Australian Government
Attorney-General's Department

12/6909

7 May 2012

Mr Robert Fitzgerald AM
Commissioner
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Mr Fitzgerald

Regulation Impact Analysis: Benchmarking

The Attorney-General's Department (AGD) welcomes the opportunity to make a submission into the Productivity Commission's study in relation to Regulation Impact Analysis: Benchmarking.

AGD's comments focus on the following issues:

- Regulation Impact Analysis (RIA) and sunsetting
- Access to justice principles
- Principles for clearer Commonwealth laws
- Costs of RIA processes
- Integration with the policy making process
- Agency responsibility and capacity for Regulation Impact Statement preparation
- Accountability and quality assurance, and
- Consultation and other transparency mechanisms

Further information on each of these issues is included in Attachment A.

The action officer for this matter is Simon Kelly

Yours sincerely

Doris Gibb
Assistant Secretary
Cabinet and Ministerial Coordination Branch

Regulation Impact Analysis (RIA) and sunsetting

Appropriate scope of RIA requirements in relation to sunsetting regulations

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.

Where regulation includes a built in requirement for review (for example, sunset clauses), should specific guidance also be provided on the nature of the impact analysis to be undertaken, including evaluation of the case for maintaining the regulation?

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.

Role of RIA in deciding whether or not the legislative instrument should be remade

The discussion paper promotes a culture in which the RIA process is used to decide whether or not a legislative instrument should be made. In our experience, in non-business type regulatory activity, the RIS process is not used to decide whether to make the Legislative Instrument (LI). In these situations there is usually no option. If the RIS is to be used early on in the process – in deciding whether or not the LI should be re-made – then the process for this will need to be worked out soon and a timetable worked out that includes the time needed for the Office of Best Practice Review (OBPR) to undertake all the assessments.

Access to justice principles

The Issues Paper notes at page 9 that a key aim of the RIA process is to minimise the inevitable costs of regulation – including administrative costs, compliance costs on business and the community, and economic costs arising from regulatory distortions. Another unintended cost of regulation is the cost of resolving and dealing with disputes arising under / in relation to a regulatory scheme. Regulation can also have unintended social costs, where the practical impact of such regulation is to reduce equitable access to justice (including access to information and assistance, as well as access to the courts).

Accordingly, the Attorney-General's Department recommends that the RIA process incorporate consideration of the Access to Justice principles adopted by the Australian Government in 2009: accessibility, appropriateness, equity, efficiency and effectiveness.

Incorporation of the Principles as part of the RIA process would help to ensure that:

- new regulatory schemes are encouraged to specifically consider and provide for effective and efficient dispute prevention and resolution as an in-built part of the scheme
- the dispute-related costs of regulatory schemes are included in the analysis of the scheme's economic impact (in particular where the scheme would place significant demand on the formal justice system, driving up court administrative costs), and
- new regulatory schemes are encouraged to consider any impact on access to justice (including equitable access to information and assistance which may serve to prevent disputes or empower individuals/businesses to handle disputes themselves).

Background
On 23 September 2009, the Government adopted a Strategic Framework for Access to Justice to guide future decisions about the federal justice system. The Strategic Framework comprises five key principles for access to justice policy-making, which have been endorsed by all State and Territory Attorneys-General. The principles are:

Accessibility
Justice initiatives should reduce the net complexity of the justice system. For example, initiatives that create or alter rights, or give rise to decisions affecting rights, should include mechanisms to allow people to understand and exercise their rights.

Appropriatenes
The justice system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level. Legal issues may be symptomatic of broader non-legal issues. The justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues.

Equity
The justice system should be fair and accessible for all, including those facing financial and other disadvantage. Access to the system should not be dependent on the capacity to afford private legal representation.

Efficiency
The justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal dispute resolution process, including through preventing disputes. In most cases this will involve early assistance and support to prevent disputes from escalating. The costs of formal dispute resolution and legal assistance mechanisms—to Government and to the user—should be proportionate to the issues in dispute.

Effectiveness
The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis. All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining and supporting the rule of law.

