# 9 Regulatory reviews

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| Key points |
| * Consistent with leading practice, all Australian jurisdictions with the exception of Tasmania require that regulation impact statements (RISs) include a discussion of how proposed regulations will be evaluated following implementation. * There would be benefits in strengthening review requirements, particularly for proposals with highly significant or uncertain impacts, by requiring the inclusion in RISs of information on review timing, governance arrangements and data requirements. * Provision for a mandatory review should be included in all future primary legislation where the associated proposal triggers RIS requirements. * No Australian jurisdiction has provisions for systematic monitoring of reviews foreshadowed in RISs, or indeed, whether the reviews even take place. There is very limited comparison of whether the estimated costs and benefits identified in regulatory impact analysis (RIA) are borne out by subsequent experience. * Oversight body monitoring and reporting on regulatory reviews flagged or required as part of RIA would improve the integrity of RIA processes. Annual regulatory plans could be utilised for this, with oversight bodies checking them for adequacy. * Post implementation reviews (PIRs) — included in jurisdictional processes for the Commonwealth, Queensland and Western Australia — can be an important mechanism to ensure that any regulatory proposal that would have required a RIS, but for which an adequate RIS was not prepared, will be examined early in its life. * PIRs for proposals with highly significant impacts should be undertaken by an independent third party, paid for by the proponent agency, with the terms of reference approved by the regulatory oversight body. * PIRs should be undertaken to the same level of rigour as a RIS. However, even where this is the case, PIRs should not be viewed as a substitute for ex ante RIA. * Broad based sunsetting or ‘staged repeal’ requirements have helped eliminate some redundant regulation and improved some existing regulation. However, resource costs can be large relative to the benefits achieved. * Regulatory outcomes and RIA resource efficiency are likely to benefit from: * prioritising sunsetting regulations against agreed criteria to identify the appropriate level of review effort and stakeholder consultation * allowing sufficient flexibility for grouping related sunsetting regulations for thematic or package review, as the recent Commonwealth reforms are designed to achieve * where appropriate, reviewing subordinate regulation in conjunction with its overarching primary legislation. |
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While RIA processes were designed initially to deal with ex ante assessments for the flow of new regulation, in most jurisdictions they are now also required, under certain circumstances, to be used for reviews of existing regulation. Those reviews that are flagged in RISs to occur within a specified period or are triggered as a result of non-compliance with, or avoidance of, some aspects of RIA processes, are considered by the Commission to be an integral part of RIA processes. In contrast, other reviews — such as those associated with sunsetting regulation — are not themselves a part of the RIA framework, but nevertheless are required to draw on RIA principles and processes.

The terms of reference for this study indicated that the Commission should have regard to whether RIA requires consideration of the evaluation and review arrangements following the implementation of proposals, including whether or not policy objectives remain appropriate. The Commission was also asked to examine whether requirements for regulation that includes sunset clauses should also include guidelines for evaluation of the case for maintaining that regulation.

Before examining these issues, a point of clarification on terminology is needed. A number of participants to the study, including in submissions, have used the term ‘post implementation review’ in its broadest sense, to relate to any review that takes place after a regulation has been made or implemented (that is, reviews that occur ‘ex post’). However, to avoid confusion, the term ‘post implementation review’ is used here only for those processes specifically identified as such by jurisdictions.

## 9.1 RIA’s role in promoting integrated regulatory policy

OECD guiding principles emphasise the need for ‘joined up’ regulatory systems, with examination of regulation occurring not only during its development, but also after it has been made and implemented. The OECD (2010d) notes:

Closing the loop is essential if regulatory policy is to be performance-driven and politically accountable. This requires ensuring that ex ante impact assessment foresees the need of future ex post consideration of regulatory impacts. A fully integrated approach to regulatory policy therefore needs to include consideration for ex post evaluation at an early stage, with a full approach of [assessing] regulations “from cradle to grave”. (p. 6)

The ‘regulatory cycle’ can be segmented into four stages or phases. These involve:

1. the initial problem identification and decision to use a regulatory solution
2. the design of the regulations concerned and their implementation
3. the administration and enforcement of those regulations
4. evaluation and review (PC 2011).

Sound RIA is central to achieving good outcomes during stage one — the decision to regulate (or not) and in choosing the best approach to address the identified problem. RIA also has an important, though sometimes overlooked, role in improving outcomes during stages two and three — analysing and promoting sound implementation, enforcement, and monitoring of the regulation once the decision is made to regulate (discussed in chapter 6).

The fourth stage, evaluation and review, occurs at different intervals for different regulations, depending on their significance and the circumstances of their formulation. Consistent with OECD guidance, consideration of review arrangements should be included as a routine part of the policy development process for any new or amended regulations with significant impacts on business. Further, the RIA framework should be used for all such reviews. The OECD (2011, p. 10) notes that to achieve leading practice, ‘the methods of RIA should be integrated in programmes for the review and revision of existing regulations’. As with the initial RIA, such reviews should be proportionate to the nature and significance of the regulations concerned, and be sufficiently broad in scope to address all issues germane to the performance of the regulation.

The set of reviews which draw directly on RIA are ‘programmed reviews’ — or predetermined mandatory requirements that a review of a regulation be undertaken at a specified time in the regulation’s life, or when a well-defined situation arises, to ensure the regulation is working as intended (PC 2011). These reviews can take various forms, each with different strengths and weaknesses and with varying applicability and timing (table 9.1). Broadly speaking:

* *‘Late RISs’,* triggered in some instances where a RIS was not prepared, would appear to be largely directed at promoting transparency. However, as they are undertaken relatively soon after the decision point they may be able to influence implementation, and possibly help reverse regulatory mistakes early on.
* *Post implementation reviews (PIRs)* arealso triggered where a RIS has been undertaken either inadequately or not at all. When completed relatively early in the life of the regulation, a PIR may be able to promote early changes in regulation and avert potentially large costs, provided it is broad enough (that is, not limited to an ‘implementation’ review) and is independent. A strength of PIRs is that they can draw on data related to the implemented regulation. However, where PIRs are delayed too long they risk becoming de facto ‘ex post evaluations’ and their transparency and sanction role (chapter 8) is likely to be diminished along with their capacity to ‘nip problems in the bud’.
* *Ex post reviews and evaluations flagged in RISs* (including embedded statutory reviews) ideally would involve an assessment of whether regulation is achieving its purpose at least cost, and whether the objectives of the regulation remain appropriate. A strength of these reviews is that areas of uncertainty identified during RIA can be flagged for further examination and data collected accordingly. Such reviews have the advantage of allowing comparison of realised costs and benefits with those outlined in the original RIS.
* *Reviews triggered by sunset requirements* are normally required where the regulation scheduled to expire has a significant impact on business or the not‑for‑profit sector. A strength of sunsetting is that automatic expiry forces reviews to occur. However, where sunsetting places large demands on limited review resources there are risks that the reviews will be insufficiently rigorous.

Table 9.1 Key features of ‘programmed’ reviews

|  |  |  |
| --- | --- | --- |
| Type of review | Indicative timing | Primary roles |
| Late RISs | 0-12 months | * Sanction for non-compliance * Ensure regulation that has not been subject to RIA is assessed * Promote transparency * Flag problems early for regulation made in haste — with potential to avert costly errors |
| Post implementation reviews | 1-2 years | * Sanction for non-compliance * Ensure regulation that has not been subject to RIA is assessed — particularly where regulation has been fast tracked or the extent of the compliance burden is uncertain * Identify early whether the regulation is working as intended, how it could be improved and whether the objectives remain appropriate * Compare realised impacts (where data are available)  with anticipated impacts |
| ‘Ex post’ reviews flagged in RISs | 3-5 years | * Determine if regulation is working as intended; achieving objectives at least cost; how it could be improved; and whether objectives remain appropriate * Compare realised impacts with anticipated impacts |
| Reviews triggered by sunset requirements | 5-10 yearsa | * Determine whether regulation scheduled to sunset should be allowed to expire, be remade or amended * Assess whether regulation remains relevant and appropriate given economic, social, technological and other changes since it was made/last reviewed. |

a Timing relates to broad-based sunsetting provisions rather than individual sunset clauses, which can be shorter.

