Productivity Commission Regulatory Impact Analysis Benchmarking

Victorian Government submission on COAG RIS Process

Victoria welcomes the opportunity to contribute to the Productivity Commission's Benchmarking study on Regulatory Impact Analysis (RIA) processes in Australian jurisdictions.

The Productivity Commission's Regulatory Impact Analysis Benchmarking Draft Report invites comment on the efficiency and quality of Commonwealth, State and Territory, and the Council of Australian Governments (COAG) RIA processes.

Victoria has already responded to data, information and survey requests from the Productivity Commission inquiry team. Victoria will continue to work with the Productivity Commission in responding to requests and providing available information to support the final report.

As Victoria has separately provided information on the Victorian RIA process, the focus of this submission is on the COAG RIA process: its quality, timeliness and oversight.

Summary

There are flaws at each stage of the COAG RIA process, and this is leading to rushed and poorly-informed decision making, sub-optimal outcomes and delayed reforms.

COAG RIA are often of poor quality and do not contain all of the information required for jurisdictions to make informed decisions or meet legislative requirements. States and Territories are often asked to make decisions on major reforms within tight timelines based on RIA which are lacking in key details, such as State-specific impacts.

Under Victoria's *Subordinate Legislation Act,* Victoria is required to undertake its own RIA in cases where a COAG RIA does not meet the requirements under the Act. The lack of an adequate RIA for national reforms for occupational health and safety and maritime safety has meant that we have been unable to meet our legislative requirements or undertake decision making with full information. In both of these cases, Victoria was forced to undertake its own RIA, delaying a Victorian decision on the reform, and opening Victorian up to criticism as a result.

COAG RIA are often initiated well after decisions are made about the reform, meaning that they become a document that advocates for a particular option rather than being a decision making tool. They are often narrowly framed around a particular option (i.e. different ways to harmonise) rather than considering all possible regulatory intervention options. In cases where RIA find significant costs associated with elements of a reform, the lack of other options means that jurisdictions will potentially pursue poor reform outcomes to fulfil commitments already made. Where significant costs are identified, it is rare that RIA make recommendations about changing the preferred option or pursuing other means to achieve a reform. This is a significant weakness.

Victoria therefore supports the draft report's draft leading practice 6.5 (relating to inclusion of individual jurisdiction impacts and reform decisions following RIA).

The poor quality of Commonwealth RIA is, in part, a function of the poor governance arrangements around RIA assessment at the Commonwealth level. Unlike VCEC (a separate statutory body with independent commissioners), the Office of Best Practice Regulation (OPBR) resides within the Commonwealth Department of Finance and Deregulation, which is also responsible for delivering the Seamless National Economy reforms. This is not good governance practice.

The only way to ensure that RIA assessment is rigorous and balanced is to establish a body separate and independent of policy making.

While Victoria supports the first aspect of draft leading practice 8.2 relating to independence of regulatory oversight bodies, we do not consider that true independence can be achieved without statutory independence of the review body.

Introduction

The Draft Report identifies that –

RIA is designed to improve the quality of regulatory decisions by providing relevant information to decision-makers and stakeholders about the expected consequences of different policy options. By providing a better informed and objective basis for making regulations, RIA seeks to ensure that regulations deliver the greatest benefit to the community relative to the overall costs they impose.

Victoria is engaged in the COAG RIA process through participation in national reforms, the most recent of which have fallen under the COAG National Partnership to Deliver a Seamless National Economy. Jurisdictions rely on COAG RIAs to make informed decisions about participation in national regulatory schemes. As a key stakeholder and potentially joint implementer of such reforms Victoria, has a critical interest in the quality, timeliness and oversight of COAG RIAs.

The Victorian Competition and Efficiency Commission (VCEC) 2011 Inquiry: *Strengthening Foundations of the Next Decade- An Inquiry into Victoria's regulatory framework* sets out the features of RIA processes that influence the overall effectiveness of the impact assessment. This submission considers the COAG RIA processes against the features of effective impact assessment identified by the VCEC, namely:

- how well the impact assessment process is linked to policy development;
- the extent to which the impact assessment process encourages a balanced review of the case for, and form, of intervention; and,
- whether a proportionate approach to analysis is adopted.

Integration of impact assessment and policy development

Integrating impact assessment with policy development is a key determinant of its success[1]*. Integration enables RIA to influence outcomes, rather than being seen as a compliance exercise. It helps to avoid moving too quickly to regulate and needing to make major changes late in the policy*[2]*.*

[1] OECD 2005, *Guiding Principles for Regulatory Performance*, Paris, OECD Publishing

[2] Victorian Competition and Efficiency Commission 2011, *An Inquiry into Victoria's regulatory framework: Strengthening Foundations for the Next Decade*, final report, April.

