Western Australia's Submission

to the Productivity Commission Regulatory Impact Analysis: Benchmarking

May 2012

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Implementation of Regulatory Impact Assessment (RIA)

Regulatory Impact Assessment (RIA) commenced in Western Australia in December 2009, considerably later than in other jurisdictions. Although RIA requirements are new to agencies, there has been encouraging support for the program. Inevitably, as with any new initiative, there will be a level of resistance and misunderstanding. The Regulatory Gatekeeping Unit (RGU) within the Department of Treasury (Treasury) seeks to minimise these instances through meeting with agencies and explaining both the requirements and how they should be applied to particular proposals.

In RIA's short history in this State, it has had a measurable impact on improving regulation. The RGU has encouraged agencies to examine their regulatory proposals more intensely, and to place greater consideration on retention of the status quo and/or non-regulatory solutions. Several agencies have abandoned proposals that, when subject to full RIA scrutiny, were unable to establish a case for regulatory action. Reports internal to Treasury have estimated the savings to business from RIA in the 2010-11 reporting year at $43 million. In 2011-12, RIA has been responsible for over $4 million in savings to the Government and has identified significant regulatory costs in proposals put forward by agencies.

In terms of its design and implementation, RIA was introduced in accordance with Western Australia's commitment to the Council of Australian Governments (COAG) and applies to new and amending legislation and regulation. The introduction was phased in over two years to ease the burden on agencies: all regulatory proposals submitted to the State Cabinet were covered in the first year of RIA and subordinate legislation covered in the following year. The roll-out to subordinate legislation followed a substantial reform of RIA to reduce the amount of information required on machinery and administrative regulatory matters.

RIA was imposed on agencies through a Premier's Circular with the RIA Guidelines for Western Australia detailing the individual requirements of RIA. Under existing arrangements, regulatory proposals must be assessed through a first-stage process known as a Preliminary Impact Assessment (PIA). An agency prepares a PIA to assess the level of impacts likely to result from the proposal. Where these are likely to have significant negative impacts on business, consumers or the economy (including the government), the RGU will advise that the agency will need to prepare a Regulatory Impact Statement (RIS). In this case, agencies prepare a Consultation RIS to inform stakeholders during the consultation process and, draw together stakeholder feedback and the further analysis of the issue into a Decision RIS which they give to the decision-maker. To promote transparency and accountability of decision-making, the RIS and the assessment provided by the RGU are to be made public following the public announcement of the decision.

The RIA Guidelines and the PIA and RIS templates provide guidance to agencies on the completion of RIA documentation. These accord with COAG requirements and address concerns on the completeness of RIA assessments expressed by the Business Regulation and Competition Working Group (BRCWG). Where RISs are required, agencies take guidance from the RIA documentation on the identification of the problem to be addressed, the objectives to be achieved and both non-regulatory and regulatory options that will achieve the objectives. The RIS asks agencies to consider both national and State market implications and restrictions on competition, as promoted by the BRCWG.

RIA supports efforts to improve the efficiency and efficacy of stock and flow of regulation and agencies are to comply with its requirements. Both Ministers and Directors-General were formally advised in writing of RIA and the RGU has conducted training to ensure officers within agencies are familiar with the requirements. There has been a growing awareness within Government of the importance of reducing the red tape burden and a number of parallel processes have been put in place to ensure the adverse and unnecessary impacts of regulation are minimised. These include raising the significance of red tape reduction initiatives with decision-makers by linking Directors'-General employment contracts to the performance of their agencies and ensuring that Cabinet and Executive Council processes include advice on RIA compliance. Where a proposal is non-compliant with RIA, Cabinet may elect to deal with that matter by deferring it or returning it to the agency for further assessment. Cabinet may also elect to refer a matter to the Economic and Expenditure Review Committee for consideration, which may involve the agency in undertaking further RIA assessment. In addition, the Parliamentary Counsel's Office requests advice from agencies on compliance so that its limited resources are appropriately utilised.

Although there is provision to publicly report on agency RIA compliance, this has not yet occurred. The RGU has prepared reports on RIA but these are internal to Treasury. The RGU has elected to engage and encourage agencies to comply with the process, finding this is more effective, at least in its early stages, than to employ a punitive approach. The RGU's approach has focussed on promoting the benefits of rigorous assessment rather than using the threat of publishing poor performance and using shame to force compliance. It has proven effective.

