# 6 Analytical requirements and impact assessment

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| Key points |
| * Key analytical requirements for sound regulatory impact analysis (RIA) are broadly similar across Australian jurisdictions and largely conform with internationally recognised leading practice. However, what occurs in practice often falls short of those requirements and there is substantial scope for improvement. * The benefits that a RIS provides are enhanced where all feasible options (including ‘no action’) are explicitly identified and assessed and the RIS is timed to inform decision making. Ministers and decision makers should not close off options for consideration prior to RIS analysis being undertaken. * Regulatory outcomes are likely to be enhanced where the option that yields the greatest net benefit to the community — encompassing economic, environmental and social impacts (where relevant) — is recommended in RISs. * Impacts should be quantified wherever possible. Where this is not possible, a qualitative assessment should be undertaken and explicitly included in the overall assessment of net benefits. * National reform processes are more likely to work effectively when: * detail on individual jurisdictional impacts, including implementation costs, is included in RISs wherever possible, in particular where the impacts are uneven across jurisdictions. * Requiring a competition statement in all RISs, irrespective of whether the regulatory proposal is ultimately assessed as having competition impacts, should ensure such issues are considered by agencies. * While many RISs are of a high standard, quality varies substantially both within and between jurisdictions. Victorian and COAG RISs were generally more comprehensive and were considered closest to leading practice. * Common improvements necessary to reduce the gap between RIA principle and practice include: * clearer identification of the nature and magnitude of the problem; more consistent consideration of a wide range of options; greater clarity in specifying objectives; consideration of a broader range of impacts, quantified wherever possible; and greater consideration of implementation, monitoring and compliance issues. |
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This chapter examines the analytical requirements for RIA in each jurisdiction and how these are being implemented in practice.

In the terms of reference for the study, the Commission is directed to establish ‘the extent to which the benefits and costs of options are robustly analysed and quantified and included in a cost benefit or other decision-making framework.’ Additionally, the Commission has been asked to examine specific analytical requirements across the jurisdictions including the consideration of: regulatory and non-regulatory options; competition impacts; and national market implications.

In seeking to address these matters, jurisdictional performance is examined both in terms of analytical requirements as set out in guidance material, as well as the resulting RIA outputs as documented in RISs produced in each jurisdiction.

For the latter, the Commission examined 182 RISs prepared and published in 2010 and 2011 for all Australian jurisdictions to assess the extent to which key analytical features were present. This was the most comprehensive RIS analysis so far undertaken in Australia; the Commission estimates that these 182 RISs account for about two-thirds of all the RISs prepared in those years. All RISs examined were assessed as adequate by the relevant oversight body (in jurisdictions where formal assessment takes place) and covered a wide range of subject areas and types of regulation.

The results of the RIS analysis reflect a range of factors including differences in: jurisdictional RIS requirements and significance thresholds and the magnitude of the impacts of regulatory proposals examined. Many of the indicators relate to basic RIA elements which, when taken together as a group, provide a broad snapshot of the relative comprehensiveness of RISs across jurisdictions in the period examined. Further information on the Commission’s RIS analysis and qualifications to its interpretation is presented in appendix E.

## 6.1 The elements of a RIS

The seven key elements of a RIS identified in the COAG *Best Practice Regulation Guide* (COAG 2007a) are:

1. *problem* identification
2. a statement of *objectives* to be achieved
3. consideration of *options* (including both regulatory and non-regulatory solutions), one of which should be ‘no action’ to achieve the desired objectives
4. assessment of *impacts* (costs and benefits) for consumers, business, government and the community
5. a *consultation* statement
6. *conclusion* *and recommended option*
7. *implementation, monitoring and review*.

Incorporation of these elements in RIA has long been recognised as leading practice in Australia (see for example Office of Regulation Review (ORR) 1996) as well as internationally (see for example, Toornstra 2001). While guidance material in all Australian jurisdictions incorporate these elements, the nature and extent of detail provided differ substantially.

Each element — with the exception of ‘consultation’ (discussed in chapter 7) and the review component of ‘implementation, monitoring and review’ (discussed in chapter 9) — is examined in more detail below to identify key differences between jurisdictions and leading practices.

#### Proportionality principle

An element of sound analysis that is not an explicit RIS element but conditions all of them is the proportionality principle. The principle states that the depth of analysis to be undertaken on a regulatory proposal should be commensurate with the significance of that proposal’s likely impacts.

The OECD has long endorsed the proportionality principle (OECD 1995). In its recent guidelines on regulatory policy adopted in March 2012 the OECD reiterated its importance, stating that jurisdictions should: ‘Adopt *ex ante* impact assessment practices that are proportional to the significance of the regulation’ (OECD 2012a, p. 10).

The Australian Government’s best practice regulation requirements provide an example of how the proportionality principle operates in practice for Commonwealth and COAG RISs (box 6.1). An examination of jurisdictional requirements as set out in guidance material indicates that all Australian jurisdictions have embraced proportionality as central to RIA.

The extent to which the proportionality principle and the examined RIS elements are reflected in impact analysis is discussed below.

## 6.2 Problem identification and objectives

Sound problem identification is crucial in conditioning the analysis in the remainder of the RIS. As the COAG guidelines note ‘an elaborate and detailed analysis of a problem that has been wrongly conceptualised may well be worthless’ (COAG 2007a, p. 25). Moreover, the problem needs to be of a nature that government intervention is able to address. As stated by the OECD in its recent recommendations on regulatory policy:

*Ex ante* assessment policies should require the identification of a specific policy need, and the objective of the regulation such as the correction of a market failure, or the need to protect citizen’s rights that justifies the use of regulation. (OECD 2012a, p. 10)

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| Box 6.1 The proportionality principle in practice |
| The Australian Government Best Practice Regulation Handbook states that the level of analysis in a RIS has to be commensurate with the likely impact of the proposal, and that:  [I]f the proposal is likely to have significant impacts on business and the community more broadly, you will need to provide a detailed analysis of those impacts; if the impacts are likely to be less significant, then a less detailed analysis will be required. (Australian Government 2010a, p. 15)  In making judgments about the likely impact of proposals the OBPR examines:   * the nature and magnitude of the proposal (and the problem it is addressing), and * the scope (or breadth) of its impacts.   The Handbook notes:  An increase in the rate of excise on petrol would, for example, be quite broad in its impact, while a curfew on flights into a small airport would be relatively narrow in its impacts.  A complete ban on providing particular goods or services would be regarded as ‘large’ in magnitude, while an example of a less significant ’small’ intervention might be an amendment to regular reporting requirements imposed on business. (p. 15)  Based on information collected, the OBPR internally assigns each RIS to one of four categories, ‘A’ – ‘D’. Proposed regulation is assessed as having a major impact (category A or B) or less significant (but non-minor) impact (category C and D).  The vast majority of Commonwealth and COAG regulatory proposals that require a RIS fall into the second category. In 2009-10, for example, only 8 RISs were assessed as having a major impact — 5 of 122 Australian Government RISs and 3 of 34 COAG RISs. (RIS data broken down by level of significance were not included in the OBPR’s Best Practice Regulation Reports for 2010-11 and 2011-12.) |
| *Sources*: Australian Government (2010a); OBPR (2010). |
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Information on the scale or magnitude of the problem is also needed to determine what, if any, policy response is warranted. While neither essential, nor an end in itself, quantification of the problem that the regulation seeks to address, can often provide a broad indication of the scale or significance of the issue, and inform judgments about whether proposed responses are commensurate. In contrast, limited concrete information on the scale and magnitude of the problem makes estimating the likely benefits of proposed responses very difficult. This, in turn, limits direct comparison of costs and benefits — a point taken up later in the chapter.

### Jurisdictional guidance on problem identification and objectives

All Australian jurisdictions, apart from Tasmania, provide explicit guidance on problem identification, requiring the RIS to illustrate the depth of the problem, likely impacts and any risk or uncertainty that may be present, as well as clearly identifying the objectives, outcomes, goals or targets sought (table 6.1).

Table 6.1 Guidance on identification of the problem and objectives  
in RISs**a**

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| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | Cwlth | COAG | NSW | Vic | Qld | WA | SA | Tasb | ACT | NT |
| **Problem** |  |  |  |  |  |  |  |  |  |  |
| Source, nature, magnitude or extent of  the problem | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓ |
| * Scope or scale of the impacts | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | 🗶 | ✓ |
| **Objectives** |  |  |  |  |  |  |  |  |  |  |
| Clearly identify the objectives, outcomes, goals or targets sought | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| * Do not confuse ‘means’ with ‘ends’ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 |
| * Do not pre-justify a solution | ✓ | ✓ | 🗶 | 🗶 | ✓ | ✓ | ✓ | 🗶 | ✓ | 🗶 |
| * Assess broad objectives so that all relevant alternatives are considered | ✓ | ✓ | 🗶 | ✓ | 🗶 | ✓ | 🗶 | 🗶 | ✓ | ✓ |
| * Avoid making objectives too broad | ✓ | ✓ | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 | ✓ | ✓ |
| * Clear objectives are valuable for later evaluation reviews | ✓ | 🗶 | ✓ | ✓ | ✓ | 🗶 | ✓ | 🗶 | 🗶 | 🗶 |

a A ‘tick’ indicates that jurisdictional guidance material requires this be considered or taken into account when preparing the RIS. b Tasmanian guidance material assumes that all non-regulatory approaches to dealing with the problem have been exhausted prior to the preparation of the RIS, and a regulatory approach is the only solution. The objectives of the RIS are canvassed only in regulatory terms.

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

In addition, COAG, New South Wales, Queensland and Western Australia require agencies to identify any constraints (for example, budgetary) on attaining the desired objectives. South Australian guidance material states that as far as possible, multiple objectives should be avoided. That is, a RIS needs to clearly distinguish the primary problem that needs addressing from other, ancillary, objectives.

Establishing a policy problem may be relatively straightforward in some instances, however it is often more difficult to make the case that the problem requires government intervention. In-principle rationales for government intervention are well established and are included in jurisdictional guidance material. Victoria’s requirements and guidance on rationales for intervention are summarised in box 6.2.

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| Box 6.2 Guidance on rationales for government intervention — Victoria |
| The Victorian *Guide to Regulation* notes that legitimate rationales for government intervention include:   * *Addressing market failures* — common market failures are: market power, externalities, information asymmetries and public goods * *Addressing social welfare objectives* — common social welfare objectives are: redistributive goals, policing of crimes and protection of human rights * *Protective regulation* — examples include: measures to promote public health and safety, to reduce the risk of harm to vulnerable sections of the community, and to restrict the practice of certain occupations and professions. |
| *Source*: Victorian Department of Treasury and Finance (2011a). |
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Once a policy problem has been identified — and it is established that it can be addressed by the government — the stated objective of the government intervention needs to be included in the RIS. The objective must be characterised as a goal or end, rather than the means with which it will be achieved. This helps ensure that objectives are not defined in a way that unduly narrows the possible solutions. The RIS should also explicitly state any risks associated with government intervention, particularly where consequences of intervening are uncertain. Setting out clear objectives in the RIS also allows for a more thorough and accurate review of the proposal, if it becomes law. (Reviews of regulation are considered in more detail in chapter 9.)

