PRODUCTIVITY COMMISSION

Mechanisms for Improving the Quality of Regulations: Australia in an International Context

Staff Working Paper

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Preface

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The paper has also drawn extensively on a number of OECD Country Review Reports and other published reports produced as part of the OECD's Regulatory Reform Program.

The views expressed in the paper are those of the authors and do not necessarily reflect those of the Commission.

Abbreviations and explanations

Abbreviations

ACT	Australian Capital Territory
APEC	Asia Pacific Economic Cooperation
ATN	Mandatory report on Legal Drafting (Italy)
BCCS	Business Cost Compliance Statement (New Zealand)
BRRU	Business Regulation Review Unit (Qld)
BRTF	Better Regulation Task Force (UK)
CDE	Ministerial Council for Economic Deregulation (Mexico)
CoA	Commonwealth of Australia
COAG	Council of Australian Governments
CPA	Competition Principles Agreement
CRIS	Cost Recovery Impact Statement
CRR	Committee on Regulatory Reform
DEWRSB	Department of Employment, Workplace Relations and Small Business
DoFA	Department of Finance and Administration
DRIU	Departmental Regulatory Impact Unit (UK)
EC	Commission of the European Communities
EFTA	European Free Trade Association
GDP	Gross Domestic Product
IAC	Industries Assistance Commission
IC	Industry Commission
MDW	Functioning of Markets, Deregulation and Legislative Quality Program (Netherlands)
MRA	Mutual Recognition Agreement

NCC	National Competition Council
NCP	National Competition Policy
NSW	New South Wales
NZ	New Zealand
OECD	Organisation for Economic Cooperation and Development
OIRA	Office of Information and Regulatory Affairs (USA)
OMB	Office of Management and Budget (USA)
ORR	Office of Regulation Review
OSB	Office of Small Business
PC	Productivity Commission
PM&C	Department of the Prime Minister and Cabinet
RAOICS	Regulatory Affairs and Orders in Council Secretariat (Canada)
RIA	Regulation Impact Analysis
RIS	Regulation Impact Statement
RIU	Regulatory Impact Unit (UK)
RPI	Regulatory Performance Indicators
SBS	Small Business Service (UK)
SBDTF	Small Business Deregulation Taskforce
SME	Small and Medium Enterprise
T11	Table of Eleven (Netherlands)
TTMRA	Trans-Tasman Mutual Recognition Arrangement
UDE	Unidad de Desregulation Economica (Mexican Economic Deregulation unit)
WTO	World Trade Organization

Explanations

Currency conversions	Currencies have been converted to Australian dollars using the OECD's Purchasing Power Parity (PPP) adjusted exchange rates (OECD 2002a).

OVERVIEW

Overview

Effective and efficient regulations facilitate the achievement of a range of community objectives without creating unnecessary burdens on business or the community.

The Commonwealth Government has implemented a range of requirements for regulation making and review that seek to improve the quality of regulations. This is consistent with a growing international consensus that good regulatory development processes are the key to ensuring high quality regulatory outcomes.

While the Commonwealth's regulatory quality policies have a high degree of consistency with Organisation for Economic Cooperation and Development (OECD) best practice principles, there is some variation in practices between member countries. This paper examines selected policies and practices used by the Australian states and territories and ten OECD countries. The countries included in the study — Canada, Denmark, Ireland, Italy, Korea, Mexico, the Netherlands, New Zealand, United Kingdom, and the United States — were all considered to have processes or specific practices that were of particular relevance to the Commonwealth.

Regulatory quality

Regulation must be well designed, effectively implemented and properly enforced if it is to yield the greatest net benefit to the community. To this end, best practice regulatory design standards and guiding principles have been identified by various Australian and international bodies involved in regulatory management and reform. The Office of Regulation Review (ORR) has consolidated some of the more important of these into a checklist, which can be used as the basis for assessing regulatory quality (chapter 2). The checklist covers the design, implementation and enforcement of regulation. According to the checklist, high quality regulations should be:

- the minimum necessary to achieve objectives;
- not unduly prescriptive;
- integrated and consistent with other laws;

- designed to minimise the compliance burden imposed;
- accessible, transparent and accountable;
- communicated effectively; and
- enforceable.

