# 8 Accountability and quality control

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| Key points |
| * Accountability mechanisms in regulatory impact analysis (RIA) processes for government agencies, regulatory oversight bodies and governments do not appear to be functioning effectively or, in some cases, they do not exist. * Accountability requires effective consequences or sanctions. The sanctions for government agencies of not complying with RIA processes are non-existent, weak or ineffective: * where post implementation reviews (PIRs) exist in the Commonwealth and Queensland, in their current design they are a weak sanction for RIA non-compliance * where parliamentary scrutiny committees are tasked with ensuring RIA requirements for subordinate legislation have been met, they appear to be unsuccessful in changing regulation. * Accountability for RIA processes would be improved if Cabinet offices were focused on the provision of RIA information to Cabinets irrespective of whether RIA requirements have been met for regulatory proposals, as in Victoria, Queensland, Tasmania and the ACT. * Implementation of PIRs as a more powerful sanction would encourage agencies to comply with RIA processes. This could be achieved by removing the responsibility (but not the financial obligation) for undertaking the PIR from the agency and placing it with an independent third party. * Concerns have been raised that at times oversight bodies have made incorrect adequacy assessments. Regulatory oversight bodies should be made more accountable for their regulation impact statement (RIS) and PIR adequacy assessments. While the publication of oversight body adequacy assessments (and their reasons/qualifications) would help, greater accountability is required. * A valuable accountability mechanism for regulatory oversight bodies is the periodic evaluation of their performance by an independent third party such as an audit office, as has been recommended by the OECD. * Regulatory oversight bodies that are more independent are likely to operate with greater objectivity and transparency in implementing RIA requirements. If oversight bodies continue to report to executive government, ideally they should be located within an independent statutory agency. Where they continue to be located in a central department their autonomy should be strengthened. * To increase the accountability of government in the medium term, consideration should be given to making regulatory oversight bodies report directly to parliament rather than to the executive branch of government. |
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## 8.1 What is accountability?

Accountability is the obligation to inform, explain and justify conduct and to face consequences associated with that conduct. Accountability is very important to developing an effective RIA process. All parties involved in the process need to be held accountable for their respective roles. That is:

* government agencies should be held accountable for the quality of their policy development processes and the RIS documents they produce
* regulatory oversight bodies should be held accountable for the quality of the RIS adequacy assessments they deliver and the other functions they perform
* government ministers should be held accountable for the quality of the regulatory decisions they make.

There are three main reasons for requiring accountability in government: to provide communities with the means to monitor and control government conduct and policy development; to prevent the development of concentrations of power and influence; and, importantly for the RIA process, to enhance the learning capacity and effectiveness of public administration (Aucoin and Heintzman 2000).

While elections are a key accountability mechanism in representative democracies and should not be underestimated, only a small minority of voters base their decisions on carefully informed judgements about either the future or the past performance of governments and politicians (Mulgan 2003). Hence, elections on their own are generally not sufficient to meet the needs of public accountability. They need to be supported by other ‘checks and balances’ or more direct accountability measures capable of extracting reliable government information and separately identifying individual policy issues and decisions. For example, public institutions, such as the Australian National Audit Office (ANAO), act as a complement to the scrutiny of government behaviour by voters and parliaments.

Such accountability measures can also stimulate public sector agencies to focus consistently on achieving desirable social outcomes and delivering on their obligations and responsibilities:

The possibility of sanctions … motivates them to search for more intelligent ways of organizing their business. Moreover, the public nature of the accountability process teaches others in similar positions what is expected of them, what works, and what doesn’t. Public performance reviews, for example, can induce many more administrators than those under scrutiny to rethink and adjust their policies. Accountability mechanisms might induce openness and reflexivity in political and administrative systems that might otherwise be primarily inward-looking. (Bovens et al. 2008, p. 232)

The processes put in place to hold governments and officials accountable are not without their shortcomings. The recent Hawke Review of the ACT Public Sector noted the following drawbacks with accountability processes:

… cost and complexity, reduced incentives and scope for independent action or innovation in response to new challenges, creation of delays to decision making, and the fact that while greater transparency can help to prevent foreseeable and preventable errors … it can also encourage risk avoidance and conservative decision making. (ACT Government 2011, p. 225)

The challenge for governments is to develop a system of holding government agencies, regulatory oversight bodies and ministers accountable for their performance in RIA processes that meets the needs of the community to scrutinise government action in a cost effective manner, but which also encourages innovation and improvements to policy design, implementation and review. A balance needs to be struck between external accountability and trust in voluntary compliance when designing accountability mechanisms. In situations where weak, ineffective (or no) accountability mechanisms exist, the RIA process must rely heavily (or solely) on individuals being motivated to ‘do the right thing’.

## 8.2 Are government agencies accountable for the quality of their regulatory impact analysis?

Regulatory oversight bodies have a variety of functions, but perhaps their most important function is challenging the quality of RIS documents put forward by government agencies in their respective jurisdictions (chapter 3). These scrutinising functions of seeking information, explanation and justification when assessing RIS adequacy, help to make agencies accountable — but only where the regulatory oversight body actually publishes its adequacy assessments of individual proposals and/or annual compliance reports.

However, as discussed in section 8.1, accountability implies more than the pursuit of transparency. Government agencies must not only be ‘called’ to account; they must also be ‘held’ to account. Accountability is incomplete without effective consequences or sanctions. And they are necessary; according to survey responses from regulatory oversight bodies, in the majority of jurisdictions some regulatory proposals are not meeting RIA requirements and are still proceeding to decision makers (figure 8.1). This has led to calls for increased sanctions for non-compliance with RIA processes from some interested stakeholders (Plastics and Chemicals Industries Association, sub. 8; and Small Business Development Corporation, sub. 25). Where decision makers then introduce regulation that is inconsistent with their own government’s RIA requirements, they (either directly or through their portfolio agencies) should be held accountable.

As discussed in chapter 3, some jurisdictions make ministers or senior public servants personally responsible for the quality of RIS documents in their agencies. The OECD was supportive of this approach in its recent review of regulatory reform in Australia (OECD 2010b). The underlying motivation for this accountability mechanism is that if the minister/public servant is personally responsible, they would ensure the quality of a RIS before it is assessed by the oversight body. On its own, this mechanism is likely to be little more than a bureaucratic red tape exercise. However, as part of a suite of transparency and accountability measures, it may have some value.

Figure 8.1 How often do non-compliant regulatory proposals proceed to decision makers?

Responses by regulatory oversight bodiesa

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| Figure 8.1 How often do non-compliant regulatory proposals proceed to decision makers? This chart shows the number of non-compliant regulatory proposals that often, sometimes, rarely or never proceed to decision makers in regulatory oversight bodies. |

a Responses were received from 9 regulatory oversight bodies. One oversight body (NSW Better Regulation Office) did not respond to this question.

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

### What are the consequences for agencies of non-compliance with RIA processes?

Current consequences or sanctions for non-compliance with RIA processes are weak, ineffective or non-existent in Australia. Only four jurisdictions publish their regulatory oversight body’s RIS adequacy assessments — Commonwealth, COAG, Victoria and Western Australia — although Queensland is expected to do so in the future (at least for some regulatory proposals) following the establishment of the Queensland Office of Best Practice Regulation (QOBPR) in July 2012 (section 7.3). Hence, most government agencies in Australia are not ‘called’ to account for RIA non-compliance — nor do many jurisdictions ‘hold’ their agencies to account for non-compliance.

Table 8.1 shows the jurisdictions that have some consequences or sanctions for non-compliance with RIA processes — the Commonwealth, New South Wales, Victoria (partial), Queensland (partial), South Australia and Tasmania (partial). Where there are sanctions, they mostly relate to RIA processes associated with subordinate legislation rather than primary legislation (Bills of Parliament) — a curious focus, given primary legislation is generally perceived to have more significant impacts on consumers, business and the community. This focus for sanctions possibly reflects the history of the development of RIA processes in many jurisdictions, where they were initially implemented for subordinate legislation. The Commission was advised in several jurisdictions that the scrutiny process associated with primary legislation was considered (at the time) to be more open and rigorous (than that of subordinate legislation) and therefore did not need sanction mechanisms for non-compliance with these RIA processes.

But irrespective of the type of legislative instrument that the sanctions for non-compliance currently apply to, some sanctions can be bypassed and others appear to be rarely used in practice. Nevertheless, agency respondents to the Commission’s RIA survey indicated that the current sanctions for non-compliance with RIA requirements are strong enough to encourage compliance. Oversight bodies were less supportive of this view (figure 8.2).

Figure 8.2 Are sanctions for non-compliance with RIA requirements strong enough to encourage compliance?

Number of responsesa

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| Agencies and departments | Regulatory oversight bodies |
| Figure 8.2 Are sanctions for non-compliance with RIA requirements strong enough to encourage compliance? This chart shows how many agencies, departments and regulatory oversight bodies agreed, disagreed or responded neutrally to the question posed in the figure title. |  |

a Based on 60 survey responses by agencies and departments, including 4 respondents who chose ‘do not know’. Responses to the survey of regulatory oversight bodies were received for 7 of the 10 jurisdictions. The OBPR, representing the Commonwealth and COAG jurisdictions, and VCEC (Victoria) did not provide responses to this question. ‘Agree’ comprises both ‘strongly agree’ and ‘agree’. Disagree comprises both ‘strongly disagree’ and ‘disagree’.