### Observed practices on problem identification and objectives

#### Intervention rationale

The majority of RISs prepared and published by Australian jurisdictions in 2010 and 2011 contained some discussion of the rationale for intervention (figure 6.1). However, in many cases this discussion was a brief or cursory statement noting the presence of a market or government failure. In some instances the existence of ‘spillovers’, ‘externalities’, ‘information problems’ or ‘regulatory failures’ were asserted, with little or no subsequent analysis of their significance, incidence or likely impacts. Overall, just over half of RISs included a more extensive discussion of the intervention rationale.

Figure 6.1 Extent to which intervention rationale was discussed in RISs

2010 and 2011, per cent of RISs analyseda

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a A total of 182 RISs produced during 2010 and 2011 were included in the analysis. ‘Other’ comprises jurisdictions with insufficient numbers of RISs to enable meaningful analysis at a jurisdictional level — specifically: Qld, WA, SA, Tas, ACT and NT.

*Data source*: PC RIS analysis (appendix E).

Results differed across jurisdictions. Almost all Victorian RISs, over three‑quarters of COAG RISs and more than half of the Commonwealth RISs included extensive discussion of the intervention rationale. While most RISs in NSW discussed the intervention rationale, discussion was less extensive. Discussion of the intervention rationale was generally less common and less extensive in the smaller jurisdictions.

#### Quantification of problem

Similarly mixed results were evident in terms of the proportion of RISs in which the problem identification discussion included some quantification. A solely qualitative discussion of the nature and extent of the problem was present in 27 per cent of RISs; and a further 29 per cent included only the most rudimentary quantification to help identify the size of the problem (figure 6.2).

Victoria had the highest rates of quantification, with all RISs containing at least some quantification when discussing the problem being addressed. While the time period and methodology employed differed slightly, the results of the Commission’s analysis for Victoria are broadly consistent with those found in analysis by the VCEC (2012). That study found that for all Victorian RISs produced between 2007‑08 and 2011‑12, the vast majority included some form of quantification in discussing the problem being addressed.

Figure 6.2 Extent of quantification of problem in RISs

2010 and 2011, per cent of RISs analysed

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*Data source*: PC RIS analysis (appendix E).

### Stakeholder views on problem identification and objectives

Concerns about poor problem specification were evident in submissions to the study (box 6.3). A number of stakeholders stated that this was the most important element of RIA, and that when done poorly, had the greatest potential to adversely impact the other elements of RIA and hence overall RIS and regulatory quality.

Poor problem identification can also contribute to unclear or inappropriate specification of objectives in RIA and, potentially, consideration of an insufficiently wide range of options, and/or too early dismissal of non‑regulatory approaches. For example, CropLife Australia noted that:

An important element of any regulatory impact analysis process is clear identification of an issue that is sought to be resolved through a regulatory process. CropLife has observed impact analyses that rather than identifying a desired outcome, described the problem to be resolved as the lack of a regulatory measure. All options that do not include the preferred regulatory measure can therefore be dismissed as not addressing the problem being considered by the impact analysis. (CropLife Australia, sub. 7, p. 6)

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| Box 6.3 Stakeholder views on problem identification in RISs |
| *The Centre for International Economics (CIE)*  If the problem and policy mechanisms are not reasonably defined, the other steps of the RIS process tend to become somewhat unbounded and confused. The relevance of the exercise is not clear and it may seem like a benefit cost analysis looking for a problem or indeed a regulatory agency looking for a cause. (sub. 14, p. 5)  *Officers undertaking RIA in the Victorian transport portfolio*  Most weaknesses [in RIA] relate to a lack of problem statement and insufficient options analysis. A really good understanding of the problem, backed up by as much evidence as possible, is of paramount importance. (sub. 17, p. 10)  *Australian Food and Grocery Council*  [T]he AFGC [Australian Food and Grocery Council] expressed the view that the Packaging Impacts Consultation RIS (PICRIS) does not establish the case for action and ministers should examine more closely whether there is a problem and if further regulation is required and would be of benefit. The AFGC is of the view that the PICRIS does not make a clear and robust case for further government regulation in relation to packaging waste management. (sub. 5, p. 15)  *Construction Material Processors Association*  There is a paucity of detail of the problem that is being dealt with. Without clearly setting out the problem and its scope the policy responses can only be best guesses. So often the response reflects the ‘sledge hammer to crack a nut’ approach. (sub. 9, p. 18) |
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In the COAG context, the Victorian Department of Premier and Cabinet noted:

… the nature of the problem is often taken to be the need for harmonisation or to avoid regulatory fragmentation rather than the imposition of unnecessary costs on business or the community. Harmonisation should not be seen as an end in itself, rather as one of a number of options for responding to a clearly identified problem. For example … the National Marine Safety Regulator reforms greatly increase the number of vessels subject to regulation … in spite of the fact that harmonisation would only benefit the 1.6 per cent of the national fleet that is transferred interstate each year. (sub. DR32, pp. 3-4)

Despite warnings in RIA guidance material that objectives should be specified in terms of ends and not means, the Commission noted that similar problems were apparent in some RISs examined.

The Commission also surveyed the views of government agencies on the impact of formal requirements on a range of key elements including problem identification. Overall, half of respondents agreed that the formal RIA framework had resulted in a more thorough analysis of the nature of the problem, with a smaller proportion concurring that RIA has helped ensure government intervention is justified (figure 6.3).

Responses by oversight bodies to the same set of questions were, not unexpectedly, more positive, with 75 per cent agreeing that formal requirements improve analysis of the problem and 90 per cent agreeing that RIA helped ensure that government intervention was justified.

Figure 6.3 Agency views on the impact of RIA on problem identification

Per cent of respondents

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a Based on 60 agency survey responses. ‘Agree’ comprises both ‘strongly agree’ and ‘agree’. Disagree comprises both ‘strongly disagree’ and ‘disagree’.

*Data source*: PC RIA Agency Survey (2012).

These results suggest that formal RIA requirements have helped improve problem analysis in policy development. However, there remains scope for further improvement. The Commission found evidence of a clear gap between the guideline requirements for problem identification — which are sound in all jurisdictions — and the analysis provided in many RISs, which was often quite limited.

## 6.3 Consideration of options

It is important that a RIS canvasses a wide range of options to improve the likelihood that the best approach to addressing the problem will be identified. As stated by the OECD:

Ex ante assessment policies should include a consideration of alternative ways of addressing the public policy objectives, including regulatory and non regulatory alternatives to identify and select the most appropriate instrument, or mix of instruments to achieve policy goals. The no action option or baseline scenario should always be considered. *Ex ante* assessment should in most cases identify approaches likely to deliver the greatest net benefit to society, including complementary approaches such as through a combination of regulation, education and voluntary standards. (OECD 2012a, p. 10)

In all jurisdictions except Tasmania, non-regulatory options have to be considered in the RIS. Queensland is the only jurisdiction which limits the range of options to be considered to be narrower than all feasible options (table 6.2). However, in all jurisdictions it is possible for overarching legislation to narrow options which can be implemented via subordinate legislation.

Table 6.2 Guidance on ‘options’ required in the RIS

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | Cwlth | COAG | NSW | Vic | Qlda | WA | SA | Tasb | ACT | NT |
| No action | ✓c | ✓ | ✓c | ✓ | ✓ | ✓c | ✓ | ✓ | ✓ | ✓d |
| Status quo | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓c | ✓ | ✓e | ✓d | ✓d |
| Non-regulatory option | ✓ | ✓ | ✓ | ✓ | ✓d | ✓ | ✓ | ✓e | ✓d | ✓ |
| All feasible options | ✓f | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓ | ✓ | ✓ | ✓ |

a Under the *Subordinate Instruments Act 1992* (Qld), if appropriate, a brief statement of any reasonable alternative must be included. b For primary legislation it is assumed that agencies have fully considered all other possible options to achieve the desired objectives, including non-regulatory approaches. c No action is treated analogously to ‘status quo’. d Considering no action or the status quo should be implicitly examined in determining the need for regulation. e For subordinate regulation, the Secretary of the Department of Treasury and Finance assesses the RIS adequacy against these criteria, but they are not required as part of the RIS. f Unless Cabinet directs that a RIS only consider certain options.

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

In addition to canvassing all feasible options, the RIS needs to offer the decision maker genuine choice between the options. That is, if all the alternative options proposed in a RIS are infeasible (for instance, they may be unduly restrictive on market participants), the decision maker may be offered no real choice other than to select what appears to be the more ‘moderate’ option. The Standing Council on Energy and Resources (SCER) warned in its recent review of the limited merits review regime that:

… this can lead to the Goldilocks syndrome, a source of bias in assessment, whereby change options tend be developed in ways that make one ‘too hot’, one ‘too cold’ and one ‘neither too hot nor too cold’. (SCER 2012, p. 16)

In all Australian jurisdictions, ‘no action’ is a required option to be considered in a RIS for new regulations. Guidance material in all jurisdictions (except Queensland) requires the status quo to be an option for amending regulations.

The difference between adopting the ‘no action’ base case and the ‘status quo’ base case is explained by the *Victorian Guide to Regulation:*

In identifying the costs and benefits likely to arise from the viable options, the base case needs to be defined for comparison purposes (i.e. what are the potential costs and benefits compared to the situation where the proposed approach is not adopted). For new regulations and sunsetting regulations, the base case is the scenario of there being no regulation. In the case of proposals for amended regulation, the base case is the previous, non-amended regulation situation. (Victorian Department of Treasury and Finance 2011a, p. 74)

The importance of selecting the correct base case for the evaluation of options cannot be overstated. The likely benefits and costs of a regulatory proposal could be markedly different depending on whether there are already regulations or other government intervention measures in place.

The COAG guidance material states that giving decision makers genuine scope for exercising choice requires RISs to analyse the costs and benefits of a number of alternatives and ensure these alternatives are clearly distinguished, and that:

[A] ‘do nothing’ alternative should always be identified, implicitly if not explicitly. This will be the base case against which alternatives can be compared. Then costs and benefits would be incremental to what would have happened in the absence of regulatory action. (COAG 2007a, p. 23)

Stakeholders also noted the importance of consideration of a range of policy options. The Australian Chamber of Commerce and Industry (ACCI), for example, commented that:

The RIA process should include a detailed consideration of ways to address policy objectives through the most appropriate policy responses … Moreover, no action/regulation option should always be the baseline scenario. (sub. 2, p. 3)

### Curtailing options in a RIS

A RIS should assess all feasible options so as to ensure that the preferred option is the one that generates the greatest net benefit to the community. As the RIS develops, it may become apparent that particular options are infeasible. Where this occurs, it should be made transparent in the RIS to the decision maker and stakeholders. However, some jurisdictions permit options to be excluded from impact assessment.