*Source*: Adapted from table E.2 of PC (2011).

Jurisdictional requirements and use of these categories of reviews are considered in the following sections.

## 9.2 ‘Late RISs’ and post implementation reviews

As noted in chapters 5 and 8, eight of the ten jurisdictions have processes in place to ensure some ex post analysis occurs in instances where a RIS is not undertaken for regulatory proposals that would ordinarily require it (table 9.2).

Table 9.2 Processes for ex post review following RIS exemption  
or non-compliance**a**

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | Cwlth | COAG | NSW | Vic | Qld | WA | SA | ACT |
| PIR (exemptions) | ✓ |  |  |  | ✓ | ✓ |  |  |
| PIR (non-compliance) | ✓ |  |  |  | ✓b | 🗶 |  |  |
| Late RIS (exemptions) |  | ✓ | ✓ | ✓ |  |  | ✓c | ✓e |
| Late RIS (non-compliance) |  | 🗶 | 🗶 | 🗶 |  |  | 🗶d | 🗶 |

a Tasmania and the NT have provision for neither PIRs nor late RISs and are therefore not included in this table. b PIR only required when there is no RIS prepared, but not when there has been an inadequate RIS. c Only relates to proposals that require urgent implementation. d Agencies are required to find offsetting red tape reductions for non-compliant proposals, unless Cabinet makes an explicit decision to the contrary. e A late RIS only applies where exemptions for RISs relating to subordinate legislation have been disallowed.

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

Australian Government agencies are required to undertake a PIR of regulation that did not have a RIS within one to two years, unless the impact was of a minor or machinery nature and the regulation did not substantially alter previous arrangements. The absence of a published RIS may be because the RIS was not adequate (which under the Australian Government’s best practice regulation framework is defined as a non-compliant proposal); or it may be because the Prime Minister granted an exemption for exceptional circumstances (which under the RIA framework is defined as a compliant proposal).

PIRs are also required in Queensland in similar circumstances. A PIR must be commenced within two years of the implementation date of any regulation with significant impacts where a regulatory assessment statement was not performed. The PIR should assess the impact, effectiveness and continued relevance of the regulation to date and analysis should be proportionate to the issue being addressed (Queensland Treasury 2010). The Commission understands that while a number of regulatory proposals for which a Treasurer’s exemption has been granted are the subject of a PIR or are scheduled for a PIR, at this stage two PIRs have commenced but none have been completed. (Queensland Government, pers. comm., 10 October 2012).

In Western Australia, PIRs are required for Treasurer’s Exemptions but not for those proposals that do not comply with RIA requirements (chapter 8). As with Queensland, no PIRs have been completed at this stage, although the Western Australian Department of Treasury noted that a number are due within the next 12 months and that:

They will take the same format as a RIS and will be assessed just as stringently. They will require verifiable evidence based on detailed quantitative and qualitative analysis of the impacts of the regulation put in place. (sub. DR37, p. 7)

In its current review of regulatory gatekeeping and impact assessment processes, the New South Wales Better Regulation Office (BRO) has sought views on its proposal that (subject to approval by the Premier) PIRs be undertaken for exceptional circumstances. The BRO notes that:

In such cases, a post implementation review should be completed within two years. The review should be approved by Cabinet or the Better Regulation Office prior to public release. (BRO 2011, p. 3)

Although five jurisdictions require that RISs be prepared for some proposals within 12 months, it is not clear how often these late RISs occur in practice or how beneficial they are. If a ‘late RIS’ was to reveal substantial problems it may be influential in shaping implementation of the regulation, depending on the timeframe for implementation of the regulatory decision. A further benefit of a late RIS is in the area of transparency, since the document is prepared too late for the final decisions, but in many cases prior to a point where substantial new data are likely to be available on actual impacts of the proposal. However, a key challenge for the proponent agency would be to resist pressures for the documents to become, in effect, ex post justification or rationalisation for prior decisions, particularly given that late RISs are prepared so close to the decision making point.

In Victoria, in some limited circumstances, regulations have an inbuilt 12 month expiry requirement (box 9.1). An advantage of this approach is that it provides a stronger incentive for agencies to actually undertake a RIS, albeit belatedly.

The Commission was advised that in Victoria, in practice, a RIS prepared where new interim regulations have been made is treated exactly the same as any other RIS — the RIS needs to satisfy the requirements of the SLA and the Victorian *Guide to Regulation* (that is, demonstrating that a policy problem exists and analysing the impacts of feasible options) and is not simply an ex post justification for the interim regulations. It is assessed by VCEC in the same way as all other RISs. The RIS is also subject to the same consultation and publication requirements as other RISs. It was noted that given the lead time for preparing a RIS (that is, the RIS will need to commence several months before the interim regulations expire), it may be impractical to use substantive data on actual impacts of the interim regulations, although this will not always be the case (VCEC, pers. comm., 25 July 2012).

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| Box 9.1 Victoria’s 12 month expiry requirement for Premier’s exemption |
| In Victoria provisions are available for subordinate legislation to be exempted by the Premier from the preparation of a RIS under ‘special circumstances’. However, in order for a Premier’s exemption certificate to be granted, the proposed rule must be scheduled to expire on or before 12 months after its commencement date. Moreover, the Premier’s certificate merely postpones the requirement to do a RIS. As the Guidebook states:  If a Premier’s certificate is granted, the RIS process will still need to be commenced and completed within the lifetime of the certificate. Only in exceptional circumstances will more than one certificate be granted. Moreover, the duration of the certificate will be the shortest possible period to enable the RIS process to be undertaken (unless exceptional circumstances are involved). In practice, a six-month period is often the maximum period granted. (Victorian Department of Treasury and Finance 2011a, p. 51)  A recent Victorian example of where new interim regulations were made and a RIS was subsequently prepared when these expired was for the Electricity Safety Amendment (Bushfire Mitigation) Regulations 2011, which replaced the Electricity Safety (Bushfire Mitigation) Amendment Interim Regulations 2010. In this case, the ‘final’ regulations were substantively the same as the interim regulations, however, the RIS included extensive analysis, with detailed consideration of other options and primary data collection through interviews and surveys of affected businesses. VCEC has advised that in other current cases where a Premier's exemption has been granted, RISs are still being prepared and/or have not been publicly released (VCEC, pers. comm., 25 July 2012). |
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### Australian Government PIRs

The following discussion focuses on the Australian Government requirements and guidance material. This reflects the short time the PIR requirements have been in place in other jurisdictions and the consequent lack of available data or examples of completed reviews.

At the Commonwealth level, the number of non-compliant regulations (and Prime Minister’s exemptions) increased from seven in 2007-08 to a peak of 30 in 2010-11. It has since halved (table 9.3).

As at end June 2012, a total of 84 PIRs were required, of which all but two were compliant. In the majority of cases the PIR had not started or the regulation had not been implemented. In both cases of non-compliance, the PIRs had commenced but not been completed (table 9.4). These relate to:

* restrictions on the quantity of liquid aerosol and gel items that may be taken on international flights to, from or through Australia (2007)
* restrictions on the use of certain lead compounds in industrial surface coatings and inks (2009).

Table 9.3 Post implementation reviews added by year

Number

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Instigation for PIR | 2007-08 | 2008-09 | 2009-10 | 2010-11 | 2011-12 |
| Proposal non-compliant with RIA | 4 | 8 | 12 | 16 | 9 |
| Proposal received a Prime Minister’s exemption | 3 | 6 | 4 | 14 | 5 |
| Total | 7 | 14 | 16 | 30 | 14 |

*Sources*: OBPR (2011a, 2012a).