COAG RIAs are, at times, prepared towards the end of the reform development process. This means that the RIA is often treated as an advocacy document to justify an already agreed position, rather than as a tool to determine the optimal policy approach. As a result these RIAs tend to have cursory analysis of the nature and extent of the problem and little genuine analysis and detailed costing of alternative options.

Intergovernmental Agreements (IGAs) signed as part of the Seamless National Economy National Partnership have covered the establishment, responsibilities, functions and reporting requirements of national regulators, detailed the proposed model for national legislation and set out transitional arrangements. These IGAs were generally endorsed by jurisdictions early in the process, often before any formal RIA process and detailed analysis had been undertaken.

For example, the Draft National Occupational Licensing System (NOLS) IGA was signed in 2008 and assumed the development of model national laws and the establishment of a national licensing body. The NOLS RIAs were released in mid-2012, with the revised commencement milestone set for 2013.

Victoria argues that IGAs should establish the case for reform through clear problem identification, agree the objectives, principles and decision-making processes for the reforms and outline feasible options to implement those objectives. IGAs should not presuppose matters which may be considered as options through the RIA process, such as institutional arrangements or potential legislative models.

To address this, the *COAG Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies* should be amended to require RIAs to be prepared early in the policy development process in order to inform the development of the reform. To support this, COAG and Ministerial Councils should require RIAs to be completed before a national agreement can be sought to progress a reform proposal. In the case of Ministerial Councils, an appropriate amendment to the terms of reference should be made.

Balanced view of the case for, and form of, intervention

…the process needs to encourage a balanced and rigorous review of the case for intervening and of different kinds of regulatory instruments.[3]

In the COAG context, the nature of the problem is often taken to be the need for harmonisation or to avoid regulatory fragmentation rather than the imposition of unnecessary costs on business or the community. Harmonisation should not be seen as an end in itself, rather as one of a number of options for responding to a clearly identified problem. For example, the national Occupational Health & Safety (OHS) RIAs focus on the importance of harmonisation without considering the extent to which negative outcomes can arise in practice from harmonisation to the wrong model; Victoria's Supplementary Impact Analysis found that the National OHS laws will actually increase costs for Victorian business. Consideration also needs to be given to the size of the sector that will be affected; for the National OHS laws it is estimated that only 1 per cent of businesses operate across borders. Similarly, the National Marine Safety Regulator reforms greatly increase the number of vessels subject to regulation

[3] Ibid.

(by way of a broad definition of "commercial vessel"), in spite of the fact that harmonisation would only benefit the 1.6 per cent of the national fleet that is transferred interstate each year.

The Draft NOLS (Electrical) RIA primarily considers the costs and benefits of the establishment of a national licensing body and the making of national model legislation. While the objective of the reform is to improve labour mobility, the NOLS RIA does not analyse the extent to which the current licensing arrangements are impacting on labour mobility for those occupations. Nor does the draft RIA analyse to the same extent the benefits or costs of an alternative model such as automatic mutual recognition of licences across jurisdictions. This is because the form of intervention was assumed back in 2008, years before the RIS was developed. The same problem exists in the development of the National Marine Safety Regulator model, which was preferred based on an obsolete RIS that did not take account of the adoption of the National Standard for the Administration of Marine Safety (NSAMS). The adoption of NSAMS significantly altered the regulatory status quo against which the impacts of national regulation were modelled. This resulted in the regulatory cost of the reforms being higher than the actual status quo.

Many of the COAG RIA processes have employed a two-stage process with a consultation RIA, followed by a decision RIA. It is important that sufficient detail is provided in the consultation RIA to allow stakeholders to provide informed commentary on the options proposed. Consultation RIAs should also include detailed costing of a range of viable options, including less onerous options, not just the preferred option.

Victoria has found a number of COAG RIAs did not provide sufficient analysis for informed decision-making and in some cases additional State-specific analysis had to be undertaken.

For example, the decision RIS for the model Work Health and Safety Regulations and Codes of Practice did not meet Victoria's requirements. The Victorian Guide to Regulation requires that, for COAG RIAs, Victorian specific impacts are understood, based on the prevailing Victorian model and in comparison to other jurisdictions. The VCEC has provided similar advice on the insufficiency of the analysis for the proposed *Marine Safety (Domestic Commercial Vessel) National Law* and the *Rail Safety National Law.*

In commenting on COAG RIAs Victoria has raised a range of concerns with the analysis employed. These issues include:

- *No estimation (quantified or monetised) of the costs and benefits for each regulatory obligation on individual jurisdictions' businesses.*

  Example: The OHS RIA did not estimate the total cost of each regulatory obligation for Victorian businesses.

- *Failure to identify the total cost to Victoria in adopting the proposed changes (including consideration of the jurisdictional base case).*

  Example: The National OHS RIA did not provide an estimate of the total cost to Victoria of adopting the proposed legislative changes.

