree of discretion in granting such exemptions. As the SBDC have stated, this would prevent exemptions being used ‘to circumvent due process when the situation does not warrant it’ (SBDC, sub. 25, p. 13).

### How is an exemption sought and granted?

As noted earlier, exemptions are typically sought on a case-by-case basis. In most jurisdictions it is a requirement that the request for an exemption be made in writing. The decision maker with responsibility for granting a RIS exemption varies across jurisdictions (table 5.2).

For subordinate legislation in New South Wales, Victoria, Tasmania and the ACT, the proposing Minister is generally responsible for granting a RIS exemption. Although in the case of public interest exemptions, the Premier is responsible for granting exemptions in Victoria and the Treasurer in Tasmania. Under the Australian Government and COAG RIA requirements, the Prime Minister is responsible for granting a RIS exemption. In Queensland and Western Australia, the Treasurer is responsible for granting all RIS exemptions.

Consistent with the need for independent oversight of RIA processes more generally and principles of good governance, the proposing Minister should not have the responsibility for determining whether their own regulatory proposal should be granted an exemption. This ensures the necessary clear separation of decision making responsibilities in such circumstances to avoid conflicts of interest as the Minister would generally have a strong vested interest in the adoption of the proposal.

Table 5.2 Responsibility for granting a RIS exemption

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | Cwlth | COAG | NSW | | Vic | | Qld | | WA | SA | Tas | | ACT | | NT |
|  | *RIS* | *RIS* |  |  |  |  |  |  |  |  | *Pri.* | *Sub.* | *Pri.* | *Sub.* |  |
| *BRS* | *RIS* | *BIA* | *RIS* | *RAS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* |
| Prime Minister | ✓ | ✓ | .. | .. | .. | .. | .. | .. | .. | .. | .. | .. | .. | .. | .. |
| Premier | .. | .. | .. | .. | ✓ | ✓a | .. | .. | .. | .. | .. | .. | .. | .. | .. |
| Treasurer | .. | .. | .. | .. | .. | .. | ✓ | ✓ | ✓ | .. | .. | ✓a | .. | .. | .. |
| Proposing Minister | .. | .. | .. | ✓b | .. | ✓ | .. | .. | .. | .. | .. | ✓ | .. | ✓ | .. |
| Cabinet Office | .. | .. | .. | .. | .. | .. | .. | .. | .. | ✓ | .. | .. | .. | .. | .. |
| Oversight Body | .. | .. | .. | .. | .. | .. | .. | .. | .. | .. | .. | .. | .. | .. | ✓ |

a Only for granting the public interest exemption for subordinate legislation. All other exemptions are granted by the proposing Minister. b Includes instances where no RIS is required based on the advice of the Attorney General or the Parliamentary Counsel. .. not applicable. ‘Pri.’ Primary legislation. ‘Sub.’ Subordinate legislation.

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

#### Timing of exemptions

The timing of applications for exemptions during the RIA process is not restricted in any jurisdiction. The guidelines in Western Australia explicitly state that the ‘treasurer’s exemption from the RIA process may be sought at any stage during policy or regulatory development’ (WA Treasury 2010, p. 2).

During discussions with stakeholders, the Commission was informed of instances in some jurisdictions where proposals had been granted exemptions after a RIS had commenced. This tended to occur because of pressure on decision makers to act on the proposal before the RIS was completed or an inability to complete the RIS in a manner that would satisfy the jurisdiction’s RIA requirements. Exemptions granted at a late stage of the RIA process discourage integration of RIA into agency culture and subvert the integrity of the RIA process.

There is scope to minimise potential abuse of exemptions by allowing applications only immediately after the requirement for a RIS has been triggered. At this stage, the responsible minister should decide between proceeding with the RIS or seeking an exemption — any genuine emergency circumstance should already be evident. If the minister decides to proceed with the RIS, there should be no further opportunity to seek an exemption and, if the proposal proceeds to decision makers with an inadequate RIS or no RIS, it should be deemed non-compliant with the RIA process, rather than being able to disguise this non-compliance with a late exemption.

#### Consequences of an exemption

A post implementation review is required within two years for regulatory proposals exempted in the Commonwealth, Queensland and Western Australia and a late RIS, within 12 months of implementation for COAG, South Australia, and New South Wales (subordinate legislation only).

There are no specific consequences following the granting of an exemption in Tasmania and the ACT or for primary legislation in Victoria. There are also no consequences in the Northern Territory if it is determined that a regulatory proposal has a ‘clear and obvious net public benefit’.