Extensions to PIR commencement or completion have been granted in some recent cases. Earlier in 2012 the OBPR reported as non-compliant some regulatory proposals in which the associated PIRs had either missed their starting deadlines or not been completed within the required timeframe. These included two PIRs for the *Tax Laws Amendment Bill 2009* which have since been granted extensions by the OBPR to allow further tax data collection. In addition, a later start date for the PIR for the *Resale Royalty Right for Visual Artists Bill 2008* was agreed between the OBPR and the Office for the Arts (OBPR 2012a).

Table 9.4 Post implementation review status and compliance

Number, as at end June 2012a

|  |  |  |  |
| --- | --- | --- | --- |
| PIR status | Compliant | Non-compliant | Total |
| Regulation not implemented | 10 |  | 10 |
| PIR not started | 43 |  | 43 |
| PIR started | 17 | 2 | 19 |
| PIR completed — not published | 1 |  | 1 |
| PIR completed — published | 11 |  | 11 |
| Total | 82 | 2 | 84 |

a Following the release of this table additional compliant PIRs have subsequently been published.

*Source*: OBPR (2012c).

All PIRs completed so far have been assessed by the OBPR as adequate — that is, meeting the Government’s best practice regulation requirements. Recent PIRs include those undertaken for the Government guarantee of the deposits and wholesale funding of Australian deposit-taking institutions (2008) and the *Fair Work Act (2009)*. It is notable that some completed PIRs have been undertaken in conjunction with RISs which proposed significant changes in the regulation. For example, the PIR for live cattle exports was included as a separate section of a larger RIS for further reforms to the industry. The Commission has previously noted that the production of PIRs along with a RIS for revisions to the relevant regulations:

… lends support to the concerns that PIRs were designed to address — that regulations made without a RIS are more likely to need revision. Having to undertake a PIR may have brought issues to light more quickly than would otherwise have been the case. This suggests that allowing PIRs to be deferred can reduce their potential to act as a catalyst for revising poor regulation. (PC 2011, p. xxiii)

The OBPR reports 19 PIRs are scheduled to commence in 2012-13, with Treasury responsible for eight of these reviews. Many PIRs required in coming years cover important areas of regulation with significant potential impacts. These include:

* changes to the arrangements for executive termination payments (2009)
* the National Broadband Network (NBN) (2009) and the NBN implementation review (2010)
* pharmacy location rules (2010)
* changes to renewable energy targets and safety and quality requirements (2010)
* certain responses to the *Australia’s Future Tax System Review*, including the minerals resource rent tax and targeting of not-for-profit tax concessions (2011)
* new large scale fishing activities in Commonwealth fisheries (2012).

Given the growing number of PIRs at the Commonwealth level and, more importantly, the significance of the issues to which they relate, there are concerns that the way in which PIR requirements are implemented may be undermining the RIA process (for example, Australian Chamber of Commerce and Industry, sub. 2; Australian Financial Markets Association, sub. 11; PC 2011). Ensuring this does not happen requires that PIRs be both a sufficient sanction to deter non‑compliance with RIA processes, and that the consequences for not completing an adequate PIR be sufficient to encourage their completion.

Such issues may also exist or emerge in other jurisdictions which have provision for PIRs. However, the lack of transparency on PIR processes in these jurisdictions (compared with the Australian Government) means that such issues, if they arise, would be largely hidden and therefore more susceptible to undermining RIA processes.

As noted in chapter 8, the consequences of non-compliance for an agency reduce as the agency becomes more non-compliant with the best practice regulation framework. Failure to submit an adequate RIS results in public reporting *and* the requirement to complete a PIR. However, if the agency subsequently fails to undertake a PIR (or is late in starting or finishing a PIR) the agency faces only the prospect of being publicly reported by the Office of Best Practice Regulation (OBPR) as non-compliant with the PIR process, without further consequence.

#### Ensuring good quality analysis in PIRs

Ensuring that PIRs not only occur, but also include robust analysis, is important for improving the likelihood of good regulatory outcomes. According to the Regulation Taskforce Report (2006), PIRs should be undertaken for proposals where:

* the introduction of the regulations had been fast-tracked — avoiding the full application of RIS requirements; or
* the extent of the compliance burden or the accuracy of the initial cost-benefit analysis was uncertain.

Such reviews should be used to identify ways of lessening high compliance costs and unintended adverse impacts, and to test whether the net benefits predicted to flow from a regulation were being realised. (p. 174)

The OBPR has stated that PIRs should be similar in scale and scope to the RIS that would have been prepared at the decision making stage, but rather than report on expected impacts it should report on actual impacts, adding that:

Stakeholder consultation should be viewed as essential and will form a key part of a PIR … The PIR should conclude with an assessment, based on the available evidence, of how effective and efficient the regulation has been in meeting its original objectives. (OBPR 2012b, pp. 3-4)

Overall the Commission is of the view that OBPR PIR guidance material on the analysis that should be included is broadly sound. A challenge, however, is to ensure that quality of analysis undertaken for PIRs in practice aligns with the principles — in particular, that it is of a comparable level of rigour to that required in a RIS. If PIR requirements were seen as less demanding or rigorous than a RIS, then there are risks that that the RIS process would be weakened.

The large numbers of significant proposals that have avoided the RIS process — whether through non-compliance or the granting of exemptions — following the introduction of the Commonwealth PIR requirements, have raised concerns among stakeholders.

In relation to the *Future of Financial Advice* (FOFA) reforms introduced by the Australian Government in 2011, AFMA noted that a PIR prepared within two years was:

… an entirely inadequate outcome and effectively sidelined the RIA process. The costs in implementation of the reforms that will have been expended by industry by the time of the review will be substantial and there will likely be resistance to further change even if it would result in a more optimal outcome as a result. (sub. 11, pp. 5-6)

The change in the basis for analysis and industry adjustments to introduced regulation are important factors which distinguish a PIR from a RIS. Where implementation costs are known, and early outcomes monitored, PIRs *should* yield better information than a RIS, but their ex post nature means that the cost-benefit calculus for different options can change (PC 2011).

Once a proposal is implemented, large expenditures and adjustment costs have often been borne by governments, business and other stakeholders. Winding back regulation can be very costly. And what were only potential winners and losers from new regulations become actual winners and losers, and face different, and often stronger incentives to lobby governments. Hence, regardless of how well the subsequent PIR is done, it cannot be seen as a substitute for a RIS.

Another area of difference between PIRs and RISs is that the former can involve an explicit terms of reference while RISs generally do not. For example, at the Commonwealth level, the terms of reference for PIRs are approved by the OBPR.

A potential advantage of requiring explicit terms of reference for PIRs rather than relying solely on the broader RIA requirements is that specific issues that have arisen following implementation of the policy (such as unexpected costs or unintended outcomes) can be identified for addressing in the PIR. Clearly, any such terms of reference would need to supplement rather than replace the existing PIR requirements to ensure the scope and coverage of the analysis in the PIR is sufficiently broad.

An issue that arose during the lead up to the commencement of the Fair Work PIR was the appropriateness and scope of the OBPR-approved terms of reference for the review (Australian Senate 2012a, pp. 96-113; Ergas 2011; OBPR 2012d). Hence, ensuring that processes for the development of terms of reference for PIRs are clear, timely and transparent is important both for strengthening stakeholder confidence in, and ensuring the quality of, PIR processes and outcomes.

Some good design features for post implementation reviews are outlined below (box 9.2).

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| --- |
| Box 9.2 Good design features for post implementation reviews |
| PIRs should require the same rigour as the RIS process. Design features which would facilitate this include:   * reviews to be undertaken by an independent third party for any regulation assessed as to be of major significance * provision to be made for data generation to monitor the costs of implementation and the outputs and outcomes * forward looking impact assessment (as is undertaken for RISs) should be supplemented by actual data on observed impacts to date * alternatives to achieving the objectives be evaluated * consultation with stakeholders impacted or potentially impacted by the regulation. |
| *Source*: PC (2011). |
|  |
|  |

#### Timing of PIRs

Although a PIR has to commence within two years of the regulation being implemented, there can be considerable discretion in the interpretation of ‘implementation’, and the timing for the completion of the review is not clearly specified. Accordingly, the Commission (PC 2011) recommended that PIRs should commence within two years of the regulation coming into effect (or in instances where regulation is retrospective, the date the regulation is made), and the completion period should also be specified in the guidelines.