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

Table 8.1 How do jurisdictions hold their agencies to account for non‑compliance with RIA processes?

As at January 2012

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|  | Sanctions (or lack of) for non-compliance |
| Cwlth | The Cabinet Secretariat will not circulate final Cabinet submissions without adequate RISs unless the Prime Minister has deemed that exceptional circumstances apply. However, where a proposal proceeds (either through Cabinet or another decision maker) without an adequate RIS, the resulting regulation must be the subject of a post implementation review. |
| COAG | **No sanctions**. |
| NSW | Where regulations have not conformed with the processes for regulation making specified in the Subordinate Legislation Act (including RIS process), the Legislation Review Committee may make recommendations to Parliament, including disallowance of the regulation — but power to recommend disallowance is rarely used in practice.  For regulatory proposals that require a BRS, the Better Regulation Office provides advice to the Premier on Cabinet and Executive Council Minutes after submission to the Cabinet Secretariat and prior to approval. Unless the Premier approves otherwise, a Minute is not listed for consideration until issues raised by the Better Regulation Office have been addressed. |
| Vic | Where regulations have not conformed with the processes for regulation making specified in the Subordinate Legislation Act (including RIS process), the Scrutiny of Acts and Regulations Committee may make recommendations to Parliament, including the disallowance of the regulation — but power to recommend disallowance is rarely used in practice.  **No sanctions** for regulatory proposals that require a BIA, where the Victorian Competition and Efficiency Commission is not satisfied with the adequacy of the BIA, the responsible minister can still submit the proposal to Cabinet. |
| Qld | If a proposal with likely significant impacts progresses to the decision maker *without a RAS* and is subsequently implemented then a post implementation review is required. There are **no sanctions** for preventing proposals *with a RAS that is not adequate* from progressing to the decision maker and there is no requirement to undertake a PIR. |
| WA | For proposals seeking Cabinet consideration there are **no sanctions** on agencies where a proposal proceeds to Cabinet without an adequate RIS. |
| SA | Where an agency does not get Cabinet Office’s sign-off on a RIS, but seeks and obtains the approval of Cabinet for their proposal, the Office of the Economic Development Board will assess any business costs imposed by the submission as an increase in costs under the agency’s red tape reduction assessment, requiring the agency to find offsetting savings to meet its red tape reduction target (unless Cabinet makes an explicit decision to the contrary). |
| Tas | If the Economic Reform Unit considers that a RIS does not meet the requirements of the Legislation Review Program or Subordinate Legislation Act there are **no sanctions** — the agency can still release its RIS for public consultation.  In relation to subordinate legislation, the Secretary will not issue a certificate, which allows the regulations to be made by the Governor, until such time as the Secretary is satisfied that the RIS requirements have been complied with — in practice a certificate has never been withheld. |
| ACT | **No sanctions**. Failure to comply with the Legislation Act RIS requirements for subordinate law or a disallowable instrument does not affect the law’s validity or create rights or impose legally enforceable obligations on the Territory, a minister or anyone else.  For regulatory proposals seeking Cabinet consideration there are **no sanctions** on agencies where a proposal proceeds to Cabinet without an adequate RIS. |
| NT | **No sanctions**. The Cabinet Office will not proceed with regulatory proposals in the absence of certification from the Regulatory Impact Committee. However, with the Chief Minister’s approval a regulatory proposal can still proceed to Cabinet or Executive Council in the absence of RIS certification or with certification indicating that the regulation does not comply with regulation-making principles. |

*Sources*: Jurisdictional guidance material (appendix B) and sub. DR30.

#### How effective are Cabinet offices where they act as RIA gatekeepers?

Cabinet offices in five jurisdictions have a gatekeeping role as part of the RIA process — Commonwealth, New South Wales, Western Australia, South Australia and the Northern Territory (chapter 3).

For example, under the Northern Territory RIA process, the Regulation Impact Committee (RIC) assesses the adequacy of a RIS against formal best practice regulation principles, and advises Cabinet through the issuing of relevant certificates. The Northern Territory Cabinet Office will not proceed with regulatory proposals in the absence of certification from the RIC, but it does not have a ‘veto power’. With the Chief Minister’s approval a regulatory proposal can still proceed to Cabinet or Executive Council in the absence of RIS certification or with certification indicating that the proposal does not comply with regulation making principles (NT Department of Treasury and Finance, sub. DR30).

Where a regulatory proposal proceeds to the Cabinet without an adequate RIS, the Northern Territory Cabinet may provide approval subject to completion of a RIS — either before or after the introduction of the regulation (Northern Territory Government, pers. comm., 4 April 2012).

In the Australian Government RIA process the Cabinet Secretariat is tasked to serve as the RIA ‘gatekeeper’:

The Cabinet Secretariat provides a gate-keeping role to ensure that regulatory proposals coming to the Cabinet and sub-committees of Cabinet meet the RIS requirements. The Cabinet Secretariat will not circulate final Cabinet Submissions or memoranda, or other Cabinet Papers, without adequate RISs unless the Prime Minister has deemed that exceptional circumstances apply. (Australian Government 2010a, p. 19)

This RIA gatekeeping role was one of a number of regulatory reforms introduced by the Australian Government in 2006 following recommendations made by the Regulation Taskforce. The Taskforce had high expectations that this proposed reform would improve compliance with the requirements:

In the Taskforce’s view, the single most important way of strengthening compliance with the principles of good process would be for the government to adhere to a rule that regulatory proposals that fail to meet the RIS requirements will not be permitted to proceed for consideration by Cabinet or other decision-maker, except in specially defined circumstances. (Regulation Taskforce 2006, p. 156)

If this RIA gatekeeping role worked as intended, then the OBPR — through the Cabinet Secretariat — would have an indirect veto power over proposals without an adequate RIS attached to the relevant cabinet submission (or decision document). In other words, where the OBPR found that a regulatory proposal did not meet the RIA requirements then Cabinet Secretariat would stop the proposal from proceeding to the decision maker.

However, in practice the Cabinet Secretariat has not stopped all proposals that do not meet RIA requirements from proceeding to Cabinet. Cases can be found of proposals not meeting RIA requirements, as assessed and reported by the OBPR (OBPR 2011a), that have still proceeded to Cabinet (or other decision makers) without a Prime Minister’s exemption. There is no public record identifying how each non-compliant submission has proceeded for decision but there is evidence that such a practice is occurring. For example, the Commission was informed that five Future of Financial Advice reforms were not assessed as adequate by the OBPR but nevertheless proceeded to Cabinet in 2010-11.

For Better Regulation Statements in New South Wales, the Cabinet Secretariat has a RIA ‘gatekeeping role’ for regulatory proposals intended for Cabinet. However, this role can be overridden at the behest of the Premier (table 8.1). The Cabinet Services Branch in Western Australia also has a RIA gatekeeping role since it ‘may’ return the Cabinet submission to the responsible Minister if the RIA requirements have not been satisfied (WA Treasury 2010a). It is unclear the extent to which this practice occurs in Western Australia. South Australia’s Cabinet Office also can prevent proposals that do not meet RIA requirements from proceeding, unless the Cabinet Office assessment is overridden on appeal to the Minister for Industry and Trade from the proponent Minister (SA Department of the Premier and Cabinet and Department of Treasury and Finance 2011). However, the South Australian RIA gatekeeping process is relatively new and there have not yet been any appeals of Cabinet Office decisions (SA Cabinet Office, pers. comm., 1 August 2012).

In consultations with the Commission, some jurisdictions indicated that RIA gatekeeping has been circumvented where Cabinet offices have been unable to ‘pull’ submissions that do not have adequate RIS documents attached, or where Ministers have ‘walked in’ submissions directly to Cabinet, without formally lodging them with the Cabinet office. Given these circumstances, calling some Cabinet offices in Australia RIA ‘gatekeepers’ seems somewhat of a misnomer — it is difficult to envisage how Cabinet offices would (ever) be able to fulfil a genuine RIA gatekeeper role.

While there may be a perception of a power of veto, in reality no Cabinet office has the power to consistently prevent proposals that do not meet RIA requirements from proceeding to decision makers. Where Cabinet offices notionally have a RIA ‘gatekeeping’ role, they are creating a perception of rigour and stringency in RIA processes which does not necessarily exist in practice. This breeds cynicism amongst stakeholders about the integrity of RIA processes and over time weakens engagement with the process by agencies, oversight bodies and governments.