As with any change to governance procedures, the introduction of RIA had teething problems. This is not surprising given the substantial coverage under RIA of legislative and regulatory proposals. Agencies were also asked to make a cultural shift, undertaking an economy-wide assessment of proposals rather than particular groups of stakeholders. Although significant training had been delivered by the RGU, the introduction of such a large, ambitious program was always going to have its detractors.

Agency Feedback

Following an invitation extended to all departments and main agencies to provide comments on the Productivity Commission's RIA benchmarking inquiry, three departments submitted responses.

In general, the concerns involved the application of RIA to quasi-regulation, the complexity of applying RIA to a proposal implemented through various stages and legislative instruments, uncertainty over when a RIS is triggered and the perceived lack of consideration of benefits in both the trigger and the assessment in the RIS.

More specifically, the Department of Local Government expressed concern that applying RIA to local laws could be seen as an unintended increase in regulatory burden. The RGU accepts that this is a risk, but argues that rigorous assessment of regulatory proposals can only benefit the State. It also points out that it has not asked local councils to undertake RIA on individual local laws, preferring to work with the Department of Local Government on its model laws, focusing on a higher-level, more general approach.

The Fire and Emergency Services Authority, a very new body, has submitted only one regulatory proposal and was granted an exemption. It elected to comment on RIA's integration with the policy process, pointing out that the development and drafting of legislation is a fluid process and that unintended changes in policy direction often occur after assessment. The Authority suggested that, for larger legislative amendments, it might be wise to allow for a second impact assessment before the approval to print stage.

The RIA Guidelines already mandate progressive impact assessment with the RGU checking proposals submitted to Cabinet for consistency with initial RIA assessments. If it finds that the impacts of the final instrument have changed and/or the agency has not identified the proposal as having been altered, the RGU can require further assessment or find the proposal inadequate.

The Department of Environment and Conservation (DEC) raised concerns on four areas of RIA in Western Australia.

1. It was concerned that the definition of a regulatory proposal, particularly around quasi-regulation, was not clear and requested that specific guidance be provided on those instruments that trigger RIA. The RIA Guidelines provide that RIA applies to all primary legislation, subordinate legislation made by the Governor (with the exception of local laws and regional land planning schemes) and quasi-regulation submitted to Cabinet. At this stage, RIA in Western Australia is not applied to the vast quantity of quasi-regulation made by agencies outside of the Cabinet process. The RGU will enter into discussions with agencies over the future application of RIA to quasi-regulation and will seek agreement on the higher impacting proposals that should be covered.

2. DEC suggested that for initiatives requested by Government, where speed is important, there be an automatic exemption process, rather than having to apply for a Treasurer's Exemption, which takes as long as preparing a PIA. It suggested a program of post-implementation reviews to maintain transparency and accountability. The RGU is examining such reforms as part of proposed red tape reduction initiatives.

3. DEC felt that RIA documentation provides insufficient guidance on the level of impact for which a RIS is required and was concerned that the RIA process does not sufficiently consider the positive impacts of regulatory proposals. The RGU is reluctant to be overly prescriptive with its guidelines, preferring a collaborative approach with agencies to identify proposals that should be subject to a RIS assessment. There has been general agreement from agencies that those matters that have proceeded to RIS assessment warranted more thorough assessment under RIA. When a proposal does have significant negative impact, the RGU does look carefully at the positive impacts and considers both. DEC provided with its submission a letter from the Environmental Protection and Heritage Council expressing concerns that cost-benefit analysis under national RIA guidelines does not allow for sufficient value or weight to be given to non-market aspects of environmental protection. The RIA Guidelines do not follow the guidelines for National Standard Setting Bodies by requiring an agency to formally establish the preferred option's net benefit to the community through a cost-benefit analysis. The concerns held are not founded and the RGU guides agencies through the RIS requirements for each proposal to ensure agencies understand what is required.