OBPR PIR guidance subsequently released (OBPR 2012b) noted:

The date on which legislation or regulation passes the Parliament, or a Minister announces a regulatory change, may not be a useful proxy for the date of implementation. (p. 7)

There is a range of factors which OBPR considers when deciding the timing of a PIR (OBPR 2012b). However in the Commission’s view these leave substantial scope for interpretation as to when ‘implementation’ occurs. Clearly, allowing a longer time between when a regulatory decision is taken and when a PIR is required will provide more opportunities to collect data on actual impacts. However, this is not without its costs. As issues lose currency over time, allowing too much time to elapse effectively reduces the sanction role played by PIRs. In addition, all regulations are subject to ex post evaluation and review as part of normal RIA process. Hence, if left too long, the PIR risks becoming a de facto ex post evaluation. While ex post evaluations are valuable tools (as will be discussed below) — their role is different to that of a PIR.

#### Who is responsible for preparing a PIR?

The agency responsible for bringing the original regulatory proposal to the decision maker has responsibility for ensuring that PIR requirements are met (OBPR 2012b). However, who actually prepares the PIR can vary. For example, some completed PIRs at the Commonwealth level have been prepared by the responsible policy department — Treasury prepared the PIR on the financial claims scheme; the Department of Agriculture, Fisheries and Forestry prepared the PIR on live cattle exports; and the Department of Infrastructure and Transport prepared the PIR for the changes to the Maritime Security Identification Card Scheme. In these three cases, the original proposals were progressed by the Australian Prudential Regulation Authority, the Australian Quarantine and Inspection Service (now in the Department of Agriculture, Fisheries and Forestry) and the Australian Maritime Safety Authority, respectively. The recent PIR for the Fair Work legislation was prepared by a government appointed panel (OBPR 2012e).

Ensuring appropriate governance arrangements is important for PIRs to work well. It may be difficult for an agency that has been implementing a particular regulatory solution to provide a ‘neutral’ assessment of the regulation 1-2 years later in a PIR. This suggests that, particularly where the impacts on business are major, an independent third party review would be desirable to ensure the review delivers robust conclusions and engenders stakeholder confidence and engagement with the process.

To promote stronger stakeholder engagement and ensure PIR processes are as transparent and accountable as possible, PIR terms of reference and other information such as planned consultations should be made publicly available as early as possible after the regulatory decision. For example, at the Commonwealth level, the Australian Government PIR guidelines state that forthcoming PIRs are supposed to be included in agencies’ annual regulatory plans (annual regulatory plans are discussed in chapter 7).

As PIR arrangements have been in place for a relatively short time, the effectiveness of jurisdictions’ PIR processes, where they exist, will need to be closely monitored over coming years. In particular, trends in numbers of significant new regulatory proposals which bypass the RIS process, and hence trigger PIR requirements, should be assessed. Should signs emerge of systematic bypassing of RISs processes, consideration should be given to the need for a further strengthening of incentives to:

* in the first instance, encourage the preparation of adequate RISs for regulatory proposals with significant impacts, and
* in those instances where adequate RISs cannot be completed, ensuring comprehensive, rigorous (and timely) PIRs are prepared.

One possibility would be to require that regulations with significant impacts for which an adequate RIS was not prepared (either due to exemption or non-compliance) include PIR requirements in an explicit statutory review provision. Alternatively, an additional sanction that could be considered is that regulation for which an adequate RIS is not prepared be subject to automatic expiry, unless an adequate PIR is prepared within a requisite period, such as two years from the date the instrument comes into effect. This approach would have similarities with the 12 month expiry requirement currently used for some exemptions in Victoria.

LEADING PRACTICE 9.1

Overall RIA processes are strengthened where comprehensive and rigorous post implementation reviews (PIRs) are required for regulatory proposals which were either exempted or non-compliant, with:

* the terms of reference for all PIRs approved by the regulatory oversight body (as occurs at the Commonwealth level)
* for all non-compliant proposals, and for those exemptions which have highly significant impacts, the PIR being undertaken through an independent process, paid for by the proponent agency
* the regulatory oversight body publishing PIR adequacy assessments, including the reasons why the PIR was assessed as not adequate, or any qualifications where the PIR was assessed as adequate.

## 9.3 Reviews and evaluations flagged in RISs or in legislation

Consistent with leading practice, all Australian jurisdictions, with the exception of Tasmania, require that RISs include a discussion of how proposed regulations will be evaluated following implementation (table 9.5).

Requirements are generally quite broad. The Commonwealth’s requirements are fairly typical, with the *Best Practice Regulation Handbook* (Australian Government 2010a) stating that a RIS (should) set out when the review is to be carried out and how the review will be conducted, including if special data are required to be collected.

Victoria’s *Guide to Regulation* notes:

An evaluation strategy might include details such as the baseline data and/or information that will be collected to judge the effectiveness of the measure; the key performance indicators (KPIs) that will be used to measure the success of the measure; and when evaluations will be undertaken. (p. 27)

Table 9.5 Review and evaluation requirements as part of RIA

|  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Characteristics | Cwlth | | COAG | NSW | Vic | Qld | WA | SA | Tas | ACT | NT |
| RIA to specify: | |  |  |  |  |  |  |  |  |  |  |
| * how regulation is to be revieweda | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | ✓ |
| * when review should occur | | ✓b | 🗶 | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | 🗶 |
| Guidance provided on: | |  |  |  |  |  |  |  |  |  |  |
| * specific questions review  to address | | 🗶 | 🗶 | ✓ | ✓ | ✓ | ✓ | ✓ | 🗶 | ✓ | 🗶 |
| * use of review or sunset clauses in legislation | | 🗶 | ✓ | ✓c | 🗶 | 🗶 | 🗶 | ✓ | 🗶 | ✓ | ✓ |
| * appropriate governance arrangements for reviewd | | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 | 🗶 |

a This can include whether specific data need to be collected. b The Commonwealth also has a five yearly ‘catch‑all’ review requirement. c Embedded statutory reviews are required for all Bills. Statutory rules and other regulations should be reviewed every 5 years. d For example, guidance on appropriate level of independence, transparency, reporting arrangements.

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

In terms of the goals of the review, most jursidictions require that regulations be reviewed for ongoing relevance as well as the effectiveness and efficiency of the regulation. More detail is provided in a number of jurisdictions. Queensland’s *Guide to Regulation*, for example, notes:

The objective of the review is to evaluate the continuing relevance, effectiveness and efficiency of the regulation. The review should:

* identify the need for continued regulatory action — does a problem still exist?
* evaluate whether the regulation met, or is meeting, its objectives while meeting regulatory best practice principles and not imposing unnecessary burdens on stakeholders
* consider competition impacts
* consider whether the regulatory objectives could be achieved in a more effective and efficient way, and
* include consultation with stakeholders. (Queensland Treasury 2010, p. 34)

Several jurisdictions highlight in their RIA guidelines that consideration should be given to incorporating sunset provisions or embedded statutory reviews. COAG requirements, for example, note that:

Ensuring that regulation remains relevant and effective over time may be achieved through planning for monitoring and review of regulation as part of the development of new regulatory proposals, or by incorporating sunset provisions or review requirements in legislative instruments. (COAG 2007a, p. 6)

### Observed practices on reviews flagged in RISs

Determining how well the ex post evaluation and review requirements are working in practice has proved difficult due to data limitations. The Commission’s examination of RISs identified the extent and nature of the discussion of ex post evaluation and review arrangements contained in RISs (appendix E). Overall results revealed that the amount of information included in RISs was very limited. While almost all RISs included some discussion of a subsequent review, less than half of these included information on when the review would occur (figure 9.1). Most commonly, when this was included in RISs it involved a brief statement that a review would occur within 3-5 years with little further detail provided.