The Australian Government and Queensland guidance material explicitly permit a reduction in the range of options that the RIS needs to consider. In Queensland, options can be curtailed when there are certain constraints, including in relation to the:

* budget available for the policy
* timeframes for implementing policy (while policy design should not be rushed, not all alternatives will be capable of implementation within available timeframes)
* extent of consistency with existing policies. (Queensland Treasury 2010, p. 59)

The Australian Government Handbook (2010a) states that:

… agencies may be given direction regarding which options to analyse in a RIS for the Cabinet or a committee of the Cabinet. (p. 15)

The practical effect of this is that options developed by Cabinet (or a sub‑committee) could be included in a RIS. (In principle, such an option, if feasible, should already be included in the RIS.) However, if an agency is constrained (by Cabinet direction) from considering all viable options, the Cabinet-preferred option may not be the one that yields the greatest net benefit to the community. Moreover, if Cabinet were to propose an infeasible option and close off on any alternatives, the ‘preferred option’ may result in increased costs to the community.

After the RIS has been completed, a decision on the preferred option is made by the decision maker (section 6.4). The Australian Government Handbook allows for the RIS to be modified after the decision, but prior to publication:

* where a draft RIS refers to commercial-in-confidence or national security information, or
* to include analysis of the option adopted where that option was not considered in the original RIS. (Australian Government 2010a, p. 20)

Permitting the modification of a RIS post-decision may result in greater transparency in communicating the government’s decision to stakeholders. However, there is a potential for ‘retrofitting’ of a RIS to take into account an option not originally considered, in order to reflect the government’s decision. The principal rationale of a RIS is to inform decision making, rather than to reflect the decision taken. Hence, including analysis for an option that was not formally considered as part of the set of feasible options in the RIS would appear to be at odds with the objectives of the RIA framework.

leading practice 6.1

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

### Observed practices on consideration of options in RISs

Based on an assessment of the consideration of options documented in RISs in Australian jurisdictions, the Commission found that:

* the number of options considered was often low
* ‘no action’ was often either not considered explicitly as a discrete option, or it was quickly dismissed
* consideration of non-regulatory alternatives was either very limited or, more commonly, absent.

Overall, two-thirds of RISs considered more than one option (excluding ‘no action’) — figure 6.4. However, in many cases these were essentially variations of the same option. Results varied by jurisdiction, with almost all Victorian RISs considering more than one option in addition to ‘no action’, although in many cases these were variations of the same option. One half of RISs in the smaller jurisdictions did not consider more than one option.

Figure 6.4 Share of RISs that included more than one option (excluding a ‘no action’ option)

2010 and 2011, per cent of RISs analysed

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*Data source*: PC RIS analysis (appendix E).

These results were broadly consistent with Ergas (2008) which examined 22 Australian Government and COAG RISs and found that around 70 per cent included consideration of more than one alternative (in addition to the status quo).

Just over two-thirds of RISs across all jurisdictions explicitly considered ‘no action’ as an option, however many of these RISs either included limited discussion of that option, or it was quickly dismissed. Non‑regulatory alternatives were considered in around half of all RISs, with just under a third of all RISs including a more extensive discussion.

The Commission’s findings on the breadth and depth of options considered are broadly consistent with findings from studies that have examined RISs in the United States, United Kingdom and the European Union (appendix E).

### Stakeholders views on consideration of options in RISs

A number of stakeholders highlighted the importance of RISs examining a wide range of regulatory and non-regulatory options.

The Australian Government Attorney‑General’s Department, for example, noted that all officers, when developing Commonwealth legislation, should adopt the following as a guiding principle: ‘Consider all implementation options — don't legislate if you don't have to.’ (sub. 4, p. 4)

Officers undertaking RIA in the Victorian transport portfolio noted that while sufficient time is allowed to consider all feasible options for reviews of major regulations:

[F]or many miscellaneous amendment bills it is not possible to consider the full scope of options because many parameters are fixed … Some RIAs are still being prepared after policy decisions and announcements have been made. While this is undesirable, it is still worthwhile undertaking a RIA as the RIA can be used to optimise the details of any scheme even if the range of options under consideration is artificially constrained. (sub. 17, pp. 8-9)

Stakeholders provided examples of regulatory proposals that they considered to have examined an insufficient range of options or that in some instances the ‘do nothing’ or non-regulatory option was misrepresented. For example, CropLife Australia noted:

CropLife has concerns that some regulatory impact analyses tend to be used by regulators to justify decisions that have already been taken by regulators and to support preferred regulatory options. This approach undermines the true purpose of regulatory impact analysis, which is to objectively identify the most efficient and effective option for achieving a regulatory or policy outcome. (sub. 7, p. 3)

In this example [Hazardous Chemicals Work Health and Safety RIS], the ‘do nothing’ option misrepresented the status quo as not being able to address the problem as described. The most efficient and effective option was not identified by the regulator seeking to impose a desired regulatory option rather than genuinely assess impacts. (sub. 7, p. 5)

Responses to the Commission’s survey of agencies were mixed on whether the formal RIA framework had contributed to consideration of a broader range of options than would otherwise have occurred. Overall, just over a third of respondents thought that it had, with the remainder disagreeing or neutral.

The results of the Commission’s analysis of RISs, as well as input from stakeholders, highlights that a gap exists between the requirement in all jurisdictions that a wide range of regulatory and non-regulatory options be considered as part of RIA and what occurs in practice.

## 6.4 Assessment of impacts

One of the central elements of RIA is the assessment of impacts expected to arise from regulatory proposals. To be comprehensive, a RIS should consider all *significant* costs and benefits that a regulatory proposal is likely to impose on the community. As stated by the OECD, the RIS should:

Adopt *ex ante* impact assessment practices that are proportional to the significance of the regulation, and include benefit cost analyses that consider the welfare impacts of regulation taking into account economic, social and environmental impacts including the distributional effects over time, identifying who is likely to benefit and who is likely to bear costs. (OECD 2012a, p. 10)

The appropriate depth of analysis in a RIS varies with the likely impacts of the proposal. Application of the proportionality principle would suggest that the level of analysis to be undertaken on a proposal is commensurate with the significance of that proposal’s expected impacts.

Consistent with OECD guidance, agencies in all Australian jurisdictions are, for at least some types of regulatory proposals, required to assess (and wherever possible, quantify):

* community, economic, social and environmental impacts
* competition impacts
* business impacts
* government, compliance and administration costs (table 6.3).

Table 6.3 Guidance on the types of impacts to be assessed in a RIS

|  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | Cwlth | COAG | NSW | | Vic | Qld | WA | SA | Tas | | ACT | NT |
|  | *RIS* | *RIS* |  |  |  |  |  |  | *Pri.* | *Sub.* |  |  |
| *BRS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* | *RIS* |
| Community, economic, social and environmental | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓ |
| Competition | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Business | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓ |
| Small business | ✓ | ✓ | ✓ | 🗶 | ✓ | 🗶 | ✓ | 🗶 | ✓ | 🗶 | ✓ | ✓ |
| Government, compliance and administration | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓ | ✓ |

‘Pri.’ Primary legislation. ‘Sub.’ Subordinate legislation.

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

### Observed practices on range of impacts considered

While the impacts on key stakeholder groups were considered in most RISs (figure 6.5), it was often the case that discussion of impacts was very brief. For example, discussion was limited to which broad groups may be impacted by the proposed regulatory change, or a very general description of potential impacts.

Figure 6.5 Consideration of impacts in RISs by type

2010 and 2011, per cent of RISs analysed

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*Data source*: PC RIS analysis (appendix E).

There was substantial variation in specific types of impacts assessed, with social impacts (broadly defined) most commonly assessed, followed by competition, national market and environmental impacts. These differences largely reflect: the types of regulatory proposals examined; the areas of the economy affected; and the ease with which various types of impacts can be identified, consulted on and/or analysed.

#### Competition impacts

The Competition Principles Agreement (COAG 1995) agreed by all Australian governments requires that legislation should not restrict competition unless it can be demonstrated that:

* the benefits of the restrictions to the community as a whole outweigh the costs, and
* the objectives of the regulation can only be achieved by restricting competition.

The OECD has stated that:

*Ex ante* assessment policies should indicate that regulation should seek to enhance, not deter, competition and consumer welfare, and that to the extent that regulations dictated by public interest benefits may affect the competitive process, authorities should explore ways to limit adverse effects and carefully evaluate them against the claimed benefits of the regulation. This includes exploring whether the objectives of the regulation cannot be achieved by other less restrictive means. (OECD 2012a, p. 10)

Restrictions on competition can enable businesses to pass on costs as higher prices to customers. Where this involves inputs into other economic activities (as with utilities and transport) these higher prices have a ripple effect on costs and productivity across the economy. Moreover, there is evidence that competition can stimulate innovation, improving dynamic efficiency and the diversity of goods and services available in an economy (PC 2008).

The competition test is an important requirement of RIA in Australia and is applied, to varying extents, as part of the assessment of new regulation in all Australian jurisdictions. The requirement to assess competition impacts as part of RIA has also been adopted internationally, with the OECD noting that:

…in the United Kingdom, assessment of competition impacts has been a mandatory part of RIA since 2002. In the European Commission, competition assessment has been part of the RIA process since 2005. In the United States, RIA guidance documents explicitly require consideration of market impacts. (OECD 2009b, p. 122)

To assist governments in identifying and assessing likely competition impacts, the OECD has provided a competition checklist. The checklist (adopted by COAG in its guidance material) should be completed wherever a proposal is likely to limit:

* the number or range of suppliers
* the ability of suppliers to compete
* the incentive of suppliers to compete
* the choices and information available to customers (OECD 2007).

All jurisdictions provide guidance on the types of impacts that can affect competition and, where a restriction exists, how it can be assessed to determine whether it is in the public interest. For instance, key examples of competition restrictions identified in Tasmania’s guidelines (Tasmanian Department of Treasury and Finance 2011) include restrictions on market entry, competitive conduct, product or service innovation, the entry of goods or services, and administrative discretion that is anti-competitive such as favouring incumbent suppliers or preferential purchasing arrangements.

While not all regulation will have an impact on competition, these impacts were discussed in only around 40 per cent of RISs examined. Some RISs included more extensive discussion, however in many cases statements on competition impacts were very brief. The Commission did not attempt to identify the number of RISs in which the associated regulatory proposal was likely to have competition impacts, but were not discussed in the RIS.