This lack of a veto power accords with leading international RIA processes, in that unelected officials generally do not have the power to block regulatory proposals from proceeding (box 8.1). According to a recent OECD working paper on public sector governance:

… most long-lasting oversight bodies have avoided trying to control the flow of information to the Cabinet and, thus, appearing to exert a real ‘veto’. Such power would be beyond oversight and transform the body into the final substantive regulator, with the risk of significant backlash. (Cordova-Novion and Jacobzone 2011, p. 31)

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| Box 8.1 Veto powers are not prevalent in leading international RIA processes |
| The United Kingdom’s Regulatory Policy Committee (UK RPC) provides independent advice on the quality of evidence and analysis supporting the regulatory proposal but does not have the power to block or approve a regulatory proposal. The Cabinet sub-Committee on Reducing Regulation vets all proposals from government departments and makes a final decision, having seen the UK RPC’s advice.  The European Union’s Impact Assessment Board (IAB) examines and issues non-binding opinions on the quality of individual draft impact assessments prepared by European Commission departments. The opinion accompanies the draft initiative together with the impact assessment report throughout the Commission’s political decision making process. The Commission’s impact assessment is an aid — not a substitute — for political judgement. Ultimately, it is the Commission which decides whether or not to adopt an initiative, taking into account the impact assessment provided by the relevant Commission department and the Board’s issued opinion.  In the United States, the Office of Information and Regulatory Affairs (OIRA) reviews draft proposed and final regulations under Executive Order 12866. The OIRA review process seeks to ensure that agencies comply with the regulatory principles stated in the Executive Order. The OIRA either offers suggestions for improving the regulatory proposal or accepts the proposal as is — but even here there is no veto power. As discussed in chapter 7, OIRA has sought to inhibit the adoption of poorly justified policies using ‘return letters’ to federal agencies. But under the Executive Order, the agency can appeal to a more senior administration official (the President’s Chief of Staff). |
| *Sources*: UK RPC (2012); EC IAB (2012); US Reginfo.gov website. |
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The RIA process should be an aid to, not a substitute for, the political judgement of what is in the community’s interest. But where governments make regulatory decisions that are inconsistent with their own RIA principles, these decisions should be made transparent to the community so governments can be held accountable (chapter 7).

A number of submissions supported this view (Australian Government Attorney-General’s Department, sub. 4; Australian Financial Markets Association (AFMA), sub. 11; Officers undertaking RIA in the Victorian transport portfolio, sub. 17). For example, Officers undertaking RIA in the Victorian transport portfolio commented:

Australia has a democratic system of government and those appointed by the people must have the capacity to make judgements about what should be done irrespective of whether these judgements are informed by [adequate] RIA or otherwise. The critical issue is transparency. The question is whether an option for change being proposed is based on a thorough examination of the problem and options or is it being proposed because the popular view is that the option will provide a solution. (sub. 17, p. 13)

If there was greater transparency in jurisdictional RIA processes — via the publishing of RIS documents and oversight body adequacy assessments in a timely manner (as suggested in section 7.3) — then the success of the RIA gatekeeper role becomes less important. Timely publication can be a powerful incentive for governments to undertake robust regulatory impact analysis. Cabinet offices can facilitate the provision of RIA information to Cabinets irrespective of whether RIA requirements have been met for regulatory proposals — as currently occurs in Victoria, Queensland, Tasmania and the ACT.

Borthwick and Milliner (2012), when reviewing the Australian Government’s RIA process, came to the view that the RIA gatekeeper role was unhelpful and unnecessary and that the OBPR should simply become a ‘watch-dog’ rather than being party to a ‘gatekeeping’ process:

In the Review’s opinion, it is not a proper role for OBPR to in effect — through the Cabinet Secretariat — prevent a submission going forward. Rather, their role should be to inform Cabinet (or other decision makers) and the public of their assessment of the veracity of the RIA Process. In this way, the integrity of the process can be better guarded with the OBPR in effect being able to act as a counterbalance when the occasion demands it. (p. 67)

In the absence of the ability for Cabinet offices to have a genuine RIA gatekeeper role, where proposals that do not meet RIA requirements continue to go to decision makers, the public scrutiny that results from a more transparent and timely RIA process should help ensure that such proposals are the exception rather than the rule. In these circumstances, it would be clear that the oversight body role is purely advisory (that is, part of an oversighting process) and that only Cabinet (or other decision makers) has the power to block proposals from proceeding further in the regulatory process.

leading practice 8.1

**The accountability of RIA processes is enhanced where, irrespective of whether RIA requirements have been met, Cabinet offices facilitate the provision of the following RIA information to Cabinets:**

* **the RIS for the regulatory proposal (where one was required and was submitted by the agency)**
* **the regulatory oversight body’s adequacy assessment of the submitted RIS (or its advice that the RIS was not completed).**

#### How often do scrutiny committees recommend disallowance?

Scrutiny committees of parliament exist in all Australian jurisdictions (except COAG) and examine proposed primary legislation and/or regulations made by the executive branch of government (chapter 3). As part of their role, scrutiny committees in five jurisdictions can examine whether regulations that have recently been made comply with RIA requirements — New South Wales, Victoria, Queensland, Tasmania and the ACT. This assessment by parliamentary scrutiny committees typically occurs very late in the process and follows the adequacy assessment of the RIS by the oversight body (where this is formally undertaken).

In Victoria, after statutory rules or subordinate legislative instruments are made, the Scrutiny of Acts and Regulations Committee (SARC) must be supplied with copies of the RIS, the Victorian Competition and Efficiency Commission’s (VCEC’s) assessment letter for the RIS, the regulations, all public comments received during the consultation period, and the relevant agency’s response to the main issues raised in the public comments. The *Subordinate Legislation Act 1994* (Vic) provides that, if the SARC believes that RIA processes have not been met, it may make recommendations to Parliament, including the disallowance or suspension of the regulation. As a regulation has already commenced operation by the time it comes before the SARC, the power to recommend disallowance is only used in exceptional circumstances (SARC 2011).

In practice, the SARC has indicated that, where it is considered that a regulation can be rectified by amendment, it will usually approach the Minister privately to seek amendment rather than report to Parliament. The last information paper (which is not a formal report to Parliament) to Members of Parliament and to the public from the SARC on a RIA issue was in 1996 — in relation to Fisheries (Abalone) Regulations. While the SARC did not move a motion of disallowance in that case, it was critical of some aspects of the RIS analysis (SARC 1996).

Box 8.2 provides some further examples of how the SARC has carried out its RIA scrutiny role and the outcomes that resulted from its interventions. Despite its efforts in identifying and exposing problems with RIA compliance, the SARC has had little impact on the form of the final regulations.

In a similar fashion to the Victorian Parliament’s SARC, the New South Wales Legislation Review Committee examines and reports on compliance with *Subordinate Legislation Act 1989* (NSW) requirements. As in Victoria, the power to recommend disallowance is rarely used in practice in New South Wales:

The Committee is constrained in its ability to consider regulatory impacts due to its size and expertise and does not assess compliance with … RIS requirements in any detail. The Committee provides advice to Parliament on these matters infrequently and Parliament has not disallowed a Regulation on these grounds in recent years. (Better Regulation Office (BRO) 2011, p. 33)

In Tasmania, the *Subordinate Legislation Act 1992* (Tas) requires that where a RIS is required for new regulation, a copy is sent to the Subordinate Legislation Committee. However, the Subordinate Legislation Committee indicated that it ‘is not able to assess whether agencies meet all the [RIA] requirements under the template’ (sub.  3, p. 4). The Committee usually accepts the view of the Tasmanian oversight body (Economic Reform Unit) in relation to RIS adequacy unless particular issues have arisen through the public consultation process. In any event, the Committee has not recommended disallowance for a failure to comply with RIA requirements, at least since 2007 (Subordinate Legislation Committee, pers. comm., 21 May 2012).

In Queensland, the former Scrutiny of Legislation Committee appears to have never recommended disallowance where there were RIS compliance issues or where it considered that a RIS should have been prepared for a regulation (but was not). However, the Committee regularly commented in its annual reports on the small number of RISs prepared in Queensland and the narrow interpretation of the threshold requirement for conducting a RIS. In addition, the Committee completed a number of individual reports on subordinate legislation where compliance with RIS requirements had been raised by other parliamentarians (not members of the Committee). As outlined in chapter 3, the Committee ceased on 30 June 2011, as part of reforms to Queensland’s Parliamentary committee system.

It appears that where parliamentary scrutiny committees have been tasked with ensuring RIA requirements for legislation have been met, they may play a useful information role in identifying and exposing RIA problems, but are largely unsuccessful in changing regulation.

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| Box 8.2 Victoria’s Scrutiny of Acts and Regulations Committee: Case Studies |
| *Country Fire Authority Regulations 2004*  The Regulation Review Subcommittee (which is a subcommittee of the SARC) were critical that the RIS failed to address alternatives and wrote to the Minister for Police and Emergency Services seeking rectification. The Minister agreed to prepare a further document to be incorporated in the RIS which considered alternatives. Following receipt of this document the Subcommittee approved the regulations.  *Firearms (Search Powers) Regulations 2003*  The Regulation Review Subcommittee voiced concerns that the RIS contained no cost–benefit analysis and no statement of alternative means of achieving the objectives of the regulations and wrote to the Minister for Police and Emergency Services seeking rectification. The Minister advised that because the objectives of the regulation and the manner in which they were to be achieved had already been determined by Parliament through primary legislation it was not considered appropriate to perform a cost-benefit analysis or examine alternatives in the RIS. The Subcommittee was satisfied with the Minister’s response.  *Water (Groundwater) Regulations 2002*  The RIS did not contain any discussion of regulatory or non-regulatory options for achieving the objectives. The Regulation Review Subcommittee wrote to the Minister indicating its concerns and highlighting examples of possible alternatives which could have been considered. It also sought advice as to whether there had been any consultation with the Victorian Farmers Federation.  The Minister indicated that the Subcommittee’s comments concerning the discussion of regulatory and non-regulatory alternatives had been noted. The Minister also confirmed that consultation had taken place with the Victorian Farmers Federation and that it had agreed that the impacts of the regulations on farmers were minimal. The Subcommittee was satisfied with the Minister’s response.  *Minerals Resource Development Regulations 2002*  The Regulation Review Subcommittee found the RIS which accompanied these regulations was unnecessarily complex and confusing, making it difficult to understand the changes introduced and the impact of those changes. The Subcommittee wrote to the Minister highlighting its concerns.  The Minister indicated that all issues raised by the Subcommittee had been drawn to the attention of appropriate officers within the Department and assured the Subcommittee that future RISs prepared by his Department would be clear and easy to understand so that members of the public can ‘understand and comment on regulatory proposals’. The Subcommittee was satisfied with the Minister’s response. |
| *Sources*: SARC (2003, 2004, 2005). |
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### Effectiveness of post implementation reviews as a consequence for non-compliance

A number of jurisdictions have a further consequence in place, in the form of a post implementation review (PIR) in the case of the Commonwealth, Queensland and Western Australia and a ‘late’ RIS, in the case of COAG, New South Wales, Victoria and South Australia. The circumstances for triggering PIRs/late RISs differ between jurisdictions and are discussed in chapter 9.