While the design and implementation of individual regulations is the overriding determinant of the costs and benefits that they will impose on the community, the interaction between regulations is also important. The aggregate burden of regulations on particular firms, industries or sectors can influence the actual outcomes achieved by incremental regulatory changes.

The measurement of the overall compliance burden imposed by government regulation is not straightforward. However, there have been some useful studies of aggregate compliance costs in Australia, including most recently by the OECD (see below). Some countries, for example, the Netherlands, have made significant progress in the development of such assessment methodologies.

Although not a direct measure of the compliance burden, simple indicators of the volume of regulation, and trends in those indicators, can be pointers to the pervasiveness of regulatory requirements and suggestive of possible trends in compliance costs.

Various partial indicators suggest that the volume of Commonwealth regulation is continuing to grow — both in terms of the number of Acts and subordinate instruments and the average length of legislation. The latter may also be a crude measure of the complexity of regulations, which in turn has implications for compliance costs. Much of the growth appears to be in forms of regulation not subject to Parliamentary scrutiny, and perhaps also more likely to slip through the Regulation Impact Statement (RIS) net.

Some of the key indicators of the volume of existing regulation and the flow of new regulations are:

- the Attorney-General's Department estimates that there are more than 1800 Commonwealth Acts currently in force;
- the addition to the stock in 2001 and 2002 was 170 and 148 new Acts, respectively;
- the average number of pages per Act in new legislation promulgated in the 1990s was about double the average number of pages for Acts passed in the 1980s and almost triple that for the 1970s; and

- the number of new statutory rules and disallowable instruments averaged nearly 1500 per year over the five year period 1997-98 to 2001-02. (This covers only those subordinate instruments subject to direct parliamentary scrutiny.[1])

Two major studies have been conducted of aggregate compliance costs imposed on Australian businesses, based on data from the mid to late 1990s. The first, part of a multi country survey in 1998 by the OECD, revealed that small *and* medium sized businesses in Australia incurred compliance costs averaging $33 000 annually (2001a). The second, conducted in 1996 for the Small Business Deregulation Taskforce, estimated that total compliance costs for small businesses averaged $7000 per year (SBDTF 1996).[2] Anecdotal evidence suggests that compliance costs may have increased since these studies were undertaken (chapter 2).

Regulatory quality policies in the OECD

Almost all OECD countries have adopted explicit regulatory reform programs, encompassing a range of mutually supportive tools and institutions.

Largely because of differences in political, constitutional and administrative environments, various models have been employed. Member countries, however, agree on a number of broad best practice strategies for achieving better quality regulations. These strategies cover both the flow of new regulations and the stock of existing regulations (chapter 3). Similar regulatory reform principles and strategies are also being adopted by many countries outside the OECD, for example, through the Asia Pacific Economic Co-operation (APEC) forum.

The most common feature of regulatory management programs in OECD countries is a requirement that affected parties be consulted on regulatory proposals. The next most common feature is plain language drafting requirements. Regulation impact analysis (RIA)[3] and requirements that regulatory alternatives be considered have also been adopted in a majority of member countries.

In most countries, regulatory quality policies are evolving rapidly. Reviews have led to the progressive refinement and improvement of the policies with an almost universal trend toward greater rigour and broader coverage. In those countries with

[1] Excludes a large number of subordinate instruments (such as many orders, determinations and by-laws) not subject to Parliamentary scrutiny and quasi-regulation.

[2] Differences in methodology and the scope of these studies explain some of the disparity in these results.

[3] The term RIA is employed by the OECD and includes Regulation Impact Statement (RIS) processes.

well established systems, a particular focus has been on the development of strategies for better integrating regulatory quality requirements into policy-development processes.