The payoff from greater attention to competition impacts in RISs is likely to be large, relative to the costs. As noted by the OECD:

[s]ignificant public benefits can be obtained from even a relatively small investment of public sector resources in competition assessment processes if it is done systematically and integrated within the regulatory policy cycle. (OECD 2009b, p. 147)

Given this, there are likely to be benefits for transparency and RIA thoroughness, from other jurisdictions following the Tasmanian and Victorian practice of requiring some form of explicit competition statement in all RISs, regardless of whether a competition impact is likely. Such a statement would provide stakeholders and decision-makers with an assurance that these issues received adequate consideration in the RIS. The public scrutiny would likely provide an added incentive for those undertaking RIA to ensure a robust competition assessment was undertaken.

Further, the Commission considers that in general, improving the overall robustness and quality of impact assessment in RISs — including assessment of both direct and indirect impacts on market participants — would contribute to better competition assessment in RIA.

leading practice 6.2

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

### Methods for assessing costs and benefits

Costs and benefits should be assessed in a systematic and objective manner so as to enable identification of the option likely to be of the greatest net benefit to the community. Jurisdictions have generally adopted at least one of three alternative methods for assessing costs and benefits in a RIS — cost-benefit analysis (CBA), cost-effectiveness analysis (CEA) and multi-criteria analysis (MCA) (table 6.4). By way of illustration, New South Wales guidance material provides a broad introduction to each method and outlines when each may be appropriate (box 6.4).

Table 6.4 Guidance on methods of assessing costs and benefits

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | Cwlth | COAG | NSW | Vica | Qldb | WAc | SA | Tas | ACT | NT |
| Cost-benefit analysis | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓ | ✓ | ✓ |
| Cost-effectiveness analysis | ✓d | ✓ | ✓ | ✓ | ✓ | 🗶 | 🗶 | ✓ | ✓ | 🗶 |
| Multi-criteria analysis | 🗶 | 🗶 | ✓ | ✓ | ✓ | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 |

a Where potential costs and benefits are likely to be particularly large, then an even closer examination of the impacts is warranted, and this may include an assessment of indirect effects (eg through general equilibrium modelling). b Break-even analysis also accepted. c Western Australia does not adopt a particular method for formally assessing costs and benefits, however costs and benefits do need to be assessed in order to establish which option yields the greatest net benefit. d As part of the CEA, cost-utility analysis can be used.

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

As suggested in box 6.4, CBA is the preferred method of assessing costs and benefits in a RIS, however it tends to be highly data intensive, typically requiring that impacts be monetised. When assessing costs and benefits, the guidance material in all Australian jurisdictions states that:

* impacts should be quantified wherever possible
* where quantification is possible, impacts should be monetised
* where quantification (and hence monetisation) is not possible, impacts should be qualitatively assessed.

In terms of the quantification of impacts, the OECD states that:

When regulatory proposals would have significant impacts, ex ante assessment of costs, benefits and risks should be quantitative whenever possible. Regulatory costs include direct costs (administrative, financial and capital costs) as well as indirect costs (opportunity costs) whether borne by businesses, citizens or government. (OECD 2012a, p. 10)

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| Box 6.4 New South Wales guidance on CBA, MCA and CEA |
| *Cost benefit analysis (CBA)*  Cost benefit analysis involves expressing all relevant costs and benefits of a regulatory proposal in monetary terms in order to compare them on a common temporal footing. This technique is most usefully applied to proposals where the major benefits can be readily quantified…  *Net present value* (NPV) – The NPV of an option is the estimated value in present terms (today’s dollars) of the flow of benefits over time less costs. Calculating the NPV involves estimating the annual costs and benefits of an option over a fixed period, and then discounting that stream of net benefits to its present value. A positive NPV indicates that an option results in a net benefit. The higher the NPV, the greater the net benefit.  The key strength of cost benefit analysis is it allows a range of options to be compared on a consistent basis. However, the focus on valuing impacts can sometimes lead to the omission of impacts which cannot be valued quantitatively. Cost benefit analysis can also require considerable data. Where the impacts of a proposal are not significant, the cost and effort required for this type of analysis may not be warranted.  *Cost effectiveness analysis (CEA)*  Cost effectiveness analysis is a useful approach where benefits of an option cannot be quantified readily in dollar terms but where the desired outcome can be clearly specified. In cost effectiveness analysis, the level of benefit desired is pre-specified and held constant for all options. Options are then assessed to identify the least cost means of achieving that objective.  For example, where an environmental outcome can be quantified in terms of environmental quality (such as the volume of environmental flows needed to ensure a healthy river) but not in dollar terms, cost effectiveness analysis can be used to determine the least costly way of achieving the outcome.  *Multi-criteria analysis (MCA)*  If it is not feasible to assign monetary values to costs or benefits of an option, qualitative analysis should be used to compare options or elements of those options. Multi-criteria analysis (MCA), or the balanced scorecard approach as it is sometimes called, is one technique for doing this. MCA requires judgments about how proposals will contribute to a set of criteria that are chosen to judge the benefits and costs associated with the proposals.  A number of different evaluation criteria are defined. A score is then assigned for each criterion depending on the impact of the policy option being considered … Weightings should also be assigned to each of the criterion, reflecting their relative importance in the decision making process, and an overall score can be derived by multiplying the score assigned to each criterion by its weighting and summing the result. |
| *Source*: NSW Department of Premier and Cabinet (2009, pp. 37-38). |
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The Australian Food and Grocery Council advocated a similar position to the OECD in that:

For regulatory proposals that are perceived to have significant economic, social and environmental impact, ex ante assessment of costs, benefits and risks of the proposed regulatory response should be quantitative when possible. It should be compulsory for the RIA process to include a proper cost–benefit analysis. The assessment of regulatory cost should include both direct cost (e.g. administrative and compliance costs) and opportunity cost borne by the government, industry and consumers. (sub. 5, p. 17)

In all jurisdictions, except Western Australia, detailed guidance material on undertaking CBA is provided. This ranges from guidance on recommended discount rates and performing sensitivity analysis, to taking into account inflationary effects and the underlying assumptions in the CBA (table 6.5).

Guidance material for the Commonwealth, New South Wales, Victoria and the Northern Territory have listed some pitfalls in undertaking CBA, including:

* failing to correctly identify the base case
* failing to consider all relevant impacts (such as indirect costs and benefits)
* incorrectly assuming the effectiveness of regulations (and omitting associated enforcement costs)
* inappropriate or inconsistent discounting of future costs and benefits
* not undertaking sensitivity analysis
* not considering risk appropriately.

Table 6.5 Guidance on specific cost-benefit analysis elements

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | Cwlth | COAG | NSW | Vic | Qld | WA | SA | Tas | ACT | NT |
| Discounting | ✓ | ✓ | ✓ | ✓a | ✓ | 🗶 | ✓ | 🗶 | ✓ | ✓ |
| Recommended discount rate | ✓b | 🗶 | 🗶 | ✓c | 🗶d | 🗶 | ✓e | 🗶 | 🗶 | 🗶 |
| Sensitivity analysis | ✓b | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | 🗶 | ✓ | 🗶 |
| Risk analysis | ✓ | ✓ | ✓ | ✓ | 🗶 | 🗶 | ✓ | ✓ | ✓ | ✓ |
| Inflationary effects | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | 🗶 | 🗶 | 🗶 |
| Assumptions | ✓ | 🗶 | 🗶 | ✓ | ✓ | ✓f | ✓ | 🗶 | ✓ | ✓ |

a The Opportunity Cost of Capital is deemed appropriate. b A discount rate of either 7 or 8 per cent real, with sensitivity analysis conducted at 3 and 10 per cent real. c 3.5 per cent real rate. d However the Queensland Treasury does provide reference rates which are 10-year Treasury Bonds, the long-term average real economic growth rate (with an adjustment for major risks and time preference), and the rate of return on debt and equity for comparable private sector projects. e Department of Treasury and Finance default rate. f Any assumptions and any other limitations need to be clearly stated as part of the assessment of costs and benefits.

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

In practice, the Commission found that a discount rate was used when assessing future impacts in almost one third of all RISs, with most Victorian and COAG RISs using a discount rate. The use of sensitivity analysis to check the robustness of assumptions was not common (16 per cent of RISs). The most common form of sensitivity analysis involved allowing the discount rate to vary, typically in a range from 3–11 per cent. Less frequently, assumptions about the likely effectiveness of proposed regulatory approaches were allowed to vary.

#### Why quantify?

Quantification can add rigour to impact assessment, as the search for evidence and the tools applied require clear definitions of impacts and the assumptions that underlie the estimates of costs and benefits (PC 2011). While it is not always possible to quantify all impacts of regulatory proposals, some quantification can still provide valuable information alongside qualitative evidence. The discipline imposed by attempting to quantify impacts also encourages a more systematic and transparent consideration of the counterfactual — what would have happened in the absence of the regulatory proposal.

Stakeholders noted that where objective analysis — particularly quantified estimates in RISs — was unavailable, it was difficult to engage in the RIA process and provide more useful input. For example, the Construction Material Processors Association commented:

The most prevalent weakness in RISs reviewed by the Association is a general lack of identification of the costs associated with options for regulatory intervention. A far greater emphasis must be given to researching these costs. A corresponding weakness is the lack of quantification of the benefits of the options. Benefits are most often estimated in qualitative terms and these are typically exaggerated. (sub. 9, p. 16)

Quantification can allow for better engagement with stakeholders about the anticipated impacts of regulatory proposals. For example, the Construction Material Processors Association submitted that:

[N]ew requirements for cultural heritage management plans (CHMP) required in Aboriginal heritage legislation were estimated in the relevant RIS to cost $20,462 each. In practice, the costs of preparing these plans range from $25,000 for a desktop plan to in excess of $300,000 for a comprehensive plan prepared by a consultant for a small operation. These costs do not include the proponent’s time or the holding costs of stalling the project. The quality of the RIS and the oversight arrangements were clearly incompetent in this case. (sub. 9, p. 3)

Despite the fact that the quantified impacts were contested in this instance, quantifying impacts in the RIS allowed stakeholders to better engage with the consultation process for the regulatory proposal. Such a process should enable the final RIS document that goes to the decision maker to be based on the best available information. As noted by the Western Australian Department of Treasury:

… a larger degree of quantification of costs and benefits in all elements of the RIS (particularly for implementation) would improve decision-making and [the Department] has this as a focus for reform. (sub. DR37, p. 4)

Moreover, by quantifying impacts, the regulatory changes imposed may be more likely to be accepted by affected stakeholders — particularly if they have had an opportunity to provide feedback on estimated impacts, and see this feedback taken into account in the final RIS and decision making process.