An Australian Government PIR is a consequence of not completing an adequate RIS irrespective of whether a proposal is non-compliant or compliant (that is, where a Prime Minister’s exemption is granted) with the Australian Government’s best practice regulation framework. Similarly, Queensland PIRs relate to both non-compliant (no regulatory assessment statement (RAS)) and compliant proposals (where a Treasurer’s exemption was granted) (Queensland Treasury 2010). However, there is no requirement that a PIR be conducted where a RAS is assessed as not adequate (another type of non-compliant proposal). PIRs in Western Australia are required for Treasurer’s Exemptions (chapter 9), but not for those proposals that do not comply with RIA requirements (WA Treasury 2010a).

For COAG, a late RIS may occur in emergency situations where there is no time to prepare a RIS before the regulation comes into effect. The Chair of the Ministerial Council must write to the Prime Minister to obtain agreement to waive the need for a RIS before making the regulation. In Victoria, a late RIS is required for Premier’s exemptions in relation to subordinate legislation. However, a late business impact assessment (BIA) is not required for a Premier’s exemption in relation to primary legislation (Victorian Department of Treasury and Finance 2011a, 2011b). In South Australia, the requirement to prepare a RIS in advance of Cabinet approval may be waived for proposals which require urgent implementation. In these cases a late RIS is prepared:

… agencies must prepare a RIS within 12 months of making the regulation and Cabinet should be asked to formally note the emergency nature of the proposal and the timeframe for the preparation of a RIS. (SA Department of the Premier and Cabinet and Department of Treasury and Finance 2011, p. 7)

New Zealand also has a PIR in its RIA process for non-compliant proposals. If a regulatory proposal with significant impacts does not meet RIA requirements but is ultimately agreed to by Cabinet, then it will be subject to a PIR. The nature and timing of this review are agreed by the lead agency in consultation with Treasury and signed off by the responsible minister, in consultation with the Minister of Finance and the Minister for Regulatory Reform (NZ Treasury 2009).

#### Do PIRs encourage compliance with the RIA process?

When PIRs were introduced by the Australian Government in 2006 it was anticipated that there would be few required (PC 2006). However, the number of non-compliant regulations has increased since the introduction of the PIR from 4 in 2007-08, peaking at 16 in 2010-11, before edging down to 9 in 2011-12 (chapter 9). This calls into question the usefulness of PIRs, in their current format, as a consequence of non-compliance with RIA processes.

The Australian Government Attorney General’s Department is of the view that the consequences for non-compliance in the Australian Government are appropriate for those agencies that are supportive of the RIA process:

The potential to undertake a post implementation review is undesirable and the potential to be ‘named and shamed’ on the OBPR [Office of Best Practice Regulation] website is effective where the agency is one that appropriately embraces the RIA process. (sub. 4, p. 6)

But given the growth of PIRs required for non-compliant regulatory proposals since 2007-08, and the significance of the issues to which they relate, it appears that the consequences for Australian Government agencies of not following RIA processes — that is, undertaking a PIR and being publicly reported as non-compliant by the OBPR — have not been a sufficient incentive to encourage full compliance with the RIA process.

Moreover, the consequences of non-compliance for an agency do not escalate but rather taper off as the agency continues to disregard the best practice regulation requirements for a proposal. Specifically, if an agency fails to complete an adequate RIS then the agency must undertake a PIR and its regulatory proposal will also be publicly reported by the OBPR as non-compliant with the RIA process. Subsequently, if the agency fails to complete an adequate PIR, its regulation will only be publicly reported by the OBPR as non-compliant with the PIR process — there is no further consequence. This could have the perverse effect of encouraging agencies to increase their level of non-compliance with the requirements.

In the case of Queensland there is no public reporting of non-compliance with PIR requirements.[[1]](#footnote-1) In contrast, in Western Australia the RIA guidelines suggest that there will be public reporting (WA Treasury 2010a) — although this is yet to be implemented (WA Treasury, sub. DR37).

To realign incentives for agencies so that they are encouraged to comply with the RIA process, the PIR needs to be implemented in all jurisdictions and become a more powerful sanction for non-compliance.

Where a regulatory proposal is non-compliant with the RIA process, in all jurisdictions a PIR should commence within two years of the regulation coming into effect and be of a similar level of rigour as a RIS. The PIR should be undertaken by an independent third party using a public consultation process, because it may be difficult for an agency that has been implementing a particular regulatory option to provide a ‘neutral’ assessment of the regulation one to two years later in a PIR. As an additional incentive to adhere to RIA requirements, the PIR should also be required to be paid for by the agency responsible for the non-compliant regulation.

To increase the accountability of the PIR process, the PIR report and the regulatory oversight body’s PIR adequacy assessment should be made publicly available in a timely manner. The PIR adequacy assessment should detail any qualifications where the PIR was assessed as adequate or provide a clear explanation of the reasons why the regulatory oversight body assessed the PIR as not adequate (in a similar manner to what should occur for RIS adequacy assessments as described in chapter 7). Chapter 9 discusses some of these issues further, and incorporates them in a leading practice for PIRs intended for both non-compliant proposals and proposals granted an exemption.

## 8.3 Regulatory oversight body accountability

### Does it matter where regulatory oversight bodies are located within government?

Most Australian oversight bodies reside at the centre of executive government, typically in a unit, with some degree of autonomy, located within the Department of Treasury or the Department of Premier and Cabinet (chapter 3).

Until recently, no Australian oversight body had strict statutory independence — VCEC came closest, as an independent advisory body established under the Victorian *State Owned Enterprises Act 1992* (SOE Act).[[2]](#footnote-2) In Queensland, in July 2012, the responsibility for RIA oversight was moved from Queensland Treasury to the Queensland Competition Authority (QCA), an independent statutory authority.[[3]](#footnote-3) Similar to all other jurisdictional oversight bodies, in both the Victorian and the new Queensland models, the oversight bodies report to ministers in the relevant government.

The OECD, in its recent recommendation on regulatory governance, considered appropriate institutional arrangements for fostering regulatory quality to include:

A standing body charged with regulatory oversight should be established close to the centre of government, to ensure that regulation serves whole-of-government policy.

The authority of the regulatory oversight body should be set forth in mandate, such as statute or executive order. In the performance of its technical functions of assessing and advising on the quality of impact assessments, the oversight body should be independent from political influence. (OECD 2012a, p. 9)

The OECD has not been prescriptive in recommending a particular location for such a body. The recommendation appears to support a regulatory oversight body that resides either within:

* a central government agency, if it has sufficient autonomy in its decision making on individual RIA processes
* an independent statutory authority, if it is close to the centre of government.

The recommendation recognises the desire for a regulatory oversight body to have both:

… a need for independence from political micro-management, to assure its neutrality and technocratic objectivity, and simultaneously a need to be close to power in order to have authority over other ministries … (Weiner and Alemanno 2010, p. 312).

On the one hand, locating the oversight body close to the centre of government may: give it greater authority and credibility; enhance its ability to more easily bring concerns to the attention of Cabinet or other key decision makers; and reduce the risk that the body will be ‘out of the loop’ and not receive timely notification of regulatory proposals. On the other hand, a more independent body may have greater objectivity, transparency and autonomy in carrying out its functions. It may be better able to resist government attempts to push through poorly justified regulatory proposals and more readily provide critical feedback on the quality of RIA processes. In reality, a trade-off has to be made between being closer to the centre of government and being more independent.

It could be argued that those oversight bodies with a formal mandate, such as VCEC and the newly established QOBPR, are consistent with the OECD recommendation. It is less clear whether other jurisdictional oversight bodies within Australia are consistent with the OECD recommendation.

The Australian Government OBPR, for example, resides within the Department of Finance and Deregulation but is afforded some independence from the Department and portfolio ministers in its administration of the Australian Government RIA requirements. This ‘independence’ is not laid down in statute but is instead periodically reaffirmed in ministerial statements by the Minister for Finance and Deregulation:

To perform its watchdog role effectively, the OBPR needs to exercise its decision-making functions in an independent manner. The government has put in place procedures to ensure that neither ministers nor their staff can seek to intervene in or influence the OBPR’s deliberations. Decisions on the adequacy of a regulatory impact analysis and compliance with the best practice regulation requirements will be made independently by the Executive Director of the OBPR. (Tanner 2008, p. 1890)

The Government will ensure that Ministers do not influence the OBPR’s decisions in determining the adequacy of Regulation Impact Statement or agency compliance with the Best Practice Regulation Guidelines. Decisions on the adequacy of a regulatory impact analysis and compliance with the best practice regulation requirements will continue to be made independently by the Executive Director of the OBPR. (Wong 2010, pp. 1069-70)

The Business Council of Australia (BCA) considers that statements by Finance Ministers about the OBPR’s independence are not sufficient to guarantee independent decision making by the OBPR:

The BCA does not consider that a statement by the Minister alone will improve the independence or the effectiveness of the OBPR ... However, little more has been done to reinforce the independence arrangements.