While there are no rigorous empirical measures of the effectiveness of different elements of regulatory policy, there is some evidence which is suggestive of the effectiveness of regulatory quality policies overall. This includes: evidence of a clear relationship between the adoption of best practice processes and better economic performance; evidence that regulatory quality programs are being adopted in an increasing number of countries; and information showing that existing programs have tended to expand (chapter 3).

The OECD is now giving a high priority to the development of better methodologies and indicators for evaluating the performance of *specific* policies and regulatory policy overall. In theory, quantitative performance measures, based on empirical evidence, could be used to evaluate the relative costs and benefits of the use of different regulatory tools and institutional arrangements. However, while it may be possible to demonstrate a relationship between specific policies and outcomes, in practice causality is usually far more difficult to establish. This study does not seek to evaluate the relative effectiveness of different approaches, rather it seeks to identify those practices employed in other jurisdictions that may warrant more detailed examination.

Commonwealth Government regulatory quality policies

The Commonwealth Government has a range of requirements for regulation making and review that are contributing to improvements in regulatory quality (chapter 4). The most important of these are:

- Regulation Impact Statement (RIS) requirements for new or amended regulation and for reviews of existing regulations;
- Cost Recovery Guidelines and Cost Recovery Impact Statement (CRIS) requirements;
- reviews of existing regulation under the Commonwealth's Legislation Review Schedule and complementary review processes;
- compliance burden and 'red-tape' reduction strategies; and
- regulatory performance monitoring and accountability initiatives.

Since 1997, the RIS requirements have been the core component of the Government's regulatory quality management system. The RIS process provides a framework for the consistent, systematic and transparent assessment of alternative

approaches to problems that may warrant government regulation. Fully integrating RISs into policy-making processes can enhance regulators' ability to identify solutions that will meet government objectives in the most effective and efficient manner. The RIS process embodies a number of other regulatory quality tools, for example: the establishment of standards for regulatory quality; consultation; consideration of alternatives; and red tape reduction.

While, in many respects, regulatory processes and the quality of regulation are considerably better than 15 or 20 years ago, the task of ensuring that regulations lead to appropriate economic, environmental and social outcomes is ongoing. The issues explored in this paper suggest that there remains scope for the Commonwealth, and other Australian governments, to do more to improve regulatory outcomes through the systematic and rigorous application of regulatory best practice processes. For example, there is evidence to suggest that some other OECD countries (including New Zealand) have lower regulatory compliance costs than Australia (OECD 2001a). Moreover, according to the Productivity Commission (PC 2002):

- there would appear to be significant scope for improvement in the implementation of RIA in some Commonwealth departments and agencies, and its closer integration into the policy development process; and
- the standard of analysis in many RISs, particularly of compliance costs and small business impacts, needs to be improved.

Regulation impact analysis in other jurisdictions

RIA is one of the most widely used tools for assuring regulatory quality in OECD countries and Australian jurisdictions. According to the OECD (2002b, p. 48), there is widespread agreement that RIA, when done well, 'improves the cost-effectiveness of regulatory decisions and reduces the number of low-quality and unnecessary regulations'.

The 1997 *OECD Report on Regulatory Reform* recommended that governments 'integrate regulation impact analysis into the development, review, and reform of regulations' (OECD 1997b, p. 39). By the end of 2000, 14 out of 28 OECD countries had adopted wide-ranging RIA programs. A further eight were using RIA for at least some regulations or in defined circumstances. No country has dismantled an RIA policy or moved to a substantially less rigorous form of analysis (OECD 2001d).

All Australian states and the Australian Capital Territory conduct formal regulation impact analysis.[4] The Northern Territory Government is in the process of implementing RIS requirements.

While there is no single model for a good RIA program — institutional, social, cultural and legal differences between jurisdictions need to be taken into account in system design — the OECD has identified ten best practices (chapter 5). These best practices are being used as the basis for evaluating the RIA programs in the country reviews prepared under the OECD's Regulatory Reform Program.