4. DEC expressed concern that RIA could be applied to some and not other parts of statutory policy-making processes, questioning whether this approach was efficient or effective. Again, the RGU is reluctant to provide a list of hard-and-fast rules on RIA, preferring to consult and negotiate the most effective approach to impact assessment. It is sympathetic to DEC's need to act quickly to deal with matters of environmental importance, but is also concerned that regulation be based on solid principles.

RIA Review

The RGU accepts that agencies would find issue in the application of a new policy assessment program and, for this reason, established a RIA working group with representation from all departments and some large agencies. This enabled agencies to express their concerns and work with the RGU on the application of RIA and to make recommendations on changes to RIA. It was as a result of the concern expressed through this working group that RIA was not extended to cover quasi-regulation generally (quasi-regulation not submitted to Cabinet). The future application of RIA to quasi-regulation will be agreed upon with agencies as part of consultation on regulatory reform initiatives.

This deferral in 2011 of the application of RIA to quasi-regulation was part of a continuing process of review of RIA. In an earlier review in 2010, the RGU examined the operation of RIA in other jurisdictions, finding that the initial design of the Western Australian RIA program was ambitious and overly burdensome in its requirements for the assessment of a range of proposals. Consequently, the RGU relaxed its PIA requirements and allowed exceptions to be claimed for machinery and administrative proposals (and certain other categories) in the rewritten RIA Guidelines. The 2012 reform initiatives provide for further streamlining to reduce the burden on agencies, allowing a greater concentration on higher impacting regulation.

The RGU is confident it is seeing a widespread change in culture among key line agency staff as they get used to the new regime and its more exacting standards. This can only continue.

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

The RGU will continue to work with agencies in a collaborative manner to ensure that RIA supports the delivery in Western Australia of well considered policy and best practice regulation.

Government of **Western Australia**
Department of **Local Government**

Our Ref: 285-07#02: E1211983

Ms Jennifer Bryant
Assistant Director
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Dear Ms Bryant

PRODUCTIVITY COMMISSION
THE ROLE OF LOCAL GOVERNMENT AS REGULATOR

Thank you for providing the Department of Local Government with the opportunity to comment on the above report.

The Department of Local Government would support the highlighting of leading practice examples from Australia, New Zealand and the United Kingdom. The combined experience and expertise of multiple jurisdictions may improve the regulatory performance of government, and support innovative solutions to common problems.

While leading practice examples may seek to reduce the regulatory burden on small business, we should be wary of increasing local government regulation as an unintended consequence. Examples of where this could occur include the introduction of formal regulatory impact assessments for local laws, or requirements for local governments to collect and publish regulatory performance indicators.

Increased regulatory reporting without a commensurate decrease in other processes associated with local government regulation may adversely affect the capacity of local governments. This could see increased timeframes and associated costs with the processing of applications, and potentially, greater costs passed on to rate payers.

In addition to those already identified by the Productivity Commission, the Western Australian Government is already exploring or progressing a number of leading practices including:

a. Introduction of regional subsidiaries as another model to assist in coordinated and sharing of LG resources and services;
b. The electronic Development Assessment pilot project (Councils Online) being coordinated by WALGA to introduce a single portal for lodgement and tracking of development assessments;
c. Provision for recognition of dog and cat registration across local governments; and
d. Mutual recognition across local governments for the registering of temporary food stalls, mobile food premises etc.

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The draft Productivity Commission report notes a number of leading practice examples in Western Australia and the Department of Local Government has noted other areas where investigation or progress towards implementation of other leading practice examples is also occurring. As such, it is disappointing that the Productivity Commission chose to use examples from submissions which characterise WA local governments in a negative fashion. See for example pp. 112-13 for the Productivity Commission's draft report, which cites examples from the Small Business Development Corporation submission.

The Department of Local Government accepts that these examples reflect poorly, however, we believe (and as the Small Business Development Corporation submission notes) that they are not indicative of established practice within local government in Western Australia.

Yours sincerely

Mark Glasson
Executive Director
Strategic Policy and Local Government Reform

8 May 2012

DATE: **1 MAY 2012**

SUBJECT: **PRODUCTIVITY COMMISSION INQUIRY INTO REGULATORY IMPACT ANALYSIS**

We refer to the Productivity Commission's Regulatory Impact Analysis Issues Paper dated March 2012. The Authority will only be commenting on one of the concepts outlined within this paper.