Figure 9.1 Ex post reviews and evaluations foreshadowed in RISs

Per cent of RISs that stated…

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

The limited information on reviews provided in RISs was most evident in regard to governance arrangements. Few RISs provided information on who would undertake the review, whether the review would be public or whether the review would be independent. This is unsurprising given that no jurisdiction provides guidance on governance arrangements for reviews — including the appropriate scope, independence, or transparency of ex post reviews for regulations with significant impacts (table 9.5).

Further, while guidance material in several jurisdictions recommends that departments and agencies consider embedding statutory reviews in legislation and/or mandatory sunsetting clauses, in practice their use was rare (5 per cent of RISs).

The limited information provided in RISs on reviews was also evident in the identification of data requirements that would need to be met to evaluate the effectiveness and efficiency of the regulatory proposal post implementation. This result is somewhat surprising, particularly given that lack of suitable data to undertake cost benefit analysis was nominated in the Commission’s survey of agencies as one of the main barriers to more effective RIA. In addition, a key area identified where RIA could be strengthened was the production of more robust and objective estimates of costs and benefits (chapter 6). Ex post reviews provide an opportunity to collect robust data and information that may have been difficult to obtain at the time the RIS was undertaken. There seems little justification for RISs not systematically outlining both how data on key performance indicators will be collected and the necessary steps to review the regulation to see whether the anticipated benefits have eventuated or there have been unforseen impacts.

Overall, the RISs examined generally provided enough information on review arrangements to meet the limited requirements for RIS adequacy and no more. For the most part this was the case regardless of the magnitude of the impacts of the regulatory proposal.

A number of participants called for more routine ex post evaluation (which they generally referred to as ‘post implementation review’) to promote greater rigour and accountability in RIA (box 9.3).

There are likely to be a number of benefits from more systematic ex post evaluation, with the proviso that such reviews are undertaken proportionately. In particular, priority should be given to regulatory proposals with large or uncertain impacts, including, but not limited to, those proposals for which the associated RIS did not contain much information on the expected costs and benefits of the proposal. The foreknowledge that there would be systematic scrutiny of whether claimed benefits and costs in RISs and underlying assumptions about the effectiveness of proposed regulatory solutions are borne out in practice, would provide greater incentives to ensure that RIS estimates are robust and impartial.

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| Box 9.3 Calls for stronger ex post evaluation to support RIA |
| *Small Business Development Corporation (Western Australia)*  The SBDC would also see benefit in requiring the post-implementation review of all new and amending regulatory proposals to be made mandatory under the RIA process, not just those subject to a Treasurer’s Exemption (as required under the RIA Guidelines). By introducing a rigorous ex-post review mechanism, Ministers and agencies will be compelled to undertake comprehensive scrutiny of the ‘realised’ impacts of their regulatory action and then justify why the regulation should continue. (sub. 25, pp. 10-11)  *Plastics and Chemicals Industries Association*  At present there are no requirements for post-implementation reviews of regulatory decisions that require regulatory impact analysis. Consequently, there is no quality control of information that has been used to support decisions. Non delivery of stated benefits could significantly change the cost-benefit consideration … Post-implementation reviews are needed to ensure that assumptions and benefits contained in RISs are ‘real’ and delivered. (sub. 8, pp. 4-5)  *WA Department of Transport*  [I]t would be useful if agencies were to introduce standardised post implementation review process for proposals that undergo a RIA to assess the impact of the introduction of the proposal. The review process could include an evaluation of measurable indicators such as the number of positive and negative pieces of ministerial correspondence, customer feedback, media interest or industry circulars in relation to the proposal. Over a period of time the results of the post implementation review process could be used to give some indication of whether the agencies are implementing improved regulation as a result of the RIA process. (sub. 12, p. 3)  *Officers undertaking RIA in the Victorian transport portfolio*  Both DOT and VicRoads have not undertaken [ex post] reviews of RIA estimates. Such reviews could be undertaken as part of general post-implementation reviews, but in practice these are not undertaken. The key issue is that resources are not made available to such activities. This is despite a broad acknowledgement of the potential benefits. (sub. 17, p. 14) |
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In consultations with regulatory oversight bodies, the Commission learned that responsibility for ensuring that reviews foreshadowed in RISs are conducted rests with departments and agencies in all jurisdictions. No jurisdiction systematically monitors the outcomes of reviews foreshadowed in RISs or, indeed, whether the reviews take place at all. In addition, there appears to be very limited comparison of whether the estimated costs and benefits identified in RISs are borne out by subsequent experience.

Lack of good ex post evaluation of new regulation is not a uniquely Australian problem. A study by the United Kingdom’s National Audit Office of all statutory instruments made in 2005 that were subject to RIA found that by mid-2009 only 29 per cent had been subject to ex post review (NAO 2010b). Unfortunately no comparable data are available for Australian jurisdictions.

Concerns have been expressed in several OECD countries about the lack of ex post assessment of the impacts of regulation more broadly, and some governments are seeking to ‘rebalance’ their evaluation efforts (box 9.4). As part of the RIS process in Canada all regulations with a major impact on business require a formal monitoring and evaluation plan which outlines data collection requirements, governance arrangements and review timing (TBCS 2009).

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| Box 9.4 Ex post evaluation of regulation in other countries |
| There is a move internationally for greater requirements for ex post evaluation of regulation. For example, stronger ex post review requirements for new regulations are proposed in the United Kingdom and the European Union. According to the United Kingdom’s National Audit Office (NAO), the process for determining whether a review should occur has improved somewhat, but it implies the process could do better:  In 2007 we reported that there continued to be an unstructured and ad hoc approach to post implementation review across all departments. Since then, we have found greater numbers of Impact Assessments include a statement of when a review should be conducted, although relatively few have been carried out to date. (NAO 2010b, p. 9)  In addition, both Canada and the United States have recently established requirements in their regulatory systems to undertake ex post evaluations of significant regulations. In particular:   * The Canadian Government explicitly requires evaluations of both the stock and flow of regulation in its 2007 Cabinet Directive on Streamlining Regulation. In addition, rolling five year evaluation plans are required (TBCS 2009) * In the United States, Executive Order 13563 requires retrospective reviews of existing regulation alongside the regulation impact assessment process:   ... It asks for ‘periodic review’ to identify ‘rules that may be outmoded, ineffective, insufficient, or excessively burdensome.’ It directs agencies to produce preliminary plans for period review of significant rules and submit them to OIRA [Office of Information and Regulatory Affairs] within 120 days. Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Before a rule has been tested, it is difficult to be certain of its consequences, including its costs and benefits. During the process of retrospective analysis, the principles … remain fully applicable, and should help to orient agency thinking. (Sunstein 2011, p. 5) |
| *Sources*: TBCS (2009), NAO (2010b), Sunstein (2011). |
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### Suggestions for improving arrangements for reviews flagged in RISs

The Commission (PC 2011) examined the issue of ex post evaluation and reviews with regard to the Commonwealth requirements — in particular how to improve the likelihood that reviews flagged in RISs are undertaken systematically and with an appropriate degree of rigour, recommending:

The Australian Government’s Best Practice Regulation guidelines should be modified to: require a formal review and performance measurement plan in cases where the expected impact of a proposed regulation is rated as ‘major’ by the Office of Best Practice Regulation (OBPR); encourage the use of embedded statutory reviews where there are significant uncertainties regarding the effectiveness or impacts of the proposed regulation; ensure that any proposed review is proportionate to the potential impact of the regulation; ensure that all reviews foreshadowed in regulatory impact statements take place within five years. (PC 2011, p. xxvi)

Given the evidence collected as part of this study, there are likely to be benefits in strengthening ex post review requirements along the same lines across all jurisdictions, particularly for proposals with large or uncertain impacts. A key element in making this work well would be more systematic monitoring to ensure reviews are actually undertaken and acted upon.