Amongst OECD member countries, the Commonwealth Government is recognised as being one of the leaders in the implementation of RIA. Its RIS requirements have a high degree of consistency with the OECD RIA best practices. The strengths of the Commonwealth Government's system include:

- its wide scope, both in terms of the regulatory instruments and types of bodies covered;
- its application to reviews of existing regulations, as well as to new proposals;
- a cost-benefit methodology that seeks to assess all important economic, social and environmental impacts, but, at the same time, is flexibly applied based on the principle of proportionality;
- assessment of RISs by an independent agency (the ORR); and
- the monitoring and reporting of compliance, where Australia is well ahead of most countries.

More than two decades of international experience[5] indicates that implementation of an effective and efficient RIA system is a long-term process that requires ongoing refinement of systems. Most OECD member countries and Australian jurisdictions that have implemented RIA processes have reviewed them, or are in the process of reviewing them. Reviews have typically resulted in refinements that have widened the scope and improved the analytical rigour required in RIAs.

While no formal review of the Commonwealth Government's post-1997 RIS requirements has yet been conducted, some of the features of systems in operation

[4] In the case of Western Australia, however, this does not include the preparation of a single comprehensive RIS-type document and analysis is limited to small business and regional impacts.

[5] The United States, in 1981, was the first OECD country to adopt broad requirements for regulatory cost-benefit analysis (OECD 1999c, p. 46). In Australia, Victoria was the first jurisdiction to introduce RIS requirements (1984), followed by the Commonwealth Government in 1986.

overseas and in other Australian jurisdictions identified in this paper would appear to merit further examination. These include, but are not limited to:

- integration of RISs into consultation processes — Canada and the United States, for example, have fully integrated regulation impact analysis into public consultation;
- better targeting and clearer guidance on threshold tests — use of preliminary screening and a staged RIS process (for example, United Kingdom, United States, Canada and Italy), and clearer guidance on threshold triggers for RISs, including monetary thresholds (for example, Korea, United States and Queensland);
- more formalised coordination of regulation review and RIS preparation within regulatory departments and agencies (possibly modelled on the United Kingdom Departmental Regulation Impact Units);
- increased ministerial involvement and accountability. Many jurisdictions require ministers to certify that RISs comply with requirements (for example, United Kingdom, Canada and Victoria). In the United Kingdom, ministers for regulatory reform appointed in key regulatory departments must report to the 'Panel for Regulatory Accountability'; and
- more effective sanctions for non-compliance — in some jurisdictions (for example, Korea, United States and Canada) independent oversight bodies have the power to reject or delay consideration of regulatory proposals not supported by the appropriate standard of analysis.

Other approaches to improving regulatory quality

As noted above, RIA is just one of a range of strategies used to improve the quality of regulation. Important complementary and supporting tools include:

- public consultation policies;
- other measures to improve transparency and accountability (such as forward planning, plain language drafting, registers of regulations and appeals processes);
- consideration and use of regulatory alternatives; and
- administrative simplification and other tools to reduce regulatory compliance burdens (for example, streamlining of paperwork requirements, one-stop shops and quantitative targets for burden reduction).

A well designed institutional framework for managing and coordinating regulatory reform is also a key component of an overall regulatory quality system.

Whilst these practices can be employed as stand alone strategies, they are most effective when implemented in a mutually supporting manner. Indeed, one of the advantages of a comprehensive RIA approach is that it integrates, or facilitates consideration of, many of these other strategies and tools.

Overall, compared with other OECD nations, the Commonwealth appears to be quite advanced in its implementation of non-RIA strategies for improving regulatory quality. However, a number of practices that have been adopted — some quite recently — in other Australian jurisdictions and in OECD countries could warrant further consideration. These include:

- minimum standards for public consultation (for example, United Kingdom, United States and several Australian States and Territories) and further government-wide guidance for officials on different approaches to consultation about regulatory issues (for example, United Kingdom, Western Australia and the Australian Capital Territory);
- integrating preliminary impact assessments into regulatory plans (for example, Canada and the United States);
- a strong independent regulatory reform advocacy body — like the Business Regulation Task Force in the United Kingdom — with substantial authority to determine its own work program and priorities;
- improved guidance materials and training on alternatives to prescriptive regulation (for example, Canada and Queensland), and improved evaluation and sharing of experiences with their use (for example, Denmark, United Kingdom and United States);
- improved measurement of compliance costs (the Netherlands, Canada, the United Kingdom and New Zealand are amongst the most advanced in this area); and
- regular and systematic monitoring and evaluation of the outcomes of regulation review and reform strategies (an area the OECD has identified as a weakness in most jurisdictions, but some initiatives have been introduced, for example, in Canada, United States, the Netherlands, Denmark and Queensland).

Next steps

The ORR is currently conducting further research on, and developing methodologies for, better measuring the performance of existing regulatory quality control systems and tools. The longer-term objective of this research is to provide information on the relative strengths and weaknesses of current strategies employed internationally and in Australia.

The ORR will also continue to monitor and report on developments in other jurisdictions and participate in national and international forums where lessons from different systems and approaches are identified and discussed.

1 Introduction

The Office of Regulation Review (ORR) — an autonomous unit within the Productivity Commission (PC) — promotes regulation-making processes that, from an economy-wide perspective, are intended to improve the effectiveness and efficiency of legislation and regulations. The ORR provides advice to approximately 100 regulation-making bodies or regulators, including 60 Commonwealth departments and agencies and about 40 Ministerial Councils and national standard-setting bodies.

In fulfilling this function, one of the ORR's specific roles as set out in its charter is to '*monitor regulatory reform developments in the states and territories, and in other countries, in order to assess their relevance to the Commonwealth'* (ORR 1998, p. A11). Monitoring and reporting on such developments provides important insights into: the regulatory review and reform experiences of other jurisdictions; the characteristics of good regulation and regulation-making processes; and recent trends and emerging issues.

Improving regulatory decision making, and ultimately the effectiveness and efficiency of new and existing regulations, involves the systematic application of a range of complementary regulatory quality control systems and strategies. To this end, the ORR has undertaken research on strategies for improving regulatory quality that have been adopted in Australian jurisdictions and selected Organisation for Economic Cooperation and Development (OECD) member countries. This research has confirmed that in some areas of regulatory management and reform, for example, the implementation of Regulation Impact Analysis (RIA)[1], the Commonwealth Government is amongst the leaders internationally. However, there is still much to be learnt from the experience of other jurisdictions, both with RIA and with the implementation of a range of related reforms designed to improve the quality of regulations.

This paper outlines selected policies and practices from the Australian states and territories and ten OECD countries. The countries chosen for the study were Canada, Denmark, Ireland, Italy, Korea, Mexico, the Netherlands, New Zealand, United Kingdom, and the United States. Some of these countries, for example, the

[1] The term RIA is employed by the OECD and includes Regulation Impact Statement (RIS) processes.

United States, Canada and the United Kingdom, were selected because they are internationally recognised as clear leaders in regulatory management and reform with sophisticated policies that have been refined by many years of experience. Other countries with newer or recently revised regulatory policies, such as Italy, Korea, Mexico and New Zealand, have benefited from this pool of experience. These countries have modelled many aspects of their policies on best practices identified by the OECD, but at the same time have developed their own novel approaches that now look like promising examples for others to follow. All the countries included were considered to have processes or specific features/aspects of processes that were of particular relevance to the Commonwealth. Information on the practices discussed has been drawn mainly from the following sources:

- detailed OECD reviews of the regulatory governance programs in selected member countries;[2]
- the recently released *OECD Review of Regulatory Reform* (OECD 2002b);
- the findings of two OECD surveys, undertaken in 1998 and 2000, on government capacities to assure high quality regulation (OECD 2001d); and
- material supplied by New Zealand and Australian governments in response to an ORR survey in 2002.