#### Assessing business compliance costs

It is COAG agreed best practice (2007a) that consideration be given to using a Business Cost Calculator (BCC) to assess business compliance costs — and around half of Australian jurisdictions explicitly state that one should be used. For example, when new regulations are proposed by Australian Government agencies, estimates of compliance costs (based on the BCC or an equivalent approach approved by the OBPR) are to be included in the RIS (box 6.5).

In its study, *Identifying and Evaluating Regulatory Reforms* (PC 2011), the Commission noted that compliance cost calculators can be used to evaluate the direct impacts of regulatory changes that arise from reductions in compliance costs (or the costs arising from increased compliance costs). However, the BCC is not useful for evaluating dynamic effects, flow-on effects (through the reallocation of resources) or other ‘spillover’ effects.

In practice, the Commission found that the extent to which compliance costs were calculated in RISs varied considerably (discussed below).

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| Box 6.5 The Business Cost Calculator (BCC) |
| The BCC is an IT tool derived from the Standard Cost Model (SCM Network 2005). Eight types of regulatory compliance tasks are included in the Business Cost Calculator (BCC). These include administrative costs (record keeping, publication and documentation and procedural tasks) and substantive compliance costs (education, permission, purchase costs and enforcement) and ‘other’ tasks.  When the BCC is used to carry out ex ante evaluations of proposed reform, the process followed involves:   * setting out the regulatory options (for example, ban a product, restrict access to licensed users or take no action) * identifying the actions that would have to be taken for each of the regulatory options (such as providing information, keeping records and purchasing equipment) * identifying the total number of firms in the industry, and the percentage likely to face obligations for each action * estimating the number of affected staff for each affected business, the number of times per year they would have to act and the time taken for the activity * entering the labour costs (manually, or using an in-built wage calculator).   Based on this information, the BCC calculates the estimated cost to each affected firm and to the industry as a whole, of each of the activities that would be required under each of the regulatory options. |
| *Source*: Australian Government (2010a). |
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#### Assessing qualitative impacts

As noted earlier, quantifying regulatory proposals’ impacts in a CBA framework is not always possible. The Australian Government Attorney-General’s Department acknowledged that while CBA is a core focus of RIA:

… this focus may not always be the determinative factor in the final decision, particularly if there are strong public or national interest factors to be considered. For example, societal expectation can be a strong values-based driver that is difficult to value in monetary terms. (sub. 4, p. 6)

It is often difficult (or not cost-effective) to obtain data in order to quantify impacts. However, where quantification is not possible, impacts should be qualitatively identified and assessed (Australian Government 2011c). As the Northern Territory guidance material notes:

Where quantitative information is not available, a discussion on the probable impacts and their likelihood of occurring, including any assumptions made, will need to be provided so a reliable assessment is possible. (NT Treasury 2007b, p. 4)

All significant impacts that have been qualitatively assessed should be transparently presented in the RIS. The OECD has stated that as part of the broad assessment of costs and benefits:

*Ex ante* assessments should, where relevant, provide qualitative descriptions of those impacts that are difficult or impossible to quantify, such as equity, fairness, and distributional effects. (OECD 2012a, p. 10)

Regulatory proposals may result in ‘winners and losers’ as they redistribute resources throughout the community, to the benefit of some, and to the detriment of others. These considerations should be clearly and separately identified in a RIS, with limited, if any, judgements on equity expressed by the proponent agency in the RIS. As the COAG guidelines note:

Distributional judgements are properly made at the political level. In the interests of avoiding subjective bias, analysts should, by and large, refrain from attaching distributional weights to cost and benefit streams. Exceptions might be where there are unambiguous government policy objectives to assist specific groups in the community, and where the justification for special assistance to these groups relative to other groups is clearly established. However, for reasons of transparency, decision-makers and the public should be made fully aware of the costs of government action aimed at benefiting particular individuals or groups in the community. (COAG 2007a, p. 26)

Where explicit in guidance material, jurisdictions generally require that equity considerations be assessed separately to economic benefits and costs. For example, the Victorian guidance material states:

In cost‐benefit analysis, it is important to identify both the allocative and distributional effects of particular proposals, but these effects need to be kept separate to ensure that the distributional effects are not included in the overall net [economic] impact of a proposal. (Victorian Department of Treasury and Finance 2011a, p 10)

Hence, the RIS should come to a conclusion based on an assessment of all significant costs and benefits — quantified wherever possible. Where these impacts cannot be quantified, they need to be qualitatively identified and assessed. Finally, any relevant equity considerations need to be stated in the RIS.

### Evidence on assessment of costs and benefits

Based on its analysis of RISs produced by jurisdictions in 2010 and 2011, the Commission found that, in practice, comprehensive assessment of costs and benefits relatively infrequent. Further, benefits and costs were directly compared in only one quarter of all examined RISs. Data constraints were identified by agencies as a key impediment to undertaking impact analysis in RISs (PC RIA Survey 2012).

#### Costs

RISs were examined to determine the extent to which the impact analysis included quantification of costs. Overall, 27 per cent of RISs (across all jurisdictions) contained a solely qualitative discussion of costs; and a further 19 per cent of RISs included only the most basic quantification (that is, numbers/quantification for any aspects of costs) (figure 6.6). Extensive quantification of most or all aspects of costs occurred in less than 20 per cent of RISs.

Figure 6.6 Quantification of predicted costs

2010 and 2011, per cent of RISs analysed

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*Data source*: PC RIS analysis (appendix E).

COAG and Victoria had the highest rates of quantification of costs, with almost all RISs containing either some or extensive quantification of costs. The Victorian results were broadly in line with those identified in previous studies (VCEC 2012). For Commonwealth RISs, 32 per cent contained a solely qualitative discussion and 27 per cent included only the most basic quantification. These results are broadly consistent with those found in a smaller study by CRA International (2006) (appendix E). Rates of quantification were lowest in NSW, in part reflecting the larger number of RISs prepared for comparatively minor issues relative to other jurisdictions.

The extent to which administrative and compliance costs for business were assessed in RISs was also examined. Overall, there was some quantification in 66 per cent of all RISs, with the remainder containing a solely qualitative discussion. Even where compliance costs were quantified, in many cases the quantification was very basic or contained gaps (appendix E).

#### Benefits

Quantitative assessment of benefits was less prevalent than quantification of costs. Across all jurisdictions, 42 per cent of all RISs contained a solely qualitative discussion of benefits; and a further 18 per cent of RISs included very basic quantification (figure 6.7). Almost a third of all RISs quantified some aspects of benefits, while extensive quantification was less frequent.

Figure 6.7 Quantification of predicted benefits

2010 and 2011, per cent of RISs analysed

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| --- |
|  |

*Data source*: PC RIS analysis (appendix E).

COAG and Victoria had the highest rates of quantification of benefits, with around 60 per cent of RISs in both jurisdictions containing either some or extensive quantification.

The lower rates of quantification of benefits relative to costs evident in all jurisdictions are unsurprising, given the inherently greater challenges that are often present in attempting to quantify benefits. However, they are also reflective of the frequent lack of information on the size of the problem, discussed earlier. Where a RIS provides a more comprehensive assessment of the scale of the problem it is correspondingly better able to assess the likely benefits of regulatory approaches that seek to address the problem.

These findings on the variable levels of quantification of costs and benefits are broadly consistent with those from a range of international studies. For example, the UK National Audit Office (NAO) reported that 86 per cent of final impact assessments examined in the United Kingdom in 2008-09 quantified some costs and 60 per cent quantified some benefits (NAO 2010) (appendix E).

### Views of stakeholders on analysis of costs and benefits in RISs

Submissions to the study emphasised the importance of rigorous and objective assessment of costs and benefits in RISs whenever possible, and noted that there was substantial scope for improvement.

Issues identified with impact assessment were broader than simply a lack of quantification. Even in the RISs where cost estimates are provided the Commission found they were often incomplete, sometimes with key costs omitted. In particular, insufficient consideration of indirect costs was evident in many RISs:

[I]t is clear that the use of the RIA process has not been as widespread or as robust as intended. A RIA must clearly indicate the costs to business of not only complying with the proposed regulation, but also the cost in terms of industry funding the regulation, lost opportunities, reduced incentives and loss of competitiveness. (ACCI, sub. 2, p. 1)

Regulatory impact analyses are regularly able to identify and assess the *direct* cost to industry and other stakeholders from regulatory proposals. However, the magnitude and impact of indirect costs are usually insufficiently addressed. Agricultural chemicals are a key input to Australia’s agricultural industries and as a result, the indirect costs of additional regulation are magnified as costs flow through the supply chain. Indirect costs are regularly many times the magnitude of direct costs. (CropLife Australia, sub. 7, p. 4)

Other issues flagged include concerns about:

* the factual accuracy of material included in RISs (Queensland Consumers Association, sub. 1; Plastics and Chemicals Industries Association, sub. 8)
* lack of supporting evidence for assumptions and costs (Victorian Department of Premier and Cabinet, sub. DR32; Plastics and Chemicals Industries Association, sub. 8; Australian Food and Grocery Council, sub. 5)
* use of unreliable data and an over-reliance on subjective analysis (CropLife Australia, sub. 7; Construction Material Processors Association, sub. 9)
* inclusion of ancillary benefits (by assessing all improvements as a function of the proposed reforms) that increased the assessed benefit of preferred regulatory options (CropLife Australia, sub. 7; Australian Logistics Council, sub. 10).

The Commission found some evidence that RIA had been beneficial in improving analysis of costs and benefits for new regulatory proposals. In response to the Commission’s survey almost 60 per cent of government agencies agreed that the formal RIA framework had resulted in a more systematic consideration of costs and benefits.

However, while these results are encouraging, there appears to be substantial scope for further improvement. In particular, the Commission has found that while some RISs contain comprehensive and rigorous analysis, many others lack detailed analysis of costs and benefits. More generally, there is often a clear gap between RIA requirements (which largely conform with internationally recognised leading practice) and what is observed in practice.

## 6.5 RIS conclusion and recommended option

As a document to inform decision making, the RIS needs to reach a conclusion (based upon the analysis of the options) and recommend a preferred option. A greatest net benefit test helps to ensure that the recommended option is the one that is most likely to benefit the overall community. The Regulation Taskforce notes a key principle of good regulatory process is that:

[t]he option that generates the greatest net benefit for the community (taking into account economic, social, environmental and equity impacts) should be adopted. (Regulation Taskforce 2006, p. 146)

South Australia’s guidance material provides a clear definition of what a RIS needs to demonstrate in order to satisfy the greatest net benefit test (box 6.6).