The consequences following the granting of an exemption for subordinate legislation in Victoria arguably create the strongest disincentive for such exemptions. In addition to the requirement that the exemption certificate with reasons be made public, for a Premier’s exemption to be granted, the proposed instrument must be scheduled to expire on or before 12 months after its commencement date:

If a Premier’s certificate is granted, the RIS process will still need to be commenced and completed within the lifetime of the certificate. Only in exceptional circumstances will more than one certificate be granted. Moreover, the duration of the certificate will be the shortest possible period to enable the RIS process to be undertaken (unless exceptional circumstances are involved). In practice, a six-month period is often the maximum period granted. (Victorian Department of Treasury and Finance 2011a, p. 51)

The Commission considers that consequences for exemptions should be sufficient to discourage unwarranted exemption requests and ensure some transparency of the likely impacts of regulatory proposals. One consequence should be the requirement for a post-implementation review (chapter 9).

### Information on exemptions granted

According to jurisdictional guidance material, exemptions are made public in around half of Australia’s jurisdictions (table 5.3). However, in practice the Commission has been able to locate public information on exemptions granted only in the Commonwealth and Victoria.

Table 5.3 Public information on granting exemptions

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | Cwlth | COAG | NSW | | Vic | | Qld | | WA | SA | Tas | | ACT | | NT |
|  | *RIS* | *RIS* |  |  |  |  |  |  |  |  | *Pri.* | *Sub.* | *Pri.* | *Sub.* |  |
| *BRS* | *RIS* | *BIA* | *RIS* | *RAS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* |
| Publication | ✓a | ✓a | .. | 🗶b | 🗶 | ✓c | 🗶 | 🗶 | 🗶d | 🗶 | .. | 🗶e | .. | 🗶f | 🗶 |
| Reasons are provided | 🗶 | 🗶 | .. | 🗶 | 🗶 | ✓ | 🗶 | 🗶 | 🗶 | 🗶 | .. | 🗶 | .. | 🗶 | 🗶 |

a Published in real-time online by the OBPR. b Exemption certificates are forwarded to the Legislative Review Committee, but are not made public. c The exemption is presented to both Houses of Parliament. d The Regulatory Gatekeeping Unit monitors, assesses and will report on the granting of Treasurer’s Exemptions and subsequent compliance with the post implementation review requirements, however the reports have not been made public. e Exemptions are forwarded to the Subordinate Legislation Committee, but are not made public. f A RIS exemption is presented to the Legislative Assembly, but is not made public. .. not applicable. ‘Pri.’ Primary legislation. ‘Sub.’ Subordinate legislation.

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

In Victoria, although there is some public reporting, actual practice also falls short of what is stated to be required in that jurisdiction. The guidance material states that a RIS exemption certificate must be published with accompanying reasons and presented to the Scrutiny of Acts and Regulation Committee (SARC) and to both Houses of Parliament (Victorian Department of Treasury and Finance 2011a). The Commission found references to exemptions granted in the SARC Annual Review and in statements from the Clerk of the House in relation to specific statutory rules — but in both cases no information on the reasons for exemptions were provided.

In Western Australia, guidance material notes that the oversight body will monitor, assess and report on the granting of exemptions, but none of the reports are publicly available. As noted above, the Small Business Development Corporation (SBDC) has concerns about the number of Treasurer’s exemptions it perceives are being granted in Western Australia. The SBDC has also noted the lack of transparency surrounding the granting of such exemptions:

Of course without Biannual Agency Regulatory Reports or the annual report from the RGU [Regulatory Gatekeeping Unit] being made available to the public there is no way of knowing how many Treasurer’s Exemptions have been granted since the introduction of the RIA regime. (SBDC, sub. 25, p. 10)

The recent review of the Commonwealth RIA system (Borthwick and Milliner 2012) recommended that when exemptions are granted, the proponent minister’s reasons be made public. This recommendation is under consideration by the Government (Australian Government 2012b).

#### Evidence from the Commonwealth and Victoria

In the Commonwealth, the number of exemptions granted by the Prime Minister has ranged between three and six per year in recent years, with the exception of 2010-11 (figure 5.2). In that year, the number of exemptions rose substantially with seven exemptions granted for separate taxation proposals related to the implementation of the Government’s response to the Henry Tax Review (OBPR 2011a).

Figure 5.2 Public reporting of exemptions granted in Australia**a**

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| Figure 5.2 Public reporting of exemptions granted in Australia. This chart compares the number of exemptions granted in the Commonwealth and Victoria over the period from 2007-08 to 2011-12. |

a The Australian and Victorian Governments are the only jurisdictions that have publicly reported exemptions granted.