A number of criteria were used as the basis for selecting the specific policies, tools, strategies or practices for inclusion, including those that:

- address perceived gaps or weaknesses in current Commonwealth policies;
- have been suggested as promising or possible best practices by the OECD (being mindful, however, that what might be appropriate for one country may not be successful in another because of political, cultural and administrative differences); and
- appear to be interesting or novel variations on policies and tools currently employed by the Commonwealth Government.

Implementation of effective and efficient policies for improving regulatory quality is a long-term task. According to the OECD (2002b), one of the key lessons from some 25 years of international regulatory management and reform is the need for continual learning and evolution of systems. National and international cooperation and sharing of experiences is contributing to the spread of good practices and the refinement of these over time. In turn, this is resulting in improvements in the design and implementation of regulations and administrative procedures and contributing to the ultimate objective of enhancing community welfare.

[2] Canada (2002c,d); Denmark (2000a); Ireland (2001b); Italy (2001c); Korea (2000b); Mexico (1999a); the Netherlands (1999b); United Kingdom (2002e); and the United States (1999c).

Chapter 2 of this study considers the question of why regulatory quality is important, including a brief examination of the characteristics of good quality regulation. Chapter 3 provides an overview of policies in the OECD and, in particular, some of the high level principles and strategies that have been endorsed by member countries. Chapter 4 presents an outline of the Commonwealth Government's current regulatory quality policies — this provides the contextual basis for understanding the specific strategies and tools presented in the following two chapters. Chapter 5 examines various aspects of RIA systems used in selected OECD countries and Australian jurisdictions. Chapter 6 provides a similar examination of experiences in other jurisdictions with non-RIA regulatory quality tools and processes.

While some clear best practices do emerge from a review of experiences in other jurisdictions — mainly at the broad or in-principle level — there has been limited *ex post* evaluation of the performance of specific approaches. This study does not, therefore, make any firm recommendations on priorities for reform and the inclusion of practices from other jurisdictions should not be taken as necessarily indicating their effectiveness in practice. However, the strategies and policies outlined in this paper could be examined more closely to assess their applicability and likely value in refining or supplementing the Commonwealth's existing policy and institutional framework for regulation review and reform.

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2 Why is regulatory quality important?

Regulation, like spending and taxing, is a fundamental policy tool used by governments. Regulations shape incentives and influence how people behave and interact, helping societies deal with difficult economic, social and environmental problems. At their best, regulations 'create order and the basis for stability and progress' (Banks 2001a).

Although some degree of regulation is essential for a properly functioning society and economy, regulations also impose costs. According to the OECD (2002b), the use of regulation is rapidly increasing and the costs that regulations impose have reached 10 per cent of Gross Domestic Product or more in some countries. It is essential, given the magnitude of these costs, that regulations are well designed, implemented and enforced.

2.1 Characteristics of good quality regulation

High quality regulation is both *effective* in addressing an identified problem and *efficient* in terms of minimising unnecessary compliance and other costs imposed on the community. The best regulations achieve their objectives and at the same time deliver the greatest net benefit to the community.

By contrast, poor quality regulation may not achieve its objectives and can impose unnecessary costs, impede innovation, or create unnecessary barriers to trade, investment and economic efficiency. The OECD (2002b, p. 44) suggests:

> There is little doubt that most governments can substantially reduce regulatory costs, while increasing benefits, by making wiser regulatory decisions. A wide range of anecdotal and analytical evidence supports the conclusion that governments often regulate badly, with too little understanding of the consequences of their decisions, and with little or no assessment of any alternatives other than traditional forms of law and regulations.

The ORR has drawn on a range of OECD and other reports to produce a consolidated checklist to illustrate the attributes and characteristics of high quality regulations (see box 2.1).

In principle, the checklist should provide a useful method of assessing the quality of individual regulations and their implementation. However, this is not straightforward because, while some of the criteria in the checklist are procedural and verifiable, others are subjective and difficult to measure.

Box 2.1 **Checklist for assessing regulatory quality**

Regulations that conform to best practice design standards are characterised by the following seven principles and features.