Principles for clearer Commonwealth laws
The Issues Paper also notes at page 9 that poor quality regulation can result in excessive administration and enforcement costs for governments and impose 'unnecessary' regulatory burdens on business or other affected groups, particularly where there is regulatory overlap or inconsistency between the jurisdictions. We also note that the RIA process includes substantial ex ante analysis, including the consideration of the necessity of adopting regulation, and ex post monitoring and evaluation of the effectiveness and efficiency of the regulation.

The Department supports this process and notes that the current review would complement the Government's move to improve the clarity and accessibility of laws. We recognise that complex legislation makes it difficult, expensive and time-consuming for individuals and businesses to understand their legal rights and obligations. Unclear laws can also place an additional burden on industry regulators and can lead to increased litigation and subsequent resource implications on businesses, individuals and other organisations, where disputes arise. By contrast, laws that are clear and easy to understand are an essential part of an accessible justice system. Clearly written laws can be better understood, complied with and administered.

In developing best practices and benchmarks for the RIA process, the Department suggests that the Commission take into account the following principles for developing clearer laws, which should be considered by all officers when developing Commonwealth legislation:

- Consider all implementation options—don't legislate if you don't have to.
- When developing policy, reducing complexity should be a core consideration.
- Laws should be no more complex than is necessary to give effect to policy.
- Legislation should enable those affected to understand how the law applies to them.
- The clarity of a proposed law should be continually assessed—from policy development through to consideration by Parliament (for Acts) and consideration by the rule-maker (for legislative instruments).

To support the development of clearer laws, the Department also encourages the regular review of legislation. In implementing new policy into legislation, instructors often look to make amendments to existing Acts without reviewing the existing provisions or the Act as a whole. This can result in longer legislation and make it harder to find and understand the relevant provisions and their inter-relationship with other provisions in the Act. To address this, the Department considers that legislation should be regularly reviewed for readability, useability, ease of administration and policy desirability. The overall clarity of the legislation should be reconsidered and the underlying policy could also be reassessed. This should be done both as a stand-alone process and when existing legislation is being amended.

Costs of RIA processes

What are some of the key factors that influence the costs of RIS preparation and other costs of RIA processes? How can the cost effectiveness of RIA be improved?

For a complex RIA, the requirements on an agency can extend to requiring a team of experts across a range of fields e.g. experts in policy development, risk assessment, risk management, economic modelling and analysis, and technical expertise in a particular subject matter.
An example is the current RIA process on 11 chemicals that can be used to make homemade explosives and used in terrorist attacks:
http://www.chemicalsecurity.gov.au/www/chemsec/chemsec.nsf/Page/Public_consultation

'Additional' costs attributed to that (ongoing) RIA process include:

- approximately $300,000 for external consultants to conduct focus groups and prepare the Consultation and Decision RIS documents
- approximately $50,000 in staff costs to undertake the procurement process to engage external consultants, and
- approximately $90,000 in advertising costs associated with the release of the Consultation RIS to ensure adequate coverage of stakeholders, particularly small to medium enterprises.

Whilst OBPR currently offers an outposting service, consideration should be given to OBPR making this service easily accessible and ensuring cost effectiveness for agencies.

Integration with the policy making process

What evidence is there that RIA has been effectively integrated into policy-making processes? Has there been necessary cultural change in regulation development?

- **How and when in the decision making cycle are Ministers, or other decision makers, engaging with RISs?**
- **Is RIA being undertaken early enough in the policy development process to enable consideration of all feasible alternatives, including regulatory and non-regulatory options?**
- **To what extent is the preparation of a RIS still being treated as an 'add on' task — after a course of action has already been agreed?**

In the Council of Australian Governments (COAG) environment, it appears that the RIA process is integrated into the policy-making process at an early stage. For example, in relation to the current RIA process on 11 chemicals that can be used to make homemade explosives and used in terrorist attacks (http://www.chemicalsecurity.gov.au/www/chemsec/chemsec.nsf/Page/Public_consultation), the need to consider the RIA process under the COAG RIA guidelines was acknowledged early in the policy development process and factored into the work program. The clarity of the COAG RIA guidelines meant that AGD did not consider the RIA process as an 'add on' to the policy development cycle.