As of the date of this submission, the Authority has not been required to draft a Regulatory Impact Assessment. On each occasion we have proposed a regulatory change, we have been exempted from having to complete an RIA. For this reason, it is not considered that the Authority has sufficient awareness of the how the State's impact assessment process functions in practice.

Integration with the policy making process

It is noted within the issues paper that 'if RIA is undertaken too late in the policy development process it may not be of any real assistance to decision makers'. In this regard, the *Regulatory Impact Assessment Guidelines for Western Australia* (the Guidelines) note that the agency should make contact with the RGU as soon as possible after a policy issue is identified.

It is not disputed that there should be impact assessment early within the regulatory development process. However, the development of legislation is a very fluid process, especially for projects with a larger scope. Even after a policy issue has been identified and agreed upon within the agency, there may still be unintended changes that occur following drafting by Parliamentary Counsel, or review by external parties.

As such, there is a risk that the impact assessment which is undertaken will not completely reflect the regulatory impact within the finalised instrument. For larger legislative amendments, there may be the opportunity for a second impact assessment to occur prior to the intended Bill being approved for printing/publishing.

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Dear Ms Bryant

PRODUCTIVITY COMMISSION INQUIRY INTO *REGULATORY IMPACT ANALYSIS: BENCHMARKING*

Thank you for your email dated 14 March 2012 inviting input to the Western Australian Government submission to the Productivity Commission's inquiry into *Regulatory Impact Analysis: Benchmarking*. The Department of Environment and Conservation (DEC) is pleased to provide the following comments on the regulatory impact assessment process.

The terms of reference in the Productivity Commission's inquiry which DEC wishes to comment on, given its experience of the Western Australian Regulatory Impact Assessment (RIA) process, are:

- the 'regulatory significance' threshold, and related thresholds, such as impacts on specific sectors and regions, at which point mandatory RIA processes are triggered;
- guidance in regard to consultation processes and other features to enhance transparency such as publication of Regulatory Impact Statements (RIS) and the assessment of RIA adequacy;
- whether RIA applies to primary and subordinate legislation, legislative and non-legislative instruments and quasi-regulation; and
- requirements for consideration of both regulatory and non-regulatory options in RIA processes.

Definition of 'regulatory proposal'

The broad definition of "regulatory proposal", particularly its extension to "quasi-regulation", creates uncertainty as to which of the large array of statutory instruments and powers used by agencies such as DEC are 'regulatory' and require RIA, and which do not.

This ambiguity makes it necessary to consult the Department of Treasury's Regulatory Gatekeeping Unit (RGU) to determine whether or not each proposal is subject to RIA, with submission of a Preliminary Impact Assessment (PIA) being required on most occasions. This creates an administrative burden and does not assist the goals of the RIA process.

The process could be improved by providing specific guidance as to which types of regulatory instruments and powers trigger the RIA process. This would result in a system that is more expeditious and promotes the goals of RIA.

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Application of RIA to initiatives requested by Government

On occasion, agencies such as DEC are required to rapidly implement proposals requested by Government, which are often quasi-regulatory in nature. The RIA process must recognise that some initiatives will require expeditious treatment.

At present, the Western Australian RIA process allows for a Treasurer's exemption to be granted in exceptional circumstances. However, the current procedure for obtaining a Treasurer's exemption does not significantly reduce the administrative burden in comparison with the process of submitting a PIA, in circumstances where the agency is seeking to implement an urgent Government proposal. The process could be improved by allowing an exception from the RIA process for urgent Government proposals rather than a Treasurer's exemption.

A post-implementation review where proposals are not subject to initial RIA analysis would help maintain transparency and accountability for such proposals.

Scope of triggers for full RIS

There is insufficient guidance as to the level of impact at which higher level RIA processes (such as the requirement for a RIS) are triggered. There is also a lack of consideration of positive impacts at the early assessment stage.

Currently, the RIA process is triggered for "regulatory proposals", and the requirement for a RIS is triggered where there would be a "significant negative impact on business, consumers or the economy" arising from the implementation of the regulatory proposal. This is a reasonable general criterion. However the Western Australian process does not provide sufficient guidance on what constitutes a "significant negative impact" (and thus requires a RIS). As a result, there are concerns that any negative impact will require a RIS, rather than this being limited to significant impacts.