*Data sources*: OBPR (2008, 2009, 2010, 2011a, 2012a); SARC (2008, 2009, 2010, 2011, 2012).

In Victoria, there have been up to seven Premier’s exemptions, per year, in recent years. The number of exemptions granted in 2007 and 2009 were higher, compared with other years, in both absolute terms and relative to the number of regulatory proposals requiring a RIS.

As previously noted, a common concern raised by stakeholders is that the proposals that have been granted exemptions have tended to be those with more major impacts or those that are politically sensitive (box 5.3). For example, the Australian Chamber of Commerce and Industry (ACCI) noted:

Politically sensitive regulations that have a significant impact on [the] business community are more likely not to have their RIA adequately completed. (ACCI, sub. 2, p. 1)

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| Box 5.3 Stakeholder concerns about exemptions |
| Industrial relations:  … it is concerning that a number of major pieces of legislation and regulations have not been subject to regulation impact statements in recent years, including those that affect all businesses, such as industrial relations legislation. (Business SA, sub. 18, p. 3)  National Broadband Network:  The first NBN [National Broadband Network], the FTTN [fibre to the node] version, was proposed to be essentially a commercial undertaking supplemented with a public equity contribution … [G]iven the Government proposed to contribute up to A$4.7bn it was careful to conduct its own evaluation to assure it received value for money. As well, if there were to be any concessions on regulation or in some other form, it would be worth assessing if these delivered benefits greater than any costs of such concessions ...  However, the second iteration of NBN, the FTTP [fibre to the premises] version, was not subject to even this level of evaluation – that is, an assessment of whether if offered value for money. Surely, this would be a more important evaluation than that for the FTTN version of NBN, given the 10-fold increase in potential government spending; that the Government now proposed to be the lead investor; that there may need to be a Government guarantee to get any private investment; and that a radical restructuring of the industry and associated regulation would be required. (Martin 2010, p. 30.4) |
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The limited recent public reporting on exemptions does not allow the Commission to provide any definitive breakdown of exemptions by significance. The OBPR’s reporting did, until 2009-10, identify which of the exempt proposals were more significant (they used the terms ‘highly significant’ or ‘major regulatory initiatives’). Some of these more significant proposals identified by the OBPR are listed in box 5.4.

The Commission notes that two of the exemptions were highly significant[[2]](#footnote-2) or related to ‘major regulatory initiatives’ in each year from 2007-08 to 2009-10, at which point OBPR stopped separately reporting this information. For the years where reporting by significance was not undertaken by the OBPR, and for Victoria, the Commission has also included in box 5.4 examples of regulatory proposals that the Commission judges may possibly have been highly significant.

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| Box 5.4 Examples of highly significant exempted regulatory proposals: Commonwealth and Victoria |
| **Commonwealth**   * Northern Territory National Emergency Response (2007-08) * Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 (2007‑08) * Fair Work Bill 2008 (2008-09) * Carbon Pollution Reduction Scheme Bill 2009 (2008-09) * Structural separation arrangements for Telstra (2009-10) * National Broadband Network implementation plan (2010-11) * Changes to Anti-siphoning Scheme (2010-11) * Banning home loan exit fees (2010-11) * Australia’s future tax system review — Minerals Resource Rent Tax (2010-11) * Response to Super System (Cooper) Review (2010-11) * Creation of a default superannuation product called MySuper (2011-12)   **Victoria**   * Radiation (Tanning Units Amendment) Interim Regulations 2007 * Road Safety (Drivers) (Peer Passenger Restriction) Interim Regulations 2008 * Building Amendment (Bushfire Construction) Interim Regulations 2009 * Gambling Regulation (Pre-Commitment) Interim Regulations 2010 |
| *Sources*: OBPR (2008, 2009, 2010, 2011a, 2012a); Scrutiny of Acts and Regulations Committee (2008, 2009, 2010, 2012). |
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leading practice 5.3

**For exemptions from the requirement to prepare a RIS:**

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

1. That is, in New South Wales, Victoria, Queensland, Tasmania and the ACT, where the legislation contains requirements to conduct RIA. [↑](#footnote-ref-1)
2. The Australian Government Best Practice Regulation Handbook provided the following guidance on significance. ‘In terms of the nature of proposals, a ban on popular or widespread activities would generally be regarded as highly significant. Placing conditions on activities, such as requiring licences or specific standards, would be regarded as a significant intervention. An example of low significance might be a change in the format of reporting requirements for businesses’ (Australian Government 2007, p. 23). [↑](#footnote-ref-2)