We would expect further information about the independence arrangements to be made publicly available. The appropriate information would include, for example, staffing arrangements and structures, reporting requirements, performance review arrangements and budgeting arrangements. (BCA 2010, p. 19)

From a COAG perspective, the Victorian Department of Premier and Cabinet was also critical of the location of the OBPR because of a perceived conflict of interest with the Department of Finance and Deregulation and suggested a more independent oversight model:

The COAG RIA oversight body, the OBPR, sits within the same Group of the Commonwealth Department of Finance and Deregulation as that which is tasked to drive the implementation of the COAG Seamless National Economy Reforms. This results in a situation where the Department is both the proponent of a reform and the review body for analysis of reform options. This is a clear conflict of interest and does not meet good governance principles. The only way to ensure that RIA assessment is rigorous and balanced is to establish a separate and independent statutory body … A new COAG RIA oversight model should adopt the OECD’s recommendations for independence and authority of the RIA oversight institutions. This would significantly reduce the risk of the gatekeeping review body being perceived as ‘captured’ when assessing proposed reforms. (sub. DR32, p. 6)

This sentiment reflects a need for oversight bodies to be seen as independent in order to maintain public confidence. A number of submissions called for more independent oversight as a means of improving the integrity of the RIA process (Australian Chamber of Commerce and Industry (ACCI), sub. 3; Australian Food and Grocery Council (AFGC), sub.  5; CropLife Australia, sub. 7; Construction Material Processors’ Association, sub. 9; Chi-X Australia, sub. 13). In addition, only 10 of the 60 agency respondents to the Commission’s RIA survey and one of the oversight body responses (South Australia) disagreed with the proposition that the RIA process is, or could be, more efficient and effective when a regulatory oversight body has statutory independence (figure 8.3).

Figure 8.3 Would statutory independence of the regulatory oversight body improve the RIA process?

Number of responsesa

|  |  |
| --- | --- |
| Agencies and departments | Regulatory oversight bodies |
|  |  |

a Based on 60 survey responses by agencies and departments, including 5 respondents who chose ‘do not know’. Responses to the survey of regulatory oversight bodies were received for 8 of the 10 jurisdictions. The OBPR, representing the Commonwealth and COAG jurisdictions did not provide responses to this question. ‘Agree’ comprises both ‘strongly agree’ and ‘agree’. Disagree comprises both ‘strongly disagree’ and ‘disagree’.

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

The Australian RIA experience, as evidenced throughout this report, suggests that regulatory oversight by units within central government agencies has not been very influential in improving regulatory decisions or the quality of outcomes, particularly where it matters most — for highly significant proposals. This conclusion is informed, in part, by the following RIA survey results:

* most central agency oversight bodies stated that regulatory proposals that do not meet RIA requirements are still proceeding to decision makers (figure 8.1) — indicating a lack of influence over agencies and/or ministers
* nearly all central agency oversight bodies agreed that ministers should provide reasons for proposing regulations that are inconsistent with RIA principles (figure 7.4) — perhaps indicating a lack of influence over ministers.

It appears that the perceived benefits of having the oversight body at the centre of government — so that it can exert influence over both agencies and decision makers and be closer to Cabinet processes and the development of policy proposals — could possibly be overstated. Furthermore, some stakeholders have suggested that being close to the centre of government has at times undermined the credibility of oversight bodies as these bodies have been seen as not being sufficiently insulated from political pressure emanating from government (BCA 2010; ACCI 2011; PCA 2011). Lack of transparency of RIA documentation and oversight body compliance reporting reinforces these perceptions (chapter 7).

More independent oversight arrangements are likely to be less susceptible (but not immune) to external political influence. The creation of an independent statutory agency would provide the greatest level of independence (while still reporting to executive government). However, this institutional model would impose some additional obligations and constraints, including:

* legislation to establish the body would need to be passed through Parliament
* some reduced flexibility in the government’s capacity to modify RIA operating practices and procedures
* some accountability obligations to the Parliament
* requirement for the publication of an annual report.

To increase independence further, some statutory agencies in other areas of government also establish an advisory committee to assist and advise the head of the agency in matters relating to the performance of their functions. For example, the recent *Australian Information Commissioner Act 2010* establishes an Information Advisory Committee to assist the Information Commissioner.

The Uhrig Review (2003) emphasised the importance of ensuring that ‘the benefits of establishing functions separate from government are significant enough to warrant the creation of statutory bodies’ (p. 58) and further stated:

The powers and functions … are generally specified in significant detail in the enabling legislation. … [it] has the effect of limiting the flexibility in responding to changing government and community priorities. Legislation may become dated and can be difficult to change.

Consideration should be given to whether functions can be accommodated successfully within a departmental structure or an executive agency, reducing the need for the creation of a separate authority and the associated costs and demands placed on the public sector. (Uhrig 2003, p. 58)

In smaller jurisdictions, the low volume of RIS activity may mean establishing an oversight body with statutory independence is not cost-effective. However, costs may be significantly reduced if the oversight body is located within an existing statutory agency, as has recently occurred in Queensland. In such cases it is important to ensure that any conflicts of interest are appropriately managed. For example, the QCA is a significant regulator itself, with potential for its RISs to be subject to QOBPR adequacy assessment — therefore appropriate ‘Chinese Walls’ would need to be in place to ensure the existing agency’s objectives do not conflict with the oversight function.

Jurisdictions could also consider alternative measures for achieving some independence without necessarily establishing an independent statutory agency, these include:

* formalising a Memorandum of Understanding (MOU) with the central department — a current example of such an arrangement (albeit for an oversight body that has some degree of independence) is the Framework Agreement in Victoria, which outlines the protocols for the working relationship between the Department of Treasury and Finance and the VCEC (Victorian Government 2005)
* supporting the oversight body with an advisory board, similar to the arrangements for the Australian Government Bureau of Resource and Energy Economics, which was formed in July 2011 and is comprised of persons with relevant skills and experience from both the private and public sectors
* Borthwick and Milliner (2012), when reviewing the Australian Government’s RIA process, considered that the Executive Director of the OBPR should be supported by a small independent advisory board to oversight the integrity of the process and be used as a sounding board on issues
* creating an ‘executive agency’— the concept is described in box 8.3 for the Australian Government, but the Commission understands that some states have the flexibility to implement similar governance arrangements
* establishing oversight functions within the departmental structure, headed by an independent statutory office holder who reports directly to a minister, similar to the arrangements for the Infrastructure Coordinator who assists Infrastructure Australia in the performance of its functions.

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| Box 8.3 Executive agencies in the Australian Government |
| Executive agencies in the Australian Government are non-statutory bodies established by the Governor-General, acting on the advice of the Prime Minister, under Part 9 of the *Public Service Act 1999*. The purpose of the executive agency structure is to provide a degree of separation from departmental management where that is appropriate to the functions of the agency and something less than a statutory agency is warranted.  An executive agency’s functions are specified in its establishing instrument, although they may be amended subsequently by the Governor-General as circumstances require. The provisions of the Public Service Act do not go into detail about the structure of an executive government agency, so there is considerable flexibility.  The head of an executive agency is appointed by, and is directly accountable to, the Minister responsible for the agency. He or she need not be a public servant but other staff of executive agencies are generally public servants.  The head of an executive agency will have the management and accountability responsibilities of an agency head under the Public Service Act. Full separation of accounting and financial reporting can be achieved where the body is made a prescribed agency under the *Financial Management and Accountability Act 1997*.  Examples of Australian Government executive agencies include:   * Australian Agency for International Development * Bureau of Meteorology * CrimTrac Agency * Insolvency and Trustee Service Australia * National Mental Health Commission. |
| *Sources*: PC (2004); Department of Finance and Deregulation (2012). |
|  |
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Each of these measures would maintain the attachment of the oversight body to a central department but at the same time may provide a degree of autonomy. For comparison purposes, the key features of these measures and the independent statutory agency alternative are set out in table 8.2.

Many of the concerns about the autonomy of central department oversight bodies might be addressed through the establishment of an independent statutory office holder. Such governance arrangements would provide a reasonable degree of organisational independence in a cost effective manner.

Table 8.2 Alternative governance arrangements for oversight bodies

Reporting to executive government

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | MOU | Advisory board | Executive agency | Statutory office holder | Statutory agency |
| Degree of organisational independence relative to a unit in dept | Minor | Minor/ medium | Medium | Medium/ Major | Major |
| Degree of financial management autonomy from dept | Minor | Minor | Major | Medium | Major |
| Separate accountability and reporting from dept | No | No | Yes | Possible | Yes |
| Employment arrangements for head of oversight body | Public servant | Public servant | Ministerial appointment | Determined by statute | Determined by statute |
| Increased admin cost relative to a unit in dept | Minor | Minor/ medium | Major | Minor/ Medium | Major |

*Sources*: Department of Finance and Administration (2005); PC assessment.