It is also unclear whether the positive economic impacts of a proposal are to be taken into account in estimating the overall impact of a proposal. Many regulatory proposals have positive impacts on business, consumers and the economy in addition to negative ones, although they may be distributed differently.

The RIA process could also benefit from simple consideration of the social and environmental benefits that regulatory actions are expected to create. The full RIS process is appropriate where there is a significant impact, but should not be necessary where major social or environmental benefits clearly exceed minor impacts on business.

This would preserve the RIS process for proposals with complex and/or high impact outcomes.

In any case, the process would benefit from clear guidelines on the types of impacts that would trigger the requirement for a RIS (for example, indications of the proportion of impacted businesses in a given region, and the financial scale of the impact on businesses or consumers).

Multi-stage statutory policy-making processes

Some of DEC's policy-making procedures are established through legislation. For example, statutory management plans prepared and administered under the *Conservation and Land Management Act 1984* are subject to a mandated process, which requires formal stakeholder consultation at a specified stage of the development process, followed by Ministerial endorsement.

Consultation often takes place early in these processes, well in advance of any actions which trigger the RIA process. DEC has submitted PIAs for such management plans, and in each instance the RGU has found that no further analysis was required. This reflects the fact that management plans are long-term, strategic documents which generally do not impose any regulatory obligations. It is questionable whether they are regulatory proposals.

However, a difficulty arises because the quasi-regulatory actions taken to implement these management plans (such as Ministerial declarations of wilderness areas or marine parks, which may lead to restrictions on public access or commercial activities), are regulatory proposals. As a result, PIAs are required to be submitted for these proposals, even where a management plan has been submitted and has received a 'no further analysis' determination.

Undertaking RIA, particularly RIS, on such actions is difficult, because the action is part of a plan that has already undergone a formal development process which generally includes lengthy consultation and has statutory force. Undertaking RIA at that stage would delay implementation without necessarily enabling the action to be changed.

Issues raised by the Environment Protection and Heritage Council

I attach a copy of a letter from the (former) Environment Protection and Heritage Council (EPHC) to the then Prime Minister regarding the application of the Council of Australian Governments' Best Practice Regulation Guidelines to EPHC matters. The issues reflect the challenge of applying RIA techniques to environmental issues if there is not sufficient recognition of qualitative factors.

The issues and approaches recommended by the EPHC remain relevant today, and should be addressed in the State's submission to the Productivity Commission.

DEC appreciates the opportunity to provide comment on the RIA process. If you have any further queries relating to these comments, please contact Chris Ryan, Manager, Strategic Policy Branch on 6467 5524.

Yours sincerely

Keiran McNamara
DIRECTOR GENERAL

1 May 2012

Att.

EPHSC45/5.5/A

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The Hon Kevin Rudd MP
Prime Minister
Chair, Council of Australian Governments
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Dear Prime Minister

The Council of Australian Governments Best Practice Regulation – A Guide for Ministerial Councils and National Standard Setting Bodies October 2007

Application of the Guidelines to Environment Protection and Heritage Council (EPHC) matters

I write to you, on behalf of EPHC, in your capacity as Chair of the Council of Australian Governments (COAG) to seek endorsement of a proposed approach (Attachment A) to the application of the COAG guidelines on regulation to EPHC matters.

On 7 November 2008, EPHC resolved to write to COAG stating how EPHC/NEPC intends to implement the requirements of the *Best Practice Regulation A Guide for Ministerial Councils and National Standard Setting Bodies, October 2007* (the Guidelines), and proposing supplementary criteria and guidance material to clarify the application of the Guidelines in order to better support the objective of improved environmental protection outcomes.

This decision followed in-depth discussion at the previous two meetings concerning the inability of EPHC to progress its priorities due to difficulties with the application and interpretation of the Guidelines in regard to environment protection and heritage matters. Progressing these matters to the consultation or decision Regulation Impact Statement has been particularly problematic.