A further driver for integrating the RIA process into policy development in this example was the project objective of minimising risk according to the 'As Low As Reasonably Practicable' (ALARP) principle. For a risk to be managed to this level, the ALARP principle requires demonstration that the risk is reduced without requiring 'excessive' investment. By nature, this requires undertaking a cost benefit analysis. In this example, the RIA process complemented the policy objective.

Agency responsibility and capacity for RIS preparation

Do agencies responsible for preparing RISs generally have the necessary skills and expertise? If not, why not?

What arrangements are in place to ensure institutional learning and knowledge transfer (between and within departments), to build on the knowledge/experience gained when completing RISs?

How can consultants and others with specialist expertise best be utilised to improve the quality of RISs? What are the implications of their involvement for the development of agency capacities and achieving cultural change?

How can RIA training and guidance material — both in-house and provided by oversight bodies — be improved?

Apart from training and guidance material, what other strategies should be employed by governments to develop and maintain agency RIA capacities and foster cultural change in regulation making?

Depending on the complexity of the RIS, it may not be cost effective for an agency to maintain staff with expertise on a range of matters (including subject matter expertise) to complete RIS documents on an ad-hoc basis. While maintaining a section of experts purely for that purpose would be desirable, it would be difficult to justify under the current economic environment.

RIA training and guidance material could be enhanced through improving the 'searchability' of RIS documents published on the OBPR website and approved as being 'adequate'. At present, though the OBPR site lists approved RIS documents, the search function does not allow users to search these documents based on, for example, subject matter (e.g. 'road safety') or keywords (e.g. 'value of statistical life'). An improved search tool to hone in on specific details of RIS documents previously assessed as 'adequate' by OBPR would assist agencies to better understand OBPR expectations and improve accessibility to relevant precedents.

The frequency of RIA training should be increased and the content tailored to more usefully outline OBPR's expectations on specific areas of the RIA process. For example, current OBPR training raises broad awareness of the issues in undertaking a cost-benefit analysis. It has limited usefulness in up-skilling officers to undertake CBA. More detailed CBA training, focused on examples and targeted at officers who are tasked with preparing a RIS would be beneficial.

Accountability and quality assurance

Are there adequate mechanisms in place to ensure accountability and compliance with RIA processes?

How can RIA processes be better insulated from political expediency? How can systems avoid the abandoning or bypassing of RIA processes when there are pressing political demands?

Are the sanctions for non-compliance with RIA requirements adequate?

Should RIA processes include the power to stop regulatory proposals without an adequate RIS proceeding to the decision maker? If so, should this power be vested in the oversight body or another body?

There are adequate mechanisms in place to ensure accountability and compliance with the Australian Government and COAG RIA processes, including adequate sanctions for non-compliance. The potential to undertake a post-implementation review is undesirable and the potential to be 'named and shamed' on the OBPR website is effective where the agency is one that appropriately embraces the RIA process. Requiring high level sign-off of each RIS before it proceeds to the ultimate decision maker is also effective and adequate.

It would not be appropriate for the RIA processes to include a power for the OBPR to stop regulatory proposals without an adequate RIS proceeding to the decision maker. There may be sound reasons for taking regulatory action without first undertaking RIA – the need to seek an exemption from the Prime Minister and the requirement to undertake a post-implementation review are adequate ways to ensure that the impact of regulation is properly assessed.

The RIA process has cost-benefit analysis as its core focus and can greatly assist and inform the decision making process. However, this focus may not always be the determinative factor in the final decision, particularly if there are strong public or national interest factors to be considered. For example, societal expectation can be a strong values-based driver that is difficult to value in monetary terms. For these reasons it would not be appropriate to make compliance with the RIA process the paramount concern in determining whether a proposal should proceed.

Consultation and other transparency mechanisms

Would publication of the oversight body's assessment of the adequacy of each RIS create a stronger incentive for agencies to undertake RIA of an appropriate standard?

Yes – publication of the oversight body's assessment of adequacy would be likely to foster a stronger incentive for agencies to undertake RIA of an appropriate standard. However, to avoid factual inaccuracies being published, the oversight body should consult with the agency on the terms of the assessment of inadequacy before it is published. This could reduce the need for agencies to pursue unnecessary, costly public responses to assessments of adequacy.