- *Incomplete or apparently incomplete assessment of the costs.*

Example: the Commonwealth RIS on the 'model' regulations and codes of practice indicated direct net benefits of $248 million per annum, and the potential for productivity benefits of up to $2 billion per annum. These figures were based on a survey sent to 4,500 businesses, but that survey attracted only 73 responses – a skewed sample, as almost half of respondents operated across State borders, compared to 1-5% of businesses nationally.

- *Lack of evidence based, bottom-up cost and benefit estimation, which may overstate the benefits and create expectations for stakeholders about the benefits*.

  Example: The national OHS RIA on the regulations and codes suggested productivity gains of 2.3 per cent per annum were anticipated from the reform. This finding was inconsistent with the average rating from respondents that compliance costs savings and safety improvements from the reform would be 'minor'. It is also inconsistent with the actual average labour productivity improvement in Australia of 1.5 per cent per annum in the ten years to 2009-10. There were also significant weaknesses in the national OHS RIA on the model laws (December 2009). The RIS concluded that there was little data on the cost to firms of complying with different State OHS regimes, and that the results obtained from the Access survey were not sufficiently robust to provide quantitative estimates (pp.65-66). Despite these comments about lack of safety benefits and that the survey was not robust, Access went on to quantify net benefits. However, it was only able to achieve a positive net benefit result by making additional assumptions: "Overall, at first glance the results suggest firms would incur net costs overall." Despite this, these estimates of benefits are frequently quoted to support the case for adopting the model laws.

  The National Marine Safety Regulator RIS estimated safety benefits at $55.5m in present value benefit, based only on assumptions of improved safety rather than any evidence or analysis. The implementation of national standards regardless of these reforms calls into question the entire attributed benefit. Further, the estimated $37m-$61m in benefits from administrative efficiency are assumed to be realised by a reduction in State regulatory authorities' functions. The majority of these savings are unlikely to be achieved as the final model involves State regulatory authorities performing all service delivery functions of the national regulator.

Detailed assessment of each regulatory requirement, based on transparent bottom-up analysis which considers the jurisdictional base case and spread of industry benefits, is vital to allow stakeholders and Governments to make informed decisions.

Victoria supports quantitative analysis of costs and benefits where there is a sufficient evidence base on which to make estimates (e.g. a well-constructed survey) and where estimates reflect the application of a rigorous and transparent methodology (e.g. a widely respected economic model). This is important because estimates of net benefits have a major influence on policy debates.

Proportionate approach to analysis is adopted

In principle, the amount of effort devoted to preparing and assessing RISs (that exceed the threshold) should reflect the additional costs and benefits for more rigorous analysis.[4]

[4] Op cit, Victorian Competition and Efficiency Commission 2011.

The Productivity Commission estimated the impacts of the new regulatory arrangements for aspects of the 'Seamless National Economy' regulatory reform priorities and vocational education and training (VET). The report estimated the total transitional costs to government of setting up and transitioning to the new arrangements to be of the order of $500 million and total business costs to be of the order of $1.2 billion. With regard to ongoing costs, the Productivity Commission identified additional ongoing costs to business of around $145 million per year, and a net increase in government outlays of around $70 million.[5]

Given the substantial costs associated with national reforms it is important that the analysis is commensurate with these impacts.

Review and oversight

The location and form of agencies that oversee the delivery of regulatory policy are important features of regulatory frameworks.[6]

The OECD Council on Regulatory Policy and Governance 2012 recommends that "the authority of the regulatory oversight body should be set forth in mandate, such as statute or executive order. In the performance of its technical functions of assessing and advising on the quality of impact assessments, the oversight body should be independent from political influence".

The COAG RIA oversight body, the OPBR, sits within the same Group of the Commonwealth Department of Finance and Deregulation as that which is tasked to drive the implementation of the COAG Seamless National Economy Reforms. This results in a situation where the Department is both the proponent of a reform and the review body for analysis of reform options. This is a clear conflict of interest and does not meet good governance principles.

The only way to ensure that RIA assessment is rigorous and balanced is to establish an separate and independent statutory body. In Victoria, the VCEC is a separate statutory body with independent commissioners.

A new COAG RIA oversight model should adopt the OECD's recommendations for independence and authority of the RIA oversight institutions. This would significantly reduce the risk of the gatekeeping review body being perceived as 'captured' when assessing proposed reforms.

This independent oversight role could be undertaken by the Productivity Commission or a similarly qualified body, with its mandate set by statute.

The terms of reference for the oversight body should be agreed by COAG, with reports to COAG on the quality of impact assessments, appropriateness of consultation and extent to which the final proposed model addresses concerns raised during stakeholder consultation.

[5] Productivity Commission, 2012, *Impacts of COAG Reforms: Business Regulation and VET*, Research Report, Volume 1 – Overview, Canberra.

[6] Op cit, Victorian Competition and Efficiency Commission 2011.