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| Box 6.6 What does a ‘greatest net benefit test’ mean? |
| The South Australian guidance material details what is meant by the greatest net benefit and how it is to be applied in practice:  [The greatest net benefit approach]…allows decision makers to:   * only recommend the implementation of those options that make the whole community better off (i.e. they have an estimated positive net benefit); and * compare the net benefits of the different feasible regulatory options being considered and rank them according to the size of the net benefit thereby facilitating the decision maker’s choice of the option which delivers the greatest net benefit to the community.   However the net benefit calculation is not in all instances the bottom line of the CBA. The CBA may ultimately contain:  1) A net benefit calculation for those items where monetary values can be assigned;  2) A discussion of whether any costs and benefits which cannot be expressed in monetary terms are sufficiently large to alter the net benefit finding;  3) A discussion of whether distributional outcomes are sufficiently concerning to alter the conclusion drawn from the first two steps above as to the appropriate policy decision. |
| *Source*: SA Department of the Premier and Cabinet and Department of Treasury and Finance (2011). |
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|  |

Each element should be separately identifiable in a RIS so as to ensure that any uncertainties with the analysis are clearly made known to the decision maker. In addition, the information should be presented in a manner that allows clear comparison of the different options.

### Jurisdictional guidance on net benefits

RISs in all jurisdictions apart from the Commonwealth must select the option that yields the ‘greatest net benefit to the community’ overall. Additionally, most jurisdictions need to demonstrate reasons for rejecting other alternative options (table 6.6).

Table 6.6 Recommended option requirements in a RIS

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Recommended option demonstrates: | Cwlth | COAG | NSW | Vic | Qld | WA | SA | Tas | ACT | NT |
| Greatest net benefit to the community | 🗶 | ✓ | ✓ | ✓ | ✓a | ✓ | ✓b | ✓a | ✓ | ✓c |
| Reasons for rejecting other options | ✓ | ✓ | 🗶 | ✓ | ✓ | 🗶 | ✓ | ✓ | ✓ | 🗶 |

a Or least net cost. b While maximising the net benefits to the community (in NPV terms) is the primary objective, agencies should be mindful also of the government’s objectives to reduce regulatory costs imposed on business. If two (or more) options have a similar net benefit NPV result, but the costs imposed on business vary considerably, consideration could be given to the lowest cost option even if not the option which maximises the net social benefit. c On the balance of probabilities.

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

The Commission notes that the Commonwealth guidance material previously did mandate that the preferred option be the one that yields the greatest net benefit, but this requirement was removed when the guidance material was updated in 2010. Under the current requirements:

… the RIS must describe the impacts of all the feasible options and identify the preferred option but, unless the option restricts competition, it is not necessary to demonstrate that the preferred option has the greatest net benefit to the community. (Australian Government 2010a, p. 26).

The stated rationale for changing the Australian Government Handbook was that it was a clarification of the pre-existing requirement to recommend the option with the greatest community net benefit:

What [the Office of Best Practice Regulation] found was that that was driving a lot of very perverse behaviour. People were doing economic modelling, for example, and coming up with options that were decimal points different in terms of the net benefit to the community and distorting that in order to meet the rules … (Australian Senate, 2012b, p. 38)

While the Handbook seems clear, there nevertheless appears to be some uncertainty around how the new requirements are interpreted (see, for example, Australian Senate 2012b).

As discussed previously, a RIS needs to explicitly identify and assess quantifiable and qualitative impacts for each feasible option canvassed. By definition, the resulting net benefit of each option will *not* be a monetised value, as qualitative impacts, by definition, cannot be monetised or even quantified. Indeed, the current Australian Government Handbook notes:

The challenge is to consider non-monetised impacts adequately, but not to overplay them. For example, if a proposal is advocated despite monetised benefits falling significantly short of monetised costs, the RIS should explain clearly why non monetised benefits would tip the balance and the nature of the inherent uncertainties in the size of the benefits. (Australian Government 2010a, p. 72)

Therefore, if one particular option (‘option A’) resulted in a higher economic net benefit than another (‘option B’), the RIS needs to explicitly state why the relevant unquantifiable impacts of option B would result in a greater community net benefit overall; and hence is the option recommended. At an extreme, if a regulatory proposal results in *net economic costs* to the community, the RIS needs to explicitly state why the unquantifiable impacts would ‘tip the balance’ and result in the greatest community net benefits, relative to all other feasible options.

The RIS should clearly demonstrate the forgone efficiency costs (‘opportunity costs’) of choosing an option with particular unquantifiable impacts, and this is best done by directly comparing options.

### Observed practices on net benefits in RISs

The relatively low rates of comprehensive quantification and monetisation evident in RISs across most jurisdictions means that costs and benefits were seldom directly compared in RISs, with net benefits estimated in just over a quarter of all RISs.

COAG and Victoria were the jurisdictions where a net benefit was calculated most frequently. Estimation of net benefits in other jurisdictions was infrequent. The infrequency with which costs and benefits were directly compared in RISs was compounded by the fact that in many instances where a net benefit was estimated it was for the preferred option only, rather than for all options considered.

To be most useful to decision makers, RISs should assess all significant costs and benefits that the community will likely incur, clearly set out the net benefit for each option in the RIS, and recommend the option that yields the greatest net benefit to the community, taking into account all impacts.

leading practice 6.3

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

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

## 6.6 Implementation, monitoring and enforcement

Participants in this study, as well as a number of previous Commission studies, have emphasised that the manner in which regulations are applied and enforced can be a significant driver of costs for businesses and the community. Similarly, the OECD identifies implementation issues as a very important element of RIA, noting:

Regulators should assess how regulations will be given effect and should design responsive implementation and enforcement strategies (OECD 2012a, p. 5).

The Commission’s review *Identifying and Evaluating Regulation Reforms* (PC 2011) noted that administration and enforcement practices will vary depending on such matters as the nature of the regulations being administered, who is responsible for implementing them and the characteristics of the businesses or groups being regulated. Administrative and enforcement matters which could be discussed in RISs include: reporting requirements on business; risk-based monitoring and enforcement strategies; mechanisms to address consistency in legislative interpretation; graduated responses to regulatory breaches; and communication with those being regulated. Most Australian jurisdictions include guidelines on the inclusion of implementation, enforcement and compliance strategies in RISs (table 6.7). COAG guidance, for example, notes that:

Consideration should be given to the effectiveness of implementation and administration and, as relevant, an assessment of likely compliance rates should be made taking into account matters such as incentive structures and costs to regulated parties. (COAG 2007a, p. 6)

The New South Wales guidance material emphasised the impact of sound implementation for administrative and compliance costs, noting:

[A]n implementation and compliance strategy should be developed for the preferred option to ensure the objectives will be effectively and efficiently achieved. This is an important part of the process, as even a well-designed regulatory solution can impose unnecessary administrative or compliance costs if it is not implemented well. Planning can help to achieve the greatest level of compliance at the lowest possible cost. (NSW Department of Premier and Cabinet 2009, p. 18)

Table 6.7 Guidance on implementing and enforcing the preferred option

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| The RIS should discuss: | Cwlth | COAG | NSW | Vic | Qld | WA | SA | Tas | ACT | NT |
| Implementation and enforcement strategies | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | 🗶 |
| Compliance strategies | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | 🗶 | ✓ | 🗶 |

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

### Observed practices for consideration of implementation and enforcement in RISs

In practice, the extent to which Australian RISs considered implementation and enforcement issues varied substantially. A quarter of all RISs included no discussion, and where these issues were discussed, most RISs included only a brief statement of timing and basic institutional arrangements, such as the establishment of a monitoring agency. Only 27 per cent of RISs included a more extensive discussion of these issues (figure 6.8).

Figure 6.8 Extent to which RISs considered implementation and enforcement issues

2010 and 2011, per cent of RISs

|  |
| --- |
|  |

*Data source*: PC RIS analysis (appendix E).

An indicator of the low priority placed on implementation and enforcement issues is the very low proportion of RISs (one third) that considered potential rates of non‑compliance with regulatory proposals; included estimates of monitoring and enforcement costs for government; or included evidence of a risk-based approach to the design and enforcement of the regulatory compliance strategy. The latter is particularly important in minimising costs on individuals and business associated with compliance and enforcement procedures (OECD 2012a).

These results are consistent with more widespread concerns that relatively low attention has been paid to administration and enforcement of regulation (see for example OECD 2010c and VCEC 2011b).

A number of business groups consulted as part of the study expressed concerns that in some instances costs associated with implementation and compliance were not covered systematically in RISs (for example, CropLife Australia, sub. 7, Construction Material Processors Association, sub. 9, Australian Financial Markets Association, sub. 11, and Master Builders Australia, sub. 19).

The Commission also found in its recent benchmarking report *Performance Benchmarking of Australian Business Regulation: Role of Local Government as Regulator* (PC 2012) that insufficient consideration is given to the capacities of, and costs to, local governments in implementing and enforcing many state regulations. Similar issues were also raised with regard to some national reforms through COAG processes not adequately assessing the implementation costs for states and territories (discussed in the following section).

Following the release of the Commission’s Draft Report, the Western Australian Department of Treasury noted that:

The immediate priority in Western Australia is to prompt agencies to give greater attention to implementation, monitoring and compliance issues in their RISs. (sub. DR37, p. 4)

In its 2011 review of the Victorian regulatory system, the VCEC recommended specific improvements to the consideration of implementation issues in RISs, as well as improvements to regulation once enacted. These recommendations were accepted by the Victorian Government (Victorian Government 2012).

#### Implications for RIA quality

Where costs of implementation for regulators, business and/or the community are substantive, their omission risks giving a too positive picture of the relative merits of the regulatory proposal. Similarly, if unduly high rates of compliance are assumed, the expected benefits will be overstated. As Victoria’s guidance material notes:

A regulation is neither efficient nor effective if it is not complied with or cannot be effectively enforced. Thus, compliance considerations should be a significant element in the choice between different regulatory approaches. Realistic assessment of expected compliance rates may suggest that a policy instrument that appears more effective in theory, but in practice is more difficult to implement, is therefore the less preferred option.

… the predicted level of compliance is a key assumption that determines the extent to which the identified problem will be reduced, and thus the benefits received. It is unrealistic for some regulations to achieve 100 per cent compliance, particularly given the expected level of resources proposed to assist and enforce compliance. Consequently, if 100 per cent compliance was assumed then this would overstate the expected benefits. (Victorian Department of Treasury and Finance 2011a, pp. 28, 75)

A longer term risk where implementation and monitoring issues do not receive sufficient attention in a RIS is a greater likelihood that unexpected costs associated with implementing the regulatory proposal will subsequently emerge.

One possible contributing factor to the limited consideration of these issues is that ‘implementation, monitoring and review’ is the last of the seven RIS elements, and is generally included after the conclusion and recommended option. While much of the focus of the implementation discussion in RISs tends to relate to implementation of the preferred option, it is important that implementation, monitoring and compliance issues are also considered for each option as part of the impact analysis in the RIS.