- Minimum necessary to achieve objectives
  - Overall benefits to the community justify costs
  - Kept simple to avoid unnecessary restrictions
  - Targeted at the problem to achieve the objectives
  - Not imposing an unnecessary burden on those affected
  - Does not restrict competition, unless demonstrated net benefit
- Not unduly prescriptive
  - Performance and outcomes focused
  - General rather than overly specific
- Accessible, transparent and accountable
  - Readily available to the public
  - Easy to understand
  - Fairly and consistently enforced
  - Flexible enough to deal with special circumstances
  - Open to appeal and review
- Integrated and consistent with other laws
  - Addresses a problem not addressed by other regulations
  - Recognises existing regulations and international obligations
- Communicated effectively
  - Written in 'plain language'
  - Clear and concise
- Mindful of the compliance burden imposed
  - Proportionate to the problem
  - Set at a level that avoids unnecessary costs
- Enforceable
  - Provides the minimum incentives needed for reasonable compliance
  - Able to be monitored and policed effectively

Sources: OECD (1995); Office of Regulation Reform (Vic) (1996); COAG (1997); ORR (1998); and Cabinet Office (UK) (2000c).

The principles in the checklist need to be applied not only when designing new regulations, but also when reviewing existing regulation. Even well designed regulation must be reviewed and updated over time. With changing technology and social and economic conditions, regulation can become less relevant, ineffective or inefficient.

Over the last decade or so, there has been a growing realisation that inefficient and unnecessary regulations have hindered the growth in Australian living standards. They have inhibited healthy competition and increased business costs and prices. In some cases, consumers' choice of supplier and products has been unnecessarily constrained.

The Commonwealth Government has put in place a range of policies and processes designed to reduce the risk of policy failure due to poor quality regulation — most notably the introduction of mandatory regulation impact statement (RIS) requirements (see chapter 4). However, the evidence presented in the next section suggests that there is a need to ensure that regulatory best practice processes are effectively integrated into policy development processes. Further — and this is a key theme of the paper — the effectiveness of regulatory quality policies needs to be regularly reviewed and consideration given to refinements, based on the experiences of the Commonwealth Government and other governments in Australia and overseas.

2.2 Concerns about regulation

Before reviewing some of the evidence regarding concerns about the quality of regulations and the economic costs they impose, it is useful to briefly consider the extent of Commonwealth regulation and recent trends.

Volume of Commonwealth regulation

Although not a direct measure of the compliance burden, simple indicators of the volume of regulation, and trends in those indicators, can be a pointer to the pervasiveness of regulatory requirements and suggestive of possible trends in compliance costs (Banks 2003).

Assessing the volume of existing regulation or the flow of new or amended regulation is not straightforward. Nevertheless, a number of partial indicators suggest that the volume of Commonwealth regulation is increasing. For example, the Attorney-General's Department estimates that there are more than 1800

Commonwealth Acts currently in force (Attorney-General's Department, pers. comm., 25 September 2002).

In 2002, 148 new Commonwealth Acts were promulgated. The equivalent figure for 2001 was 170. These figures are roughly comparable to annual legislative activity since the 1970s, but well above that in earlier decades.[1]

More tellingly, there has been a steady increase in the average *length* of legislation. This is a very crude indicator of the growing complexity of legislation. Nearly 55 000 pages of legislation were passed by the Commonwealth Parliament in the 1990s, equivalent to around 30 pages per Act on average. This was about twice the average number of pages for Acts passed in the 1980s and almost three times that for the 1970s.

The stock of other less 'visible' types of regulation has also increased over the last couple of decades. These subordinate instruments are not subject to direct scrutiny by the Parliament. While there is not a consolidated and comprehensive register of all Commonwealth subordinate instruments (see chapter 6), information on the number of statutory rules and disallowable instruments (those subject to parliamentary scrutiny) reveals that more than 7200 such regulations were made in the five year period to 2001-02. This was about 2000 less than the total number of regulations made in the previous five year period, but a substantial increase compared to the mid to late 1980s (Senate Standing Committee on Regulations and Ordinances 2002).