The regulatory oversight body in each jurisdiction would seem best placed to supervise these requirements, which essentially represent an extension of its current activities. In particular, the regulatory oversight bodies could: encourage more proportionate, timely, and useful reviews; ensure early consideration is given to the availability of data for reviews, particularly for regulations with major impacts; promote more timely rectification of any adverse impacts arising; and help maintain ‘fit for purpose’ regulation. Publication of a timetable for the reviews would also assist agencies, business organisations and other stakeholders to better coordinate consultation efforts.

The Commission has previously recommended that such actions be taken at a Commonwealth level:

The Australian Government should establish a system that: tracks reviews proposed to meet the RIS requirements to ensure they are undertaken; monitors the progress of reform recommendations from these and other commissioned reviews; makes this information available on a public website, with links to planned reviews, completed reviews, government responses, and a record of subsequent actions. (PC 2011, p. xlv)

Details of scheduled reviews — including any embedded statutory reviews (discussed below) — could be included in annual regulatory plans with monitoring by oversight bodies to ensure they are periodically updated to reflect ongoing developments in review plans.

Leading practice 9.2

In reviewing existing regulations, more efficient use of RIA resources is achieved by targeting resources at those regulations with highly significant or uncertain impacts.

All regulatory oversight bodies should monitor and report publicly on regulatory reviews flagged or required as part of RIA processes. Annual regulatory plans could be utilised for this, with oversight bodies checking them for adequacy.

### ‘Embedded’ statutory reviews

An approach that has been adopted to ensure that reviews foreshadowed at the time regulation is developed actually take place is to build the review requirement into the regulation. In some cases legislation includes a requirement for a review to be conducted and in some instances it also sets out the specifics of the review, such as timing, scope and governance arrangements. These ‘embedded’ reviews have generally been used for significant areas of regulation where there are uncertainties about the efficacy or impacts of the legislation; where the regulatory regime is transitional; or to reassure stakeholders who are adversely affected by new legislation (PC 2011).

Embedded reviews vary considerably in scope from consideration of major changes or repeal of the legislation to consideration of only the implementation design features.

In New South Wales, the *Guide to Better Regulation* (NSW Department of Premier and Cabinet 2009) states that review provisions should be included in all Bills, unless a Bill has a minimal impact. In most cases reviews are to be conducted every five years and statutory reviews must be tabled in Parliament to allow for public scrutiny. However, the timing of reviews and details about review objectives can be varied on a case-by-case basis.

An examination of the stock of primary legislation in force in New South Wales (as at end October 2012) revealed that a total of 265 instruments contained a review provision. Although the time periods varied, wording of provisions typically ran along the following lines:

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years. (*Architects Act 2003* (NSW), section 89)

Overall, agencies in New South Wales completed 11 comprehensive statutory reviews of Acts in 2009-10. The New South Wales BRO is canvassing views on strengthening RIA requirements to mandate the inclusion of a review provision in all Bills, including amending legislation (BRO 2011).

Embedded statutory reviews can sometimes be paired with a sunset clause, which states that the legislation will expire at a particular time subject to the findings of the review. In its submission to this study the Small Business Development Corporation of Western Australia noted ‘… embedding sunsetting clauses in laws and regulations, which would trigger a review before the law or regulation can be renewed’ (sub. 25, p. 11) was an option for consideration to strengthen RIA processes in Western Australia.

Similarly, Borthwick and Milliner (2012) recommended that the Australian Government introduce either a sunset clause or a review provision into all primary legislation that has a more than minor regulatory impact on business or the not‑for‑profit sector, noting that while subordinate legislation at the Commonwealth level is subject to sunsetting provisions under the *Legislative Instruments Act 2003*:

… primary legislation are not required to be reviewed as a matter of course. A review provision would ensure that the Government and Parliament periodically reflects on whether the Act is meeting its objectives, and whether the objectives could be achieved in a more efficient and effective way. (Borthwick and Milliner 2012, p. 77)

The evidence collected in this study — including the challenges agencies face in obtaining robust data on likely costs and benefits of proposed regulations in RIA —and the lack of systematic follow up of reviews flagged in RISs highlights the benefits from more systematic use of such reviews.

The Commission is therefore of the view that mandating the systematic use of review provisions for primary legislation with significant impacts would help strengthen overall RIA processes. Such a requirement would not be appropriate for subordinate legislation. Reviews of subordinate legislation in most jurisdictions are covered by sunsetting or staged repeal requirements (discussed in the following section).

In addition to mandating a review, such provisions could also specify the time period for the review — which could vary depending on circumstances — as well as aspects of scope, coverage and governance arrangements.

Leading practice 9.3

Provision for a mandatory review should be included in all future primary legislation where the associated proposal triggers RIS requirements.

## 9.4 Reviews associated with sunsetting requirements

A key tool for regulatory review that draws on RIA processes is sunsetting. Sunset clauses are requirements for legislation (usually subordinate) to lapse after a specified period if not re-made. The rationale for sunsetting is that much regulation inevitably has a ‘use-by date’, when it is no longer needed or will require significant modification. But without a trigger to reassess its usefulness, at least some of this regulation will inevitably remain in place (PC 2011). Sunsetting should, at least theoretically, reduce the average age of the stock of regulation and ensure regular review and reform of the stock of regulations.

Sunsetting can either be narrow, with clauses included in specific legislation, or broad, applying to classes of legislation. Given that automatic lapsing would be problematic for much primary legislation, broad based sunset arrangements are confined to subordinate legislation (table 9.6). However, specific sunset clauses can generally be included in individual Bills. For example, in Western Australia, sunset clauses are used in Bills at the direction of Cabinet, Parliament or individual Ministers. While most jurisdictions have stated that these are used on occasion, systematic data on this are not available.

Table 9.6 Sunset requirements in Australian jursidictions

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| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Characteristic | Cwlth | COAG | NSW | Vic | Qld | WA | SA | Tas | ACT | NT |
| Broad-based sunsetting for subordinate legislation | ✓ | .. | ✓ | ✓c | ✓ | 🗶 | ✓ | ✓ | 🗶 | 🗶 |
| Time period (years) | 10 | .. | 5 | 10 | 10 | .. | 10 | 10 | .. | .. |
| Deferral (years) | 1a | .. | 1-5b | 1 | 1-5 | .. | 1-4 | 1 | .. | .. |
| RIA for remaking regulations with significant impacts | ✓ | .. | ✓ | ✓ | ✓ | .. | ✓ | ✓d | .. | .. |

a Applies to requirements as at 1 January 2012. Since then, amendments to the Commonwealth Legislative Instruments Act have increased this to up to 5 years to allow greater flexibility and promote greater use of ‘thematic’ or package reviews of related instruments. b Postponement occurs in 1 year intervals. Postponement on the third, fourth or fifth occasions can only occur if the responsible Minister has given the Legislative Review Committee at least one month’s written notice. c Statutory rules sunset 10 years after coming into effect. RISs are prepared before the rules are remade. Legislative instruments do not ordinarily sunset. d A RIS is not required for the remaking of subordinate legislation where the original regulation has been in operation at some time in the preceding 12 months, and has been in operation for less than 10 years, and a RIS was prepared in relation to the original regulation. In practice, this means regulation could go for up to 19 years without a review. .. not applicable.

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

General sunset clauses applied to classes of legislation were first employed in Australia by state governments. Six jurisdictions have legislation for general sunsetting, or ‘staged repeal’ of delegated legislation — the Commonwealth, New South Wales, Victoria, Queensland, South Australia and Tasmania. The OECD (2002) has previously noted that Australia has been at the forefront of OECD countries in the use of sunsetting.