This point is reinforced in jurisdictional guidance. For example, the ACT guidance material states:

After establishing the best option that will address the problem, the final stage in the RIS process is to state how the option will be implemented and enforced, and how it will be reviewed after a period of implementation. Note, however, that these issues should be considered when identifying and quantifying the costs and benefits of the proposals and incorporated in the impact analysis. (ACT Department of Treasury 2003, p. 24)

Based on the evidence observed by the Commission, it appears that there is considerable scope for improving the consideration of implementation issues in RISs. Hence, greater efforts by agencies to include explicit statements on implementation, enforcement and assumed compliance rates (and the costs of achieving them) within the impact analysis section of RISs are likely to yield substantial dividends in terms of overall RIS quality.

LEADING PRACTICE 6.4

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

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

## 6.7 Assessing national market implications

As noted earlier, the terms of reference for this study direct the Commission to examine the extent to which ‘national market implications’ are considered in RIA.

The OECD study into regulatory reform, *Australia: Towards a seamless national economy* noted that Australia represents something of a ‘role model’ for OECD countries in its approach to regulatory reform. However, it also stated that costs associated with inconsistent or duplicative regulatory regimes between Australian jurisdictions were a significant issue for competitiveness. It concluded that:

Further streamlining of regulatory frameworks as part of the multi-level strategy will enhance market openness, as well as the ability to compete globally in knowledge intensive industries. (OECD 2010a, p. 13)

Assessing the ‘national market implications’ of regulatory proposals as part of RIA requires consideration of how the proposed regulation:

* affects transaction/compliance costs for businesses and individuals operating across multiple jurisdictions through introducing regulatory or technical barriers, and hence impacts on:
* cross border trade in goods and services, and the mobility of capital and labour across jurisdictions, and
* impacts on, or leads to, externalities or spillovers affecting other jurisdictions.

In assessing these impacts, an important consideration is how the proposed regulation is likely to interact with regulations in other jurisdictions — including impacts on national ‘coherence’ such as through a reduction in regulatory duplication, or alternatively, the introduction of overlapping or inconsistent regulations.

### State-territory guidance on national market considerations

Guidance material for national market considerations in RIA varies substantially across jurisdictions both in terms of the issues covered and their comprehensiveness (table 6.8).

Table 6.8 Jurisdictional guidance on ‘national markets’

|  |  |
| --- | --- |
|  | Selected guidance material |
| NSW | National or cross border harmonisation of regulation should be considered as an option where possible, recognising that businesses that operate in several jurisdictions can face significant costs when forced to comply with different regulatory regimes … Harmonisation should not be a goal in itself — NSW policy objectives and the impacts of regulation on NSW businesses and community should be the key consideration. |
| Vic | Adoption of national schemes can reduce costs to businesses, particularly those operating in more than one jurisdiction…There may be advantages in undertaking a national impact assessment because the resources and expertise can be pooled with counterparts in other jurisdictions dealing with similar issues. |
| Qld | It is also important to consider how the policy problem is addressed and managed in other jurisdictions, and whether a nationally consistent, or harmonised approach may be the most appropriate option. |
| WA | What are the implications for inter-jurisdictional trade in goods and services where relevant? … Has relevant existing regulation, at all levels of Government, been documented, and demonstrated to not adequately address the issue? |
| SA | For the majority of proposals, the scope of the assessment of costs and benefits should extend to the entire State. However, where there are likely to be flow on effects to interstate businesses, consumers, governments or the wider community, including environmental spillovers, these should be taken into consideration. For example: a regulatory regime which differs from interstate regimes may impose costs on nationally operating businesses and these costs should be brought to account in the CBA; or, a reduction in greenhouse gas emissions from South Australia may result in higher emissions elsewhere in Australia under a fixed national cap/allocation of permits. |
| Tas | Legislation can restrict the entry of goods and services from interstate or overseas, giving a competitive advantage to local producers. In most cases such restrictions relate to quarantine matters, are scientifically based and are designed to stop the spread of animal or plant pests or diseases. However, in some cases the restrictions have no scientific basis and serve to protect existing businesses from interstate and overseas competition. |
| ACT | Mutual recognition reduces compliance costs to business and improves their efficiency and competitiveness when conducting transactions across State and Territory borders…The increasing emphasis given to cross-jurisdictional policy and legislative development means that regulations are no longer developed in isolation. Consideration must be given to regulatory regimes operating in other jurisdictions to ensure that consistency is achieved wherever possible, particularly where common enforcement procedures or harmonisation of regulatory regimes will have the positive effect of reducing compliance costs to businesses operating across State and Territory borders. |
| NT | [The assessment of costs and benefits should] document any relevant national standards, and if the proposed regulation differs from them, identify the implications and justify the variations … |

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

Information relevant to national market considerations include: implications for inter‑jurisdictional trade in goods and services — such as possible competition impacts; environmental spillovers; documenting how problems are addressed and managed in other jurisdictions; identifying any relevant national standards and how the proposed regulation differs; the potential for national schemes to reduce costs to business operating in more than one jurisdiction. Another issue raised in a number of jurisdictions was whether a nationally consistent or harmonised approach may be the most appropriate option, and the best means of achieving the objectives.

The OECD notes that RIA should:

Design appropriate co-ordination mechanisms to develop regulatory policies and practices for all levels of government, including where appropriate through the use of measures to achieve harmonisation, or through the use of mutual recognition agreements (OECD 2012a, p. 17).

Improving national coherence of regulations, can be achieved in a number of ways, including through jurisdictions: adopting uniform regulations; harmonising key elements of their regulatory frameworks; and mutually recognising other jurisdictions’ regulations (PC 2009a).

All jurisdictions provide exceptions to RIA for regulatory proposals that involve national harmonisation where a national RIS has been completed. For the jurisdictions with subordinate legislation Acts that cover RIA — New South Wales, Victoria, Queensland, Tasmania and the ACT — regulatory proposals that are substantially uniform to or complementary with regulation in another Australian jurisdiction can be excepted from RIA. In addition, proposals that are for the ‘adoption of international or Australian standards or codes of practice’ are excepted from RIA in New South Wales, Queensland, Western Australia, Tasmania and the ACT in certain circumstances (these issues are discussed further below and RIA exceptions are discussed more broadly in chapter 5).

#### Treatment of costs and benefits falling on other jurisdictions in RIA

It is generally accepted that business and individuals should not face additional regulatory costs in conducting their activities across jurisdictions unless the regulatory differences are in the interests of the wider community (PC 2011).

However, beyond the general requirements outlined above, jurisdictional guidance material generally does not provide much assistance on how ‘national market implications’ should be taken into account. An exception is the South Australian guidance material which provides a more extensive discussion on assessing national market implications (table 6.8).

Clearly, the extent to which national market considerations should be included in a RIS will vary depending on the subject matter. For issues where there is no cross‑jurisdictional intersection, national market implications do not arise, and hence do not need to be separately considered in a RIS. Western Australia’s regulatory oversight body notes, for example:

The geography of Western Australia dictates much of the application of RIA to the State’s regulation. While it has been agreed through COAG to place importance on such considerations as national markets, in practice this is not always appropriate. Given the sheer distances involved, markets such as energy are necessarily isolated from the Eastern states, so national market considerations around energy regulation may not be applicable. However, in areas such as industrial relations and occupational safety and health, there is a need to address interstate barriers for employers operating in Western Australia and other states. (WA State Government, sub. 24, p. 5)

Similarly, the New South Wales oversight body (BRO 2011) states that it does not see merit in an explicit requirement to assess national market implications for all proposals, since not all regulation has national market implications. However, the BOR notes:

[F]urther guidance on identifying national markets and identifying potential impacts for business would assist agencies … and improve the information provided to decision makers. Guidance should cover identifying the effective market the regulation will impact, the activity being regulated, the number of businesses operating across jurisdictions, and the need to consider future market dynamics. This approach should ensure adequate consideration is given to national market implications. (BRO 2011, p. 23)

The Commission found that aspects of national market implications were discussed in just under 40 per cent of RISs prepared in all jurisdictions. For the states and territories, this most commonly involved an assessment of how other jurisdictions had approached a regulatory issue, including where they already had regulatory arrangements in place and how they compared. Few subnational jurisdictional RISs were found to include much substantive consideration of the implications of a regulatory proposal for cross border trade and labour mobility, including the likely magnitude of these impacts, or to explicitly consider the merits of adopting approaches that are consistent with those adopted in other jurisdictions.

Officers undertaking RIA in the Victorian transport portfolio noted while, in general, implications for national markets were *not* given adequate consideration when new or amended regulation was considered:

There are some limited examples of involving other states in state based reforms (eg VIC involved NSW in marine safety discussions given the obvious overlap at the Murray River). An option may be that when a RIA is prepared in one jurisdiction it should send a copy of the RIA to the relevant agencies and stakeholders in other jurisdictions. That may identify potential impacts. However the amount of time allowed for consultation may be a relevant consideration here also. (sub. 17, p. 10)

The Commission also found, unsurprisingly, that RISs with more robust and comprehensive overall impact assessments were more likely to include a more thorough consideration of national market impacts.

Evidence from responses to the Commission’s survey of agencies also suggests that national market implications are not considered consistently as part of RIA. For example, only around half of all respondents agreed with the proposition that the effect of proposed regulatory options on national markets was considered during the RIA process, with the remainder either disagreeing or neutral (PC RIA Survey 2012).

Given this, there would be benefits in strengthening jurisdictional guidance on identifying national market implications.

LEADING PRACTICE 6.5

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

Clearly, the benefits of providing clearer guidance on identifying national market implications will ultimately depend on whether it leads to better analysis in RISs. As has been observed throughout this chapter, robust, clear and comprehensive RIS guidance, while beneficial, is not sufficient to guarantee better results in practice.

Further, national market implications can be more readily identified when comprehensive impact analysis is undertaken. Hence, the priority in promoting a more consistent and comprehensive consideration of national market implications in RISs should be to seek ways to improve the overall quality of impact analysis, including identification of impacts on key stakeholders, direct and indirect costs and benefits, in particular the potential flow-on impacts for competition and markets (both within, and between, jurisdictions).