While increased independence of oversight bodies is supported by the Commission, statutory independence, of itself, will not necessarily ensure the oversight body is immune to political pressure. The reporting arrangements of the oversight body —be it to the executive or directly to the legislature — may have a more important impact in practice than the body’s underlying statutory independence (this is discussed further in section 8.4).

leading practice 8.2

**Regulatory oversight bodies that have a greater degree of independence are likely to operate with more objectivity and transparency in implementing RIA requirements.**

* **Ideally, the oversight body should be located within an independent statutory agency.**
* **Where the oversight body remains located in a central department, its autonomy can be strengthened through the appointment of a statutory office holder with direct ministerial reporting and appropriate safeguards to ensure independence and objectivity.**

### Are regulatory oversight bodies accountable for their assessments?

All regulatory oversight bodies examine RIS documents and advise decision makers whether they meet the government’s regulation requirements by providing an adequate level of analysis (chapter 3). But there is no government agency in any jurisdiction which periodically assesses the performance of the regulatory oversight body in carrying out this ‘challenge function’. This lack of accountability has been raised by Harrison (2009) in relation to the Australian Government:

An issue that has been ignored by … various inquiries is the incentives for the OBPR to perform its role and enforce a RIA process that improves regulation … The lack of focus on the OBPR’s performance has meant the RIA process has often provided it with poor incentives. For example, its main indicator of best practice regulation is the rate at which regulatory bodies comply with the RIA process. Although a low compliance rate from a failure to conduct RIAs indicates the process is being evaded, a high compliance rate tells us little about the quality of regulatory outcomes … High compliance rates can be produced through low standards of adequacy … (p. 44)

For RIA processes to be credible and legitimate they need to be seen by stakeholders to be working effectively. Currently, stakeholder perceptions of oversight bodies are clouded in all jurisdictions by a lack of evidence of oversight body activity and performance coupled with ample evidence of regulatory proposals which fail to meet RIA requirements, yet are still implemented.

It would be unfair to suggest that if poor regulatory outcomes have arisen then responsibility necessarily lies with the regulatory oversight body. As discussed earlier, regulatory proposals which do not meet RIA requirements can still be implemented in all jurisdictions (for example, through agency bypass of the RIA process, a breakdown in the Cabinet office ‘gatekeeping’ role (where it exists) or through an exemption from RIA processes).

Regulatory oversight bodies can only be held accountable for the actions and decisions they take. Once it has been decided that a regulatory proposal will require a RIS, all oversight bodies make one key decision that has the potential to influence regulatory outcomes: is the RIS undertaken by the agency adequate?

Concerns have been raised in submissions that at times oversight bodies have made incorrect adequacy assessments. Some submissions suggest oversight bodies narrowly confine themselves to assessing whether ‘due process’ has been followed, rather than the adequacy of the RIS, because they often do not have the resources and skills necessary to undertake this task effectively (AFGC, sub. 5). Similarly, Crop Life Australia commented that a lack of technical expertise in the regulatory oversight body has resulted in some poor proposals being assessed as adequate:

Some impact statements that have identified regulatory impacts as being small and net positive for governments, community and industry have, on closer examination, been reliant on overly optimistic and inaccurate assumptions that undermine the validity of the conclusion. … ‘quality checks’ by independent agencies such as the Office of Best Practice Regulation are often insufficient to identify key failings in impact analyses. Indeed, while they can provide assurance that government guidelines are strictly followed, they are not able to identify or challenge many of the key assumptions contained within the analysis. (sub. 7, p. 3)

If this were a common occurrence across jurisdictions it would be of concern because an important facet of the oversight body challenge function in most jurisdictions is to examine the quality of evidence provided in the RIS in support of key assumptions. For example, the Victorian *RIS/BIA Initial Assessment Checklist* requires the VCEC officer assessing the RIS/BIA to check the extent to which ‘all assumptions are explicitly stated and supported’ (VCEC 2007, p. 4).

Similarly in the Australian Government, the OBPR is supposed to assess whether a RIS contains an adequate analysis of the costs and benefits of the feasible options, whether it provides evidence in support of key assumptions and clearly identifies any gaps in data (Australian Government 2010a). At the same time, it should be recognised that even with the best efforts of oversight bodies assessing the adequacy of RIS documents, there will always be some shortcomings in the analysis that will be difficult for oversight body staff to detect.

Business groups such as the Australian Chamber of Commerce and Industry (ACCI) are also critical of the quality of some RIA processes that are being assessed as adequate:

… Australian businesses continue to express concern and disappointment with RIA processes. They are often less than adequate and comprehensive, even for major policy proposals, do not allow adequate consultation with stakeholders, and RIA documents are neither readily available nor easily accessible. (sub. 2, p .1)

Similarly, when reviewing the Australian Government’s RIA process, Borthwick and Milliner (2012) concluded that:

… many more RISs should be judged as non-compliant because, for example, alternative options were not thoroughly explored, consultations were inadequate, or a decision had effectively been taken before finalisation of the RIS. (p. 51)

Given the high RIS compliance rates (for those few jurisdictions that record compliance) discussed in chapter 3, it would appear that adequate RIS assessments may indeed occur more often than perhaps they should. That is, regulatory oversight bodies may have a greater tendency to assess a RIS as adequate when it is not, than to assess an adequate RIS as not adequate (box 8.4).

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| Box 8.4 Type I and Type II errors in RIS adequacy assessments |
| If a regulatory oversight body is fully effective it should only be passing adequate RISs and failing not adequate RISs. Of course, assessing RIS adequacy relies heavily on the judgement of the individual assessor and there is a degree of subjectivity around the assessment. While adequacy criteria may be transparent it may not always be clear to what extent a particular RIS meets the adequacy criteria — judgement is required. And where judgement is required mistakes can be made.  A regulatory oversight body can make two types of errors:   * it can pass a RIS as adequate when it is actually not adequate, which is known as a ‘false positive’ or Type I error * it can fail a RIS as not adequate when it is actually adequate, which is known as a ‘false negative’ or Type II error.   The set of correct and incorrect assessments that are possible for an oversight body are outlined in the matrix below:   |  |  |  | | --- | --- | --- | |  | **RIS adequate** | **RIS not adequate** | | **‘Pass’** | Correct assessment | Type I error  (‘false positive’) | | **‘Fail’** | Type II error  (‘false negative’) | Correct assessment | |
| Source: Bogaards (2011). |
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One reason for this possible bias is the political, public and media pressure on governments to regulate as a solution to current problems or risks. This pressure can be transferred from ministers’ offices to departments and subsequently flow through to regulatory oversight bodies. Regulatory oversight bodies, particularly those located close to the centre of their government, may be under pressure to give an agency the benefit of the doubt and ‘pass’ rather than ‘fail’ a RIS. This pressure to pass may be even more acute for those oversight bodies that are part of a RIA ‘gatekeeping’ process (section 8.2) — where the consequences for government agencies of non-compliance are more costly (at least in principle) — because, in principle, the proposal cannot proceed to decision makers.

Making RIS documents and the oversight body’s adequacy assessments with reasons publicly available at the time of a regulatory announcement (as suggested in chapter 7) may improve both the quality of RIA processes and the accountability of oversight body assessments. Such public transparency would provide a much needed counterbalance to the pressure on governments to regulate.

### Is periodic assessment of the oversight body’s performance required?

Putting in place an accountability mechanism for regulatory oversight bodies, such as the periodic evaluation of their performance by an independent third party, would be an added motivation — beyond public transparency — for consistency in oversight body adequacy assessments.

While the first line of protection is to depend on the oversight body’s own professionalism and ethics, there may be value in supplementing and reinforcing these by external controls. Some overseas jurisdictions have engaged audit offices to provide periodic oversight of their RIA processes, including aspects of the oversight body’s performance (box 8.5).

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| Box 8.5 Auditor reports on RIA process performance in some overseas jurisdictions |
| In the United Kingdom, the National Audit Office (NAO) views the quality of regulation and its implementation as a key value-for-money issue in public policy. The NAO has reported annually on the RIA process and the quality and thoroughness of impact assessments since 2004.  In the European Union, an audit report on the European Commission’s Impact Assessment system was published in September 2010 by the European Court of Auditors (ECA). The ECA audit analysed whether impact assessments supported decision making in the EU institutions. In particular, it examined the extent to which:   * impact assessments were prepared by the Commission when formulating its proposals and the European Parliament and the Council consulted these assessments during the legislative process * the Commission’s procedures for impact assessment appropriately supported the Commission’s development of its initiatives * the content of the Commission’s impact assessment reports was appropriate and the presentation of findings was conducive to being taken into account for decision making.   In the United States, the Government Accountability Office (GAO) has published seven reports since 2003 on Federal Government rulemaking. In its latest report, published in 2009, the GAO discussed how broadly applicable rulemaking requirements cumulatively have affected:   * agencies’ rulemaking processes, in particular including effects of requirements added to the process since 2003 * transparency of the Office of Information and Regulatory Affairs’ (OIRA, the US regulatory oversight body) regulatory review processes — advocating for more transparency at OIRA to better allow the public to understand the influence of OIRA on agency rulemaking. |
| *Sources*: NAO (2010b); ECA (2010); GAO (2009). |
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Moreover, the OECD has recently called for the periodic assessment of the performance of regulatory oversight bodies. The OECD (2012a) recommendation of the Council on Regulatory Policy and Governance explicitly states:

The performance of the oversight body, including its review of impact assessments should be periodically assessed. (p. 9)

The assessment of RIA by the regulatory oversight body should be periodically evaluated by an independent third party, such as, for example, the National Audit Authority. (p. 13)

Most government agencies responding to the Commission’s RIA survey were supportive of subjecting the decisions of the oversight body to a periodic audit to improve the RIA process. In comparison, oversight bodies were generally neutral (figure 8.4).