Where governments do not want sunsetting regulation to lapse, it must be remade — following the same procedural requirements (including RIA) as new legislation. For example, the Australian Government’s (2010a) *Best Practice Regulation Handbook* requirements apply to any regulation remade due to sunsetting.

Most jurisdictions have a ten year sunset period (including the Australian Government, Victoria, Queensland, South Australia and Tasmania). New South Wales has a five year period. Sunsetting provisions also apply at the local government level for by-laws and local laws in a number of jurisdictions (PC 2012).

The sunset requirements introduced in the Commonwealth, New South Wales, Victoria, South Australia and Tasmania apply to the pre-existing stock of regulation. To facilitate this, the sunsetting of existing legislation was staggered. However, in Queensland sunset requirements are generally applied to new instruments that commenced after sunset requirements were introduced.

Knowing the amount of regulation that lapses as a result of sunsetting arrangements and is subsequently remade essentially unchanged would shed light on the usefulness of RIA for sunsetting, but definitive data are not available.

### How well does RIA for sunsetting work in practice?

#### Views on the benefits of sunset reviews

There is some evidence that reviews associated with sunsetting do play a role in promoting better regulatory outcomes. A recent US empirical study by Sobel and Dove (2012), which examined how differences in the regulatory review processes across US states affect the level of regulation, found strong evidence of benefits from reviews associated with sunsetting:

By making regulations fight to stay in place, even if it is just to put them through the political battle necessary to be re-enacted individually instead of being pork-barrel legislated, sunset provisions force a re-evaluation of all regulations and tend to lessen the degree of regulation within a state. (p. 37)

An OECD study (1999) reviewed the use of sunsetting in several Australian states and found some benefits, noting that it had substantially reduced the overall number of regulations in force, removed much redundant regulation from the statute books and encouraged the updating and rewriting of much that remained.

While not a measure of the level of regulatory burden, data on the number of instruments and pages of regulation subject to staged repeal in New South Wales via sunsetting show a significant reduction in regulation after the introduction of sunsetting. Reduction in the regulatory stock achieved through sunsetting was greatest in the first few years, as the *Subordinate Legislation Act 1989 (NSW)* required the sunsetting of the pre‑existing stock of regulations (all statutory rules in force prior to 1 September 1990) in stages — with one-fifth of the stock subject to sunsetting each year between 1991 and 1995 (figure 9.2). Even allowing for this, reduction has slowed in recent years, with the BRO (2011) noting that this may reflect, in part, that the easiest reforms have been identified and resolved in the early years of the repeal program.

Figure 9.2 NSW subordinate legislation subject to staged repeal

Number of rules and pages of legislation

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| Figure 9.2 NSW subordinate legislation subject to staged repeal. This chart shows the number of rules and pages of legislation that have been subject to staged repeal from 1992 to 2010. |

*Data source*: BRO (2011).

Tasmania’s Department of Treasury and Finance also reported benefits from reviews of sunsetting regulation in their state:

While the sunsetting of regulations is often viewed as administratively onerous (particularly where considerable review of the legislation has been undertaken within the 10 year period), it is generally considered that sunsetting is very beneficial and has led to improved regulatory outcomes at the end of the 10 year period. In some cases regulations have not been remade at the end of the 10 year period. (sub. 22, p. 1)

The use of RIA for reviews associated with sunsetting regulation can lead to early engagement from the relevant departments and improve the overall effectiveness of the process. VCEC noted that effective early engagement by regulators improved the regulatory proposals relating to sunset reviews of the Environmental Protection (Industrial Waste Resource) Regulations 2009 and the Children’s Services Regulations 2009. The departments responsible for both of these RISs engaged with VCEC more than 12 months before the regulations were due to sunset. VCEC (2009) noted that early engagement enabled these RISs to be used as tools to analyse the costs and benefits of various options, and better shape the proposed regulations.

Nevertheless, analysis by VCEC for Victorian RISs assessed between 2005 and 2009 found that 14 per cent of the compliance savings came from re-made sunsetting regulations rather than from new/amended regulations, despite the fact that 40 per cent of the RISs were for sunsetting regulation (VCEC 2011b). More recently, however VCEC notes that it has observed significant savings for regulations that have sunset recently (VCEC pers. com., 25 October 2012). For example, the recent RIS prepared in Victoria for the re-made Dangerous Goods (Storage and Handling) Regulations proposed significant reductions in regulatory burden compared to the previous regulations.

The Commission’s survey of agencies undertaken for this study identified that:

* only one-quarter of respondents thought that sunsetting made a substantial contribution to improving regulatory quality
* more than 40 per cent agreed that sunsetting requires too much investment of resources for the benefits achieved; just over one-fifth of respondents disagreed (figure 9.3).

This issue of managing the resource burden of reviews for sunsetting regulation was also raised with the Commission by both agencies and oversight bodies during consultations. Other issues raised and considered below include difficulties in determining the appropriate base case to use in such reviews and various approaches to dealing with review burden.

Figure 9.3 Agency views on sunsetting of regulation**a**

Responses to question on whether sunsetting of regulation…

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a Based on 58 survey responses by agencies and departments, of which: 6 respondents answered ‘do not know’ to the question of whether sunsetting makes a substantial contribution to improving regulatory quality; and 7 respondents answered ‘do not know’ to the questions on investment of resources and package reviews. ‘Agree’ comprises both ‘strongly agree’ and ‘agree’. Disagree comprises both ‘strongly disagree’ and ‘disagree’.

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

#### Managing the resource burden of sunset reviews

Reviews associated with sunsetting can create particular pressures on the RIA resources of agencies and oversight bodies that are not always evident in assessment of new regulation. These pressures can arise due to: the sheer volume of regulation that sunsets each year; the often limited scope for smoothing out workloads given that regulation will expire at a particular date (and scope for extensions is sometimes limited). In addition, priorities for reviewing existing regulation can be low for governments keen to develop and implement new policy agendas.

In discussing the NSW staged repeal program for sunsetting subordinate legislation, for example, the BRO (2011, p. 27), noted that ‘the resources needed to undertake reviews on an ongoing basis are substantial.’

For reviews associated with sunsetting to achieve benefits that justify the potentially large investment of RIA resources they can entail, some prioritising of reviews and resources is necessary. A key challenge is ensuring that RIA undertaken for remaking sunsetting instruments is appropriately rigorous. The time pressures involved mean overly mechanistic or ‘tick and flick’ reviews are a risk. For example, in a submission to this study, AFMA, while generally supportive of sunsetting, noted that:

Sunset clauses, while a welcome addition to ensure regular review of regulation, are a fairly primitive approach to ongoing assessment of regulatory relevance. In practice when regulations reach their sunset timing they are reintroduced sometimes without sufficient re-assessment. (sub. 11, p. 10)

Similarly, a review of Victoria’s RIS process found:

Despite efforts by VCEC to raise awareness of sunsetting regulations well in advance, these are often not considered soon enough because of departmental workloads and/or lack of resourcing for RIS preparation, particularly when a number of regulations are due for renewal within a defined period of time. This means that the RIS process receives little attention early on, particularly at the stage when alternative options could be considered, and RIS documents are prepared in a rush. (Access Economics 2010, p. 23)

While one of the strengths of sunsetting as a tool for regulation reform is that agencies are forced to act, in all jurisdictions that have sunsetting, there are mechanisms available for delaying the sunsetting and associated reviews (table 9.6). For example, New South Wales’ five-yearly sunsetting requirement has seen the postponement of substantial numbers of regulations scheduled to sunset. In 2009 and 2010 the staged repeal of 51 per cent and 42 per cent of expiring regulations, respectively, were postponed. The BRO (2011) notes that this may reflect a review period (five years) that is too short for some regulations and that agencies are choosing to allocate resources to higher priority activities. Options for addressing this problem, while ensuring the stringency of sunsetting provisions in NSW are maintained, are currently being examined by the BRO.