EPHC acknowledges the need for a rigorous and transparent regulatory impact assessment to inform decision making on regulation. However, rather than facilitating consideration of environmental issues by EPHC, the application and interpretation of the Guidelines are creating impediments to appropriate and timely decision making by Ministers, in particular in the area of waste policy.

A particular difficulty with the current application of the Guidelines concerns the need for Ministers to value and weigh the non-market aspects of environmental protection. The Guidelines acknowledge that some costs and benefits resist the assignment of dollar values and note that such costs and benefits need to be presented to decision-makers in conjunction with those that can be quantified. However, by insisting that Ministerial Councils consider and adopt only those options with a net benefit for the community as defined within the parameters of conventional cost-benefit analysis, the Guidelines effectively preclude Councils from analysing unquantified non-market elements or considering well established Government imperatives such as the precautionary principle and intergenerational equity. To a large extent the Guidelines also preclude recognition of community and industry concern and desire for government action.

Over the last six years EPHC has been virtually unable to develop Regulation Impact Statements that are assessed as compliant with the COAG Guidelines by the Office of Best Practice Regulation (OBPR). Two thirds of the Regulation Impact Statements put forward on waste priorities, even at the consultation stage, have been deemed non-compliant by the OBPR. This has occurred notwithstanding the EPHC's considerable investment in resources over long periods, including commissioning data collection and expert financial and economic analytical work, as well as significant work done by industry groups, in seeking to address issues raised by the OBPR.

Moreover this inability to progress consideration of these matters over this period has led to considerable frustration by key industry groups, such as those representing the TV and computer sectors, who are seeking to implement a more sustainable product stewardship approach to waste management in conjunction with government.

EPHC has no desire to circumvent the proper application of rigorous scientific and economic analysis in its deliberations on issues; however, such analysis must be accompanied by equally rigorous social and environmental analysis. EPHC therefore proposes a revised approach to interpreting the Guidelines, as outlined in the Attachment, to better support improved environment protection outcomes. The revised approach seeks to clarify the application of the Guidelines to environmental issues through some variations, supplementary criteria and guidance material to provide a more effective, transparent and efficient process leading to improved decision making.

On behalf of EPHC, I seek your endorsement of the revised approach at Attachment A to the application of the Guidelines to issues that are subject to consideration by EPHC.

Yours sincerely

Peter Garrett

ATTACHMENT A

Council of Australian Governments' *Best Practice Regulation – A Guide for Ministerial Councils and National Standard Setting Bodies October 2007.*

Proposed Application of the Guidelines to Environment Protection and Heritage Council (EPHC) matters

Issue 1

It is not possible to present the required full quantitative Regulation Impact Statement (RIS) analysis on many environment protection issues at the consultation stage. The current approach does not adequately allow for the consultation RIS to draw out the required additional information from stakeholders.

Recommended Approach

There are many important aspects of environmental matters for which quantitative and qualitative data is lacking. It is important for information on these issues to be drawn out through the process of engagement with stakeholders rather than seeking to separately gather and analyse this information in advance and in isolation of stakeholder and community input.

Consultation with stakeholders should therefore be able to take the form of a discussion or consultation paper as an alternative to a consultation RIS.

Where a consultation RIS is developed compliance assessment should not be a formal requirement.

Issue 2

The current approach does not allow the many, legitimate factors that underpin the government's approach to environmental issues to be quantified or valued.

Recommended Approach

The quantitative analysis provided for in the decision RIS under the Guidelines should be complemented by a qualitative analysis that is provided to the Office of Best Practice Regulation (OBPR) in conjunction with the RIS.

Both the quantitative decision RIS analysis and the qualitative analysis should inform Ministers in reaching a decision on the preferred approach.

This would allow full consideration and due weight to be given to qualitative factors in the decision on the approach or option to be adopted.

- The many factors that underpin our approach to environmental issues that cannot be quantified or valued but are of fundamental importance and need to be given equal consideration to those matters that can be quantified and assigned a monetary value.
- These factors include social and heritage values, intergenerational equity, the precautionary principle, environmental duty, the risk of harm to the environment or public health, improving the efficiency of resource use, community attitudes to sustainability, and the assessment of environmental externalities (positive and negative) and intangibles.
- An assessment of the cost effectiveness of approaches should be an appropriate alternative to cost benefit analysis.
- The option that demonstrates the greatest net community benefit following a quantitative cost benefit analysis of each option under the decision RIS, or that which is the most cost effective, should be considered by decision makers in the context of the qualitative analysis.