Figure 8.4 To improve the RIA process, should the decisions of the regulatory oversight body be audited?

Number of responsesa

|  |  |
| --- | --- |
| Agencies and departments | Regulatory oversight bodies |
|  |  |

a Based on 60 survey responses by agencies and departments, including 8 respondents who chose ‘do not know’. Responses to the survey of regulatory oversight bodies were received for 8 of the 10 jurisdictions. The OBPR, representing the Commonwealth and COAG jurisdictions did not provide a response to this question. ‘Agree’ comprises both ‘strongly agree’ and ‘agree’. Disagree comprises both ‘strongly disagree’ and ‘disagree’.

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

As discussed in chapter 1, many governments in Australia have subjected their RIA processes to external review in recent years. But most reviews have tended to focus on the performance of the overall RIA process in a jurisdiction, rather than how well the oversight body has performed its particular compliance assessment role.

#### Who will watch the watchmen?

Audit offices in Australia appear well placed to provide some retrospective scrutiny and verification of the adequacy assessment decisions of regulatory oversight bodies — both for RIA and PIR processes. All Australian jurisdictions have an audit office that could, if requested, periodically undertake a ‘performance audit’ of such bodies (box 8.6). However, other independent third parties with relevant skills could also undertake this work.

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| Box 8.6 What do government auditors do? |
| The government auditor (Auditor-General) is a statutory officer who is legally guaranteed a degree of independence from the executive government, operating more as an agent of the legislature. The legislature is usually involved to some extent in the choice of subjects for audit investigation. Audit reports are normally presented to the legislature rather than the executive.  Government audits are generally one of two types, financial or performance. Financial audits are aimed at verifying whether government expenditure has been conducted in accordance with legislative authorisations. Performance audits, audit the performance of government in terms of economy (minimising cost), efficiency (maximising the ratio of outputs to inputs) and effectiveness (the extent to which intended government objectives were achieved).  While financial audits must be conducted on all agencies regularly, performance audits are discretionary, being applied to areas or issues of particular concern, either at the initiative of the auditors themselves or at the request of legislators or even of the government. While requests from parliament and/or ministers are accorded high priority, the government auditor usually has ultimate discretion over the areas subject to performance audit.  While auditors conduct inquiries and publish reports (that may contain recommendations) they do not exercise formal powers of rectification, leaving the imposition of remedies to other agencies, such as the police and the courts in cases of fraud or embezzlement or the government on matters of policy. |
| *Source*: Mulgan (2003). |
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The periodic assessment of the performance of regulatory oversight bodies by an independent third party, such as an audit office, would make a valuable contribution to the accountability of RIA processes across Australia — it would introduce some accountability where currently there is little or none.

leADING PRACTICE 8.3

**Stakeholder confidence in regulatory oversight bodies is enhanced where their performance, including their adequacy assessments of RIA and PIR processes, is periodically evaluated by an independent body, such as the audit office.**

### Could audit offices also provide a broader performance monitoring role of a government’s RIA performance?

Following the experience of the United Kingdom, it may also be useful to consider if the audit office should regularly assess how RIA is being implemented within government more generally — not just the performance of the oversight body.

Borthwick and Milliner (2012), when reviewing the Australian Government’s RIA process, suggested that the ANAO could be called on to influence agency behaviour by emphasising RIA process compliance and appropriate regulatory practice as part of good public administration.

Engaging the assistance of the audit office may be helpful since it is usually the case that the oversight body inevitably becomes the sole champion of compliance with what is in fact broad government policy. Being the sole champion can make the oversight body somewhat isolated and vulnerable to criticism (both within and outside government). Having the ‘third party perspective’ of an audit office may be effective at broadening ownership of, and increasing support for RIA and is naturally linked to its concerns for effective programs and policies. For example, the audit office could consider the use of consultation practices by agencies, as well as the quality of individual impact assessments, through monitoring the application of quantification to costs and benefits.

## 8.4 Executive government accountability

### What mechanisms are available to make governments accountable?

There are two major mechanisms for holding Australian governments accountable for the regulatory decisions they make during their time in office: ministerial responsibility; and parliamentary committee investigation.

#### Ministerial responsibility

Ministerial responsibility (or accountability) to the House or Chamber of parliament of which the minister is a member, is a core principle of Westminster-based systems of government. Ministers are also accountable to the community via parliament. Part of this accountability to parliament is an obligation on ministers to respond to questions about their portfolios put to them by their parliamentary colleagues. However, ministers have the right to refuse to answer questions, and will not usually discuss matters that: impinge on national security; are before a court of law; or are part of confidential discussions with cabinet colleagues.

In some jurisdictions, such as the Commonwealth, there is a dedicated cabinet minister with overarching responsibility for the RIA process and more specifically the oversight body adequacy assessments that are attached to cabinet submissions (or other decision documents). Having a RIA ‘champion’ inside the Cabinet may help reduce the frequency of ministers not complying with the RIA process. The New South Wales Government had a dedicated Minister for Regulatory Reform in Cabinet that supported the RIA process. However, this position ceased in 2010, with responsibilities for RIA being transferred to the Premier.

#### Parliamentary committee investigation

Ministers (and senior bureaucrats) can also be subject to investigation and scrutiny by legislative committees. In many respects, legislative committees are where much of the ‘heavy lifting’ by parliaments is carried out. Committees are involved in a number of legislative functions, including: reviewing proposed legislation; and investigating particular policy problems.

Of most relevance for accountability is their role in the oversight of the government bureaucracy. In such committee processes, government bureaucrats are excused from giving opinions on matters of policy but they are not prevented from giving information about the factual and technical background to policy, including aspects of RIA processes. While committee recommendations from their investigations are made public they are not binding on the parliament (Mulgan 2003).

#### How effective are these mechanisms in holding governments accountable?

If working effectively, information and discussion of government policy and implementation, both in parliament and in committee investigation, should add to public accountability. It is not clear, however, that these mechanisms have achieved their full accountability potential:

… legislatures in parliamentary systems often appear weak and irrelevant, excluded by the executive from discussion of the major government decisions and unable, or unwilling, to examine the great bulk of bureaucratic decision-making. (Mulgan 2003, p. 57)

The opposition party’s desire to expose a government’s mistakes and criticise its unpopular actions does much to hold the government accountable. However, such motivations may not always result in sufficient scrutiny of those regulatory proposals that may require it and the quality of information available to the opposition can hinder debate on regulatory proposals.

As a consequence, sanctions on government for poor regulatory proposals usually rely on public transparency (via the media). For this reason, efforts to improve the accountability of government should be focused on making it more open to legislative investigation by parliament and increasing the transparency of decision making.

### Are there other options to improve scrutiny of government?

Requiring ministers to be transparent when introducing legislation that has been exempted from undertaking a RIS or that has been assessed as not in accordance with RIA requirements — for example, by requiring them to provide the reasons in a statement to parliament (as recommended in chapters 5 and 7) — is one option that could be employed to increase the accountability of government regulatory processes.

Two other options that could be employed to increase the accountability of decision makers focus on strengthening parliament’s ability to scrutinise the regulatory decisions made by government. Specifically: providing greater institutional support within parliament on regulatory issues; and/or making the regulatory oversight body report directly to parliament rather than to executive government — which reflects even more independence than the statutory agency model discussed in section 8.3.

#### Would greater institutional support within parliament improve government accountability?

In its recent research report, *Identifying and Evaluating Regulation Reforms*, the Commission questioned whether the Australian Parliament could benefit from greater institutional support from its own system of committees:

The Senate Standing Committee on Regulations and Ordinances plays an important role in providing technical scrutiny of all delegated legislation to ensure their compliance with principles of parliamentary propriety. Whether there may be a role for a Committee with a wider focus on ‘good regulation’ is worthy of further consideration. Such a forum could strengthen political leadership in this area and help promote a better understanding of regulatory effectiveness. (PC 2011, p. 131)

The Senate also has a Scrutiny of Bills Committee that assesses legislative proposals with a focus on the effect of the proposed legislation on individual rights, liberties and obligations and parliamentary propriety.

In some jurisdictions where parliamentary scrutiny committees are tasked with ensuring RIA requirements for (mainly subordinate) legislation have been met, they have played a useful role in airing RIA problems, but have been largely unsuccessful in changing regulatory outcomes (section 8.2). To make scrutiny committees more effective in focusing on RIA requirements and improving regulatory outcomes they need:

* an explicit mandate to examine RIA issues — which those jurisdictions (New South Wales, Victoria, Queensland, Tasmania and the ACT) with legislated RIA processes for subordinate legislation already have
* the analytical expertise, resources and time to examine these issues effectively
* the confidence to use their existing powers (such as recommend disallowance) when all other efforts to resolve RIA issues have failed.

Such arrangements could assist in increasing the amount of attention given to RIA issues and in turn lead regulation makers within executive government to give more thought to RIA quality during the policy and legislation drafting processes.

It is also important for parliamentary committees generally (not just scrutiny committees) to develop a closer working relationship with the regulatory oversight bodies in their respective jurisdictions — particularly as the administrative task of assessing compliance of government regulatory proposals falls within the scope of parliamentary committee investigation. To preserve the confidentiality of the government’s regulatory decisions, discussions between parliamentary committees and the oversight body (on its RIS adequacy assessment) would need to commence only after the announcement of the regulatory decision by the government and the oversight body’s adequacy assessment had been made public.