### COAG RIA processes for ‘national reforms’

The COAG RIA process provides the opportunity to examine regulatory impacts in multiple jurisdictions. This is particularly important where there is overlap in regulatory responsibilities or where businesses operate across borders. COAG best practice regulation requirements state:

Regulation impact analysis of the feasible policy options, should also include an assessment of whether a regulatory model is already in place in a participating jurisdiction that would efficiently address the issue in question and whether a uniform, harmonised or jurisdiction-specific model would achieve the least burdensome outcome (or generate the greatest net benefit for the community). A regulation impact assessment should also have regard to whether the issue is state-specific or national, and whether there are substantial differences that may require jurisdiction-specific responses. (COAG 2007a, p. 11)

When implementing agreed national reforms, states and territories differ on the content necessary in COAG RISs in order to waive their own jurisdictional requirements to prepare a state/territory-specific RIS (table 6.9). For example, the Northern Territory guidance material states that:

… preparation of a RIS may not be appropriate for particular types of regulatory proposals … because a sufficient level of relevant analysis has already been undertaken through other fora. (NT Treasury 2007a, p. 16)

Table 6.9 State and territory content requirements for COAG RISs

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | NSWa | Vic | Qld | WA | SA | Tas | ACTb | NT |
| Is a summary of the process and outcomes required? | ✓ | 🗶 | 🗶 | 🗶 | ✓ | 🗶 | 🗶 | ✓ |
| Do jurisdiction-specific impacts need to be identified and assessed? | 🗶 | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓ |
| Does the national or COAG RIS need to satisfy the jurisdiction-specific guidance material? | ✓c | ✓ | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 | ✓ |

a 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. b For subordinate legislation only. c The process must at a minimum include detailed regulatory impact assessment and public consultation.

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

A key question that arises is how much detail should be included on individual jurisdiction impacts. This has implications for duplication of work and the overall costs of RIA processes. For example, the Northern Territory Department of Treasury and Finance submitted that:

… in practice an agency proposing development of legislation to implement a national reform must still prepare a Preliminary Regulation Impact Analysis … A concern of the Northern Territory has been that national RISs frequently do not include a sufficiently adequate assessment of impacts at the regional or jurisdictional level. (sub. DR30, p. 6)

|  |
| --- |
| Box 6.7 National health and safety reforms |
| In February 2008 the Workplace Relations Ministers’ Council agreed that model legislation was the most effective way to harmonise work health and safety laws across Australia. COAG subsequently committed to a harmonised system of laws, with the signing of an Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA). The IGA also included a national review into the existing occupational health and safety laws across the jurisdictions and required the formation of Safe Work Australia.  In December 2009 Ministers endorsed a revised model Workplace Health and Safety (WHS) Act, and a decision RIS was published recommending its adoption (a consultation RIS was approved by the OBPR in September 2009). In December 2010, the draft WHS Regulations and the first stage of model Codes of Practice were released. A consultation RIS was published in February 2011 and a decision RIS on WHS Regulations and Codes of Practice was published in November 2011.  Concerns were raised by a number of stakeholders about a range of aspects of the RIA process including pre-conceived outcomes, rushed timelines, inadequate consultation, limitations in the impact analysis — particularly the costs of implementation by jurisdiction. In a submission to this study, Business South Australia, for example, noted that in an attempt to achieve deadlines:  … the process has been rushed with stakeholders ‘overwhelmed’ by the volume of paperwork and totally unreasonable timeframes in which to respond to discussion papers and other documents. (sub. 18, p. 2)  The Premier of Victoria commissioned PricewaterhouseCoopers to undertake supplementary impact assessment of the proposed national work health and safety laws. The review (which was not a formal RIS) was released in April 2012 and found that only three of the twenty proposed changes would have a positive impact on Victorian businesses. The report concluded that the package of reforms, if implemented, would, in net terms, likely have a negative effect on the Victorian economy.  In August 2012 the Western Australian Government commissioned Marsden Jacob Associates to undertake an assessment of the benefits and costs of the model WHS regulations and obtain information on the impact of the proposed changes.  Notwithstanding concerns expressed about this COAG RIS process, the Business Regulation and Competition Working Group noted in its report card on progress of deregulation priorities:  The national [OHS] reform commenced in five jurisdictions – Queensland, New South Wales, the Australian Capital Territory, the Northern Territory and the Commonwealth – on 1 January 2012. In addition, Tasmania has passed the necessary legislation, with the reform to commence in Tasmania on 1 January 2013. Legislation is also currently before the Legislative Council in South Australia. The Victorian Government supports harmonisation of OHS laws in principle, but has advised that they will not implement the model OHS laws in their current form and will seek changes to them. Western Australia has advised that their decision on implementation is subject to finalisation of the mine safety component of the regulations, expected to be completed by December 2012, and to the conduct of a State-specific analysis of the potential costs and benefits from implementing the reform. |
| *Sources*: Access Economics (2009); Safework Australia (2011, 2012); COAG (2012); PWC (2012); Western Australian Government (2012). |
|  |
|  |

When adopting national reforms, RIA processes in New South Wales and South Australia require a summary of the COAG RIA process and its outcomes. Additionally, New South Wales and Victorian RIA processes require the COAG RIS to meet their respective state RIA requirements — in particular, that it identify and assess small business impacts. Where a COAG RIS does not meet state/territory content requirements, further state/territory-specific impact analysis is typically required (table 6.9). A recent example of a proposal where a COAG RIS was assessed as not meeting the Victorian RIA requirements — and therefore required supplementary analysis — was the harmonisation of occupational health and safety laws (box 6.7).

More generally, stakeholders — including state-territory governments — raised a number of issues with regard to COAG national reforms that related to RIA including:

* constraints on the *range of options* that can be considered in RISs, particularly where COAG and Ministerial Councils announce policy decisions before RIA has been undertaken
* the *timing* of COAG RISs, including lack of time to consider some RISs, and the fact that timetables and milestones for progressing reforms are sometimes agreed well before RIA has been undertaken
* the *quality of analysis*, including a lack of detail on the impacts by jurisdiction and the costs of implementation — which can affect the accuracy of estimated net benefits and can lead to delays in implementing reforms where jurisdictions conduct further RIA to determine the likely impacts for their jurisdiction.

In discussions with agencies in the states and territories, concerns about the lack of consideration of implementation costs for jurisdictions in COAG RIA processes were frequently raised. Western Australia’s Department of Treasury, for example, noted that ‘taking the costs and benefits for each jurisdiction into account in the Council of Australian Government’s RIS would inform better decision-making and consequently result in better outcomes for all.’ (sub. DR37, p. 5)

Some of the broader issues raised by stakeholders in regard to COAG RIA processes are outlined in box 6.8.

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| --- |
| Box 6.8 Selected stakeholder comments on COAG RIA processes |
| *Construction Materials Processors Association*  The draft Model Work Health and Safety Regulations Mining and associated Draft Code of Practice for the Work Health and Safety Management Systems in Mining are a recent illustration of how the RIS process works in national regulation … The draft Regulations and the Code were promulgated for comment without the required RIS. A RIS was, however, subsequently released but it failed to address the issues raised by industry and others. (sub. 9, p. 19)  *Government of Western Australia Department of Transport*  Often the states have minimal control or input over the Commonwealth or nationally led RIS processes and they can be undertaken at a fast pace. However, if the Commonwealth amends its practices to require a more thorough section on specific state and territory impacts (in consultation with the jurisdictions) this could create efficiencies for both the Commonwealth and states, as the implementation of national projects would be less likely to be delayed in jurisdictions that are required to undertake additional RIA by their own oversight agencies. (sub. 12, p. 5)  *Victorian Department of Premier and Cabinet*  There are flaws at each stage of the COAG RIA process, and this is leading to rushed and poorly‑informed decision making, sub‑optimal outcomes and delayed reforms … COAG RIA are often of poor quality and do not contain all of the information required for jurisdictions to make informed decisions or meet legislative requirements. States and Territories are often asked to make decisions on major reforms within tight timelines based on RIA which are lacking in key details, such as State‑specific impacts. (sub. DR32, p. 1)  The national Occupational Health & Safety (OHS) RIAs focus on the importance of harmonisation without considering the extent to which negative outcomes can arise in practice from harmonisation to the wrong model … Consideration also needs to be given to the size of the sector that will be affected; for the National OHS laws it is estimated that only 1 per cent of businesses operate across borders. (sub. DR32, p. 3)  *Master Builders Australia*  There is … a concern at present that the National Occupational Licensing policy process often appears quite closed and when a RIS is eventually released it will represent an agreement among governments that has little practical chance of being altered.  (sub. 19, p. 10)  *Officers undertaking RIA in the Victorian transport portfolio*  RIA analysis undertaken for national regulation does not take into account the impacts in individual states and territories. In Victoria, the RIA process and other regulatory hurdles, such as compliance with the Transport Integration Act, are much more rigorous … A separate issue is the national RIA processes not providing sufficient time for state agencies to prepare and sign off a submission. It is common for the relevant agency in a state to be given late notice of the RIA process and therefore that agency either has no resources, no permission to consult with stakeholders and no time to prepare a submission for the proposal. (sub. 17, pp. 10-11) |
|  |
|  |

A recent discussion paper prepared for the COAG Reform Council (CRC) on reform models and governance arrangements in the COAG SNE reforms identified a number of challenges in undertaking RIA for national reforms. In particular it highlighted that a lack of jurisdictional-specific impacts was a barrier to progressing reforms, and noted:

… SNE reforms have not always made the best possible use of the evidence base particularly where Regulatory Impact Statements and other evidence as to the benefits of reform broken down to the state and territory level have been lacking, or provided late in the reform process, leading the reform impetus to slip (Allens 2012, p. 8)

Undertaking national reforms places many stresses on RIA processes. These are understandable given the number of stakeholders involved and the magnitude and complexity of the task. This highlights the importance of effective prioritisation of the issues being pursued through COAG to allow thorough and timely RIA analysis.

LEADING PRACTICE 6.6

National reform processes are more likely to work effectively when:

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

## 6.8 Conclusion

Key analytical requirements for sound RIA are broadly similar across Australian jurisdictions and largely conform with internationally recognised leading practice.

In contrast, the Commission found that RIS quality varied substantially, both across and within jurisdictions. While some RISs stand out as being very comprehensive and rigorous there was often a clear gap between best practice requirements and what was observed in practice.

Common areas for improvement in RISs, include:

* clearer identification and assessment of the nature and magnitude of the problem and the rationale for government intervention.
* more comprehensive consideration of wider range of alternative options, including the ‘do nothing’ option and non-regulatory alternatives
* consideration of national market implications more consistently, as part of a more thorough overall assessment of impacts, including both direct and indirect impacts
* greater use of quantification and monetisation of costs and benefits of alternatives to provide the basis for a more objective comparison of alternatives
* where quantification is infeasible, more systematic qualitative consideration of all major impacts should be included
* more clarity in stating key underlying assumptions and data sources, including greater use of sensitivity analysis
* more explicit consideration of compliance and enforcement issues, including the potential for non-compliance and costs of enforcement.

Given the already large gap that exists between principle and practice, improving RIS quality is unlikely to be achieved by simply providing more detailed guidance material or further strengthening analytical requirements. Based on the evidence examined, such an approach would likely only further widen the gap between principle and practice. In view of this, other approaches are needed, and these are discussed in subsequent chapters.