Issue 3

The Guidelines suggest that additional factors that should be explored such as consistency with Australia's international obligations, however, they do not articulate a mechanism for their inclusion as a factor determining which option should be preferred.

Recommended Approach

The policy and regulatory context, government decision or mandate and international obligations should be articulated in the consultation process and in the development of the decision RIS and its complementary qualitative analysis, and they should be put forward to Ministerial Council as a formal part of the identification of options and decision of the approach to be adopted.

- Overarching agreements and the policy context need to be the framework within which the RIS is developed and considered. For example in relation to waste these would include the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal and the 1992 National Strategy For Ecologically Sustainable Development endorsed by COAG and its associated objectives in relation minimising waste and avoiding the generation of hazardous waste.
- The objectives and outcomes required by government need to be clearly articulated and considered at each stage. In environment protection, issues are often complex, diffuse and a range of outcomes may be sought. There needs to be a means of allowing for consideration of government initiatives and policies that may present a range of benefits to the community and to industry, not all of which can be definitively quantified in purely economic terms. A simple statement of a single problem and a result that can be subject to quantitative analysis is often not appropriate or possible. Such an approach is better suited to safety and health issues, such as the introduction of a new safety standard.

Issue 4

EPHC has observed duplication of regulatory impact assessment effort and cost where environmental protection policies are developed through National Environment Protection Measures.

Recommended Approach

Where the development of an impact statement is required under the *National Environment Protection Council Act 1994* (NEPC Act) then this analysis should be considered as equivalent to a RIS under the Guidelines. This assessment may be applied to all options and provided to EPHC in lieu of a RIS to avoid duplication and inconsistency in analyses provided.

- One of the options available to EPHC to address an environmental protection issue is the application of a National Environment Protection Measure (NEPM) through the NEPC Act. The NEPC Act s17(b) requires the Council to prepare an impact statement at the time of preparing the draft National Environment Protection Measure (NEPM). The impact statement process is equivalent to the COAG Guidelines RIS and currently both can apply, the impact statement for a NEPM being a legal requirement.
- In the longer term consideration should be given to amending the Guidelines and the NEPC Act to provide better integration.

Issue 5

State and territory governments may introduce (indeed some have already introduced) different environment protection policies and regulations on matters considered to be of national significance. These may result in inefficient and inconsistent outcomes across the jurisdictions. This is particularly evident where the national processes have extended over a number of years without producing a policy outcome.

Recommended Approach

The decision on the approach to be adopted by a Ministerial Council should not only be informed by the decision RIS quantitative analysis of approaches and options together with the proposed complementary qualitative assessment of other factors. The decision should also be informed by a judgment on the impacts and costs that may be borne by business and government through the implementation of a variety of alternate approaches by individual jurisdictions aimed at achieving the same or varying objectives.

Issue 6

The Guidelines do not provide for adequate transparency, timeliness or indeed advisory arrangements of the OBPR to Ministerial Councils regarding the OBPR's assessment of whether a RIS is compliant or non-compliant.

Recommended Approach

The way in which the Guidelines are applied should be made more transparent through a requirement for the OBPR to formally advise the EPHC of the compliance or non compliance of a RIS prior to its consideration by the Council. If a RIS is assessed as non-compliant the substantive reasons for this should be included.

- The 2007 Guidelines require OBPR to assess the compliance of the RIS with the Guidelines at both consultation and decision stages and to report compliance to COAG.
- The compliance reporting by OBPR is Ex Post reporting. This takes the form of a formal report published on an annual basis by OBPR that identifies all non-compliant RISs over a 12 month period. This report does not provide details. The report and its timing are not linked to the consideration of matters by Ministerial Councils.
- The Guidelines do not require that OBPR provide formal advice to the Ministerial Council articulating the substantive reasons a RIS has been assessed as non-compliant. As such the process lacks transparency and timeliness from an EPHC perspective. A requirement to advise EPHC Ex Ante would make this process both transparent and informative.