In other jurisdictions, mechanisms for delay include:

* Victoria — on the certificate of the minister, the Victorian Governor may extend the operation of a regulation once only for a period not exceeding 12 months
* Queensland — extensions of one year or a maximum of five years for subordinate legislation substantially uniform or complementary with legislation of the Commonwealth or another state
* South Australia — postponement of expiry for up to a maximum of four years.

In Queensland, expiry of substantial numbers of sunsetting instruments has been delayed over the past decades through the granting of extensions. However, the numbers have been falling — down from 100 extensions granted in 1998 to only 32 in 2008, suggesting that the process of regulation review may have become better established and/or the volume of regulation that is sunsetting and requiring review has eased to a manageable quantity (Scrutiny of Legislation Committee 2010).

While there can be legitimate reasons for deferral of sunsetting — such as to allow for thematic or package review (discussed below) — sunsetting is less likely to work well where exemption rules and rollover time limits are lax, allowing undue deferral of review.

#### Determining the appropriate base case for sunsetting reviews

While there have been no suggestions that RIA is not the appropriate framework for reviewing sunsetting regulation, the level of impact analysis and the appropriate base case that should be used in determining whether the regulation should be maintained was raised as an issue in consultations with stakeholders. The Australian Government Attorney-General’s Department noted:

In relation to sunsetting regulations, the impact analysis will be different to a process which involves considering making a new regulation or regulatory scheme. It may be in some cases that the need for continuing regulation is clear, and the RIA requirements should not require unnecessary additional analysis. It seems sensible to provide different guidance on the steps required to analyse existing regulation. (sub. 4, p. 2)

An issue raised in this regard is what the appropriate base case should be for undertaking RIA for regulation scheduled to sunset. Where regulation has been in place for a long time, a base case of ‘no regulation’ may be both nonsensical and infeasible to analyse. Officers undertaking RIA in the Victorian transport portfolio noted:

Consideration should be given to removing the requirement to assess sunsetting regulations against a zero regulation base case. In some cases, this requirement is too onerous as it is not feasible to collect data associated with no regulations. For example, the requirement to carry lifejackets onboard recreational vessels has been a long standing requirement in Victoria (since the introduction of the *Victorian Motor Boating Act 1962*). (sub. 17, p. 5)

An alternative model suggested by officers undertaking RIA in the Victorian transport portfolio was that a zero regulation base case could only be applicable in instances where the regulation is identified as clearly problematic or that it is not meeting regulatory objectives.

The Commission is of the view that for sunsetting reviews to work well in assessing whether regulation should be remade or allowed to lapse, they should always adopt a RIA framework. There are likely to be benefits from a base case of continuation of a regulation, particularly where such regulations have been in place for a long time, or have been reviewed multiple times. However, ‘no regulation’ should always be included as an option and the likely impacts assessed accordingly, with the depth of analysis proportionate to the significance of the issue. In cases where the regulation has been identified as problematic, the base case should be ‘no regulation’.

#### Package reviews

Although sunsetting can be effective at removing redundant regulation (usually subordinate legislation), the ability of reviews associated with sunsetting to achieve deeper or more broad‑based reform is constrained by sunsetting’s mechanistic character. However, reviews associated with sunsetting offer the opportunity to examine related legislative instruments, including primary legislation, in a thematic or systemic manner. The Commission has noted (PC 2011) that it is through such reviews that some of the greatest benefits are likely to be found.

For example, in examining the Australian Government’s sunset legislation (set out in the *Legislative Instruments Act 2003),* the Commission noted that sunsetting would be enhanced if it were able to provide a catalyst for more systemic reviews:

These reviews should cover both sunsetting and related legislation, including where appropriate, the primary legislation. This approach is potentially not just more cost-effective, but provides the opportunity to improve the quality of regulation. (PC 2011, p. x)

This issue was also addressed in a submission to this study by the Australian Government Attorney-General’s Department which noted:

RIA requirements can place a large burden on agencies when many individual instruments are sunsetting at the same time. Allowing for thematic reviews of instruments may assist to streamline this process and allowing for a single RIA for a number of related instruments subject to a thematic review would reduce the workload on agencies and business without undermining the goals of the RIA process. (sub. 4, p. 2)

Following the Commission’s 2011 review, the Australian Government subsequently amended the sunsetting requirements in the *Legislative Instruments Act 2003* to allow for package review and also to better smooth out the volume of instruments required (box 9.5).

Also supporting an approach of packaged reviews, around two-thirds of agencies responding to the Commission’s survey considered that sunsetting was likely to yield greater benefits if related subordinate and primary legislation were reviewed as a package (figure 9.3).

leading practice 9.4

There are likely to be benefits for regulatory outcomes and efficient use of RIA resources from:

* prioritising sunsetting regulations against agreed criteria, to identify the appropriate level of review effort and stakeholder consultation
* grouping related sunsetting regulations for thematic or package review
* where appropriate, consideration of subordinate regulation in conjunction with its overarching primary legislation.

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| Box 9.5 Recent changes to Australian Government sunsetting requirements |
| The Government’s *Legislative Instruments Amendment (Sunsetting Measures) Act 2012,* which commenced in September 2012, introduced several measures to improve the operation of sunsetting provisions at the Commonwealth level. The changes aim to allow for better management of workload burdens on governments (and stakeholders) associated with reviewing and remaking legislative instruments.  Key features include changes to:   * more efficiently allow for the repeal of redundant instruments and provisions * provide greater certainty about what instruments sunset and when they sunset, and provide staged sunsetting dates for older instruments to remove large peaks in the number of instruments scheduled to sunset in coming years * enable the Attorney-General to align sunsetting dates of related legislative instruments to enable thematic reviews to be conducted * clarify the requirements for explanatory material for instruments, including instruments that are remade following a review.   The Explanatory Memorandum noted that rules for calculating when instruments and provisions sunset were difficult to apply, particularly for older instruments amended before or just after the Legislative Instruments Act (LIA) came into force. It also noted:  The [Act] introduces and encourages thematic reviews of legislative instruments by creating a mechanism to align sunsetting dates. This may involve bringing forward some sunsetting dates, and pushing others back by up to five years. The ability to conduct thematic reviews will facilitate more efficient and effective review processes, and enable departments and agencies to comprehensively engage with stakeholders prior to the remaking of any instrument. This is consistent with the Productivity Commission recommendation that more flexibility be introduced to the LIA to enable thematic reviews of related instruments (*Legislative Instruments Amendment (Sunsetting Measures) Bill 2012* (Explanatory Memorandum), p. 8). |
| *Sources*: *Legislative Instruments Amendment (Sunsetting Measures) Bill 2012* (Explanatory Memorandum); PC (2011). |
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## 9.5 Conclusion

Sound regulatory policy involves adopting a fully integrated approach to the development of regulation: from problem identification and the decision to employ a regulatory solution; through the design, implementation and enforcement of the regulations; to ex post review. While Australian jurisdictions have a number of review processes in place, there remains scope for improvement, including:

* ensuring that regulation with significant impacts that has not undergone RIA is subject to PIR (and ensuring that an adequate PIR is subsequently completed)
* for reviews foreshadowed in RISs
* more systematic monitoring to ensure they actually take place and are undertaken with an appropriate level of rigour
* greater transparency in governance arrangements and development of the terms of reference to improve review effectiveness and stakeholder engagement
* more comparisons of whether the estimated costs and benefits identified in RIA are borne out by subsequent experience
* more widespread use of embedded statutory reviews and individual sunset clauses, particularly where the assessment of costs and benefits in RIA was limited or there is significant uncertainty about impacts
* promoting greater use of either thematic or package reviews of related regulation for sunsetting regulations, including where appropriate in conjunction with overarching primary legislation.

Ultimately, ex post reviews, no matter how well done, should not be seen as substitutes for ex ante analysis. However, when done effectively, ex post reviews can complement RIA processes and lead to better regulation.