There are growing pressures overseas for stronger ties between parliament and the executive government in relation to RIA. For example, a recent report by the Committee on Legal Affairs of the European Parliament called for improvements in engaging with the RIA process at the European Parliament level. In particular, it called for greater dialogue between the Parliament and the European Commission (which includes the Commission’s oversight body, the Impact Assessment Board):

[The Committee] takes the view that a standard citation should systematically be included by Parliament in its legislative resolutions, by which a reference is made to consideration of all impact assessments conducted by EU institutions in the areas relevant to the legislation in question … Notes that Parliament and its committees already possess the machinery with which to scrutinise the Commission’s impact assessments; considers that a presentation of the impact assessment by the Commission to the relevant committee would be a valuable addition to the scrutiny undertaken in the Parliament … Calls for Commission impact assessments to be examined systematically and as early as possible at parliamentary, and in particular at committee, level … Encourages all its committees, before considering a legislative proposal, to hold an in-depth discussion with the Commission on the impact assessment. (European Parliament 2011, p. 10)

Better engagement of the regulatory oversight body with the parliament and parliamentary committees would improve the scrutiny of RIA issues in Australian parliaments and increase the likelihood that such issues will be given greater prominence by regulation makers. In effect, parliaments would be a more effective ‘backstop’ for legislative proposals, particularly for those proposals that have been assessed as departing from RIA requirements.

#### Would oversight body reporting to parliament improve executive government accountability?

Improving institutional support within parliaments may improve some individual regulatory proposals — those that particularly attract the attention of parliaments — but it may not necessarily result in a general lifting of regulatory quality. A more significant strengthening in the design of RIA systems may be required to increase the likelihood of system-wide improvements.

As seen in many jurisdictions, the coupling of executive government agencies undertaking the RIA process with executive government oversight from central agencies has at times limited the scope of RIA to influence policy decisions, particularly where the results of RIA (or likely results) conflict with political priorities. In many cases, the RIA process has been undertaken with the underlying motivation of protecting the regulatory decision (already made), rather than exposing it to constructive criticism. As the ACCI comments:

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

A further, medium term option, when considering how RIA can play a more influential role in guiding regulatory decisions, is to remove responsibility for RIA oversight from the executive branch of government. In principle, the regulatory oversight function could alternatively be located within a parliamentary committee or as a separate body reporting directly to parliament (Wiener and Alemanno 2010). For example, a regulatory oversight body could be established as an independent statutory authority (like the Australian National Audit Office) in each jurisdiction reporting to the jurisdiction’s parliament (rather than reporting to a minister). To minimise duplication, such an entity could subsume the role of the current regulatory oversight body — in the Australian Government’s case, for example, the OBPR would report directly to the Parliament of Australia.

One option for reporting to parliament could be via the establishment of a ‘Parliamentary Regulation Office’ in each jurisdiction. This would be akin to the recently established Parliamentary Budget Office (PBO) in the Australian Government (Parliamentary Library 2011). In addition to improving their independence, such a change in reporting arrangements for the regulatory oversight body would enable them to become a source of high-quality, independent analysis and advice to the Parliament on regulatory matters — improving the quality of parliamentary debate and enhancing decision making.

Transparency and accountability were key reasons for establishing the Commonwealth PBO (Joint Select Committee on the Parliamentary Budget Office 2011). There is, arguably, a greater need for transparency and accountability in the making of regulatory decisions by governments given they are not subjected to the sharper disciplines that budgetary measures face through the Expenditure Review Committee process (Australian Government 2012c).

There do not appear to be similar cabinet committees *for regulatory proposals* in Australian jurisdictions, although they do exist in some overseas jurisdictions. For example, in the United Kingdom the Reducing Regulation Committee of Cabinet examines regulatory proposals making sure that only those of suitably high quality (that is, meeting good regulation principles) proceed to Cabinet.

Enabling the oversight body to report directly to parliament rather than being subject to direction by a minister (as now occurs in every jurisdiction) would appear to offer several distinct advantages for the accountability of RIA processes —

* It would better insulate the oversight body from government political pressure, as discussed in section 8.3, which could assist in improving the quality of RIS/PIR adequacy assessments.
* It would improve capacity for parliament to assess the merit of regulatory proposals because it would have greater access to the analysis/assessment of the oversight body.
* It would motivate all participants in the RIA process (agencies, oversight bodies and ministers) to exercise their RIA responsibilities in a rigorous manner.

On the other hand, agency officials may be more guarded dealing with the staff of an oversight body that reports directly to parliament than they would with the staff of an oversight body within executive government. As a consequence, any move of the oversight body away from the executive may require commensurate information gathering powers and confidentiality requirements.

Such a change in reporting structures for the oversight body would also require legislative change for the establishment of the body and it may also require the RIA process to be legally mandated (as opposed to administratively mandated). As discussed in chapter 1, some states and territories have already given RIA legal status — but only in relation to subordinate legislation.

Changing the reporting requirements would appear to be an option to consider if the suite of transparency and accountability measures suggested in this report do not realise the necessary improvement in regulatory decisions and outcomes over the medium term. Even then, such a change would be appropriate only for those jurisdictions that have an established regulatory oversight body with the relevant functions and a ‘critical mass’ of RIS activity. Such a change in governance is more likely to be possible in larger jurisdictions such as the Commonwealth, New South Wales and Victoria.

While the creation of an oversight body reporting directly to parliament may be one way to enhance government RIA accountability, by itself it may not be enough. It may also require parliaments to want better regulatory impact analysis and embrace the responsibility to improve regulatory outcomes. Without this underlying acceptance it is unlikely that any profound shift in outcomes would result.

## 8.5 Conclusion

If the objective of RIA is to enhance the empirical basis of government decisions and to make the regulatory process more transparent and accountable, then Australian jurisdictions still have a considerable way to go. As a consequence, most of the discussion on leading practices in this chapter refers to overseas rather than Australian experience. The current weaknesses in RIA practice are affecting stakeholder confidence in RIA’s effectiveness in promoting good regulatory decisions and policy outcomes. A degree of cynicism is pervading the regulatory landscape in response to the perceived lack of integrity in regulation making.

There is a large gap between RIA requirements set out in guidance material and what happens in practice. In most jurisdictions, there are examples of both good and bad practice — but too often, RIA processes lack sufficient accountability (and transparency) mechanisms to ensure that the incentives of participants in the process (agencies, oversight bodies and governments) are aligned with those of the community. To encourage greater ‘buy in’ from participants, it is less about changing the ‘nuts and bolts’ of RIA requirements and more about improving overarching RIA system design. Improving accountability mechanisms provides one of the greatest opportunities for RIA processes to better inform and influence regulatory decisions and outcomes. In particular, there is a need for more effective sanctions for non-compliant proposals, the establishment of accountability mechanisms for oversight bodies, greater engagement with parliaments through more useful scrutiny and legislative committee processes and perhaps, in the medium term, a change in reporting and governance arrangements for oversight bodies.

Accountability is incomplete without effective consequences. The sanctions for government agencies of not complying with RIA processes are currently weak, ineffective or non-existent. To encourage agencies to comply with RIA processes, PIRs need to be implemented in all jurisdictions and become a more powerful sanction for non-compliance.

Regulatory oversight bodies are not sufficiently accountable for the RIS (and PIR) adequacy assessments they make. Currently, many interested stakeholders do not have access to sufficient information to determine:

* whether an oversight body determined a RIS met RIA adequacy requirements
* whether an oversight body assessment was rigorous and appropriate.

It is therefore not surprising that concerns have been raised in submissions that at times oversight bodies have made incorrect adequacy assessments. While the publication of oversight body adequacy assessments (and their reasons or qualifications) would help, greater accountability for their performance is required. Putting in place an accountability mechanism for regulatory oversight bodies, such as the periodic evaluation of their performance by an independent third party, for example an audit office, would be an added motivation — beyond public transparency.

Regulatory oversight bodies that have a greater degree of independence are likely to operate with more objectivity and transparency in implementing RIA requirements. If oversight bodies continue to report to executive government, ideally they should be located within an independent statutory agency. Where they remain in a central department their autonomy could be strengthened through some form of statutory office holder arrangement with direct ministerial reporting and appropriate safeguards to ensure independence and objectivity.

To increase the accountability of Australian governments, parliaments’ engagement with RIA processes could be strengthened. In the short term, this could be done by providing greater institutional support within parliaments for RIA requirements. In the medium term, consideration should also be given to making the regulatory oversight body report directly to parliament rather than to the executive branch of government. While there are no ‘silver bullet’ solutions to generating better regulatory outcomes, increased accountability is likely to be one of the most effective mechanisms for achieving this objective.

1. The newly created QOBPR is expected to report annually on RIS and PIR compliance. [↑](#footnote-ref-1)
2. The Australian Government OBPR was, until late 2007, part of the Productivity Commission, which has statutory independence. The SOE Act under which VCEC is established, can be amended by the Victorian Government through the Governor in Council without going through the Victorian Parliament. [↑](#footnote-ref-2)
3. Because the QCA has statutory independence, amendments to the *Queensland Competition Authority Act 1997* (Qld) were required to be passed by the Queensland Parliament to expand its functions to include the reviewing and reporting of RIA processes. [↑](#footnote-ref-3)