Regulation also includes a range of rules, instruments and standards which governments use to influence business behaviour, but which do not involve 'black letter law'. These are known as 'quasi-regulation' and can take many forms such as codes of practice, advisory notes, guidelines and rules of conduct, issued by either non-government or government bodies.

Quasi-regulation, by its nature, is less transparent and more difficult to monitor than explicit government rules. Considerable confusion exists about what constitutes quasi-regulation and there is no common mechanism by which agencies record or 'register' quasi-regulatory activity. There is, therefore, no systematic way to measure the extent of this type of regulation or trends over time. However, anecdotal evidence suggests that quasi-regulation is increasingly being used by governments. This reflects in part the advantages of such instruments, such as greater flexibility and increased participation and ownership by regulated parties. It may also reflect attempts to avoid the greater scrutiny that typically applies to more

[1] Figures relating to Commonwealth Acts, which are reported in this section, are based on the relevant annual volumes of *Acts of the Commonwealth*.

formal regulations. While the Commonwealth Government's RIS requirements apply equally to quasi-regulation, their greater opacity and the difficulty of tracking them means that, in practice, there is a greater risk that they will escape these quality assurance and transparency requirements.

In summary, the volume of regulation appears to be growing, with a significant proportion of this growth not being subject to direct scrutiny by the Parliament. The increasing trend in the average page length of legislation may be an indicator of growing complexity of regulatory requirements.

Costs of complying with regulations

Given their pervasiveness, it is not surprising that regulation and red-tape continue to impose significant compliance costs.

Direct compliance costs can include the time taken to comply with regulations, the need for additional staffing, the development and implementation of new information technology and reporting systems, external advice, education, advertising, accommodation and travel costs. As well as having a direct impact on regulated businesses and individuals, compliance costs also impact indirectly on the community, by changing pricing and distorting resource allocation, impacting on international trade and delaying the introduction of new products or services. There remain concerns that such costs are excessive.

While the design and implementation of individual regulations is the overriding determinant of the costs and benefits that they will impose on the community, the interaction between regulations is also important. The aggregate burden of regulations on particular firms, industries or sectors can influence the actual outcomes achieved by incremental regulatory changes.

Although most studies on compliance costs are inherently difficult and based on data from the mid to late 1990s, they are still revealing. For example, as part of a major international study, the OECD estimated from survey responses that, in 1998, taxation, employment and environmental regulations imposed over $17 billion (2.9 per cent of GDP) in direct regulatory compliance costs on small and medium-sized businesses in Australia (OECD 2001a). Of these costs:

- employment regulations accounted for 40 per cent (the OECD average was 35 per cent);
- compliance with tax regulations accounted for 36 per cent of the total (the OECD average was 46 per cent); and

- environmental regulations accounted for 24 per cent of total Australian compliance costs (the OECD average was 19 per cent).

The OECD estimated that Australian small and medium enterprises (SMEs) incurred compliance costs averaging $33 000 annually, a bit under the OECD average of $36 300.

A 1996 survey conducted for the Commonwealth Government's Small Business Deregulation Taskforce (Bell Taskforce) found that, on average, small business spent 16 hours a week on administration and compliance activities. Of this, government paperwork and compliance accounted for, on average, around four hours per week — three hours on tax matters and one hour on other activities. Total annual compliance costs were estimated to be well below the OECD figure, around $7000 with $3000 of this being spent on external advice. Not included in these figures are the lost opportunities and disincentive effects created by the paperwork and compliance burden. These average figures also hide significant variation, with many firms spending considerably less than four hours per week on paperwork and compliance activities. Indeed, 50 per cent of surveyed firms spent a little more than one hour per week on regulatory compliance matters.

The disparity between the results of the study for the Bell Taskforce and those of the OECD can be partially explained by the first study's exclusive focus on 'small business', as well as a narrower definition of costs (for example, excluding capital expenditures). However, a significant difference remains, which reflects inherent problems in survey-based assessments of such issues.

The attempt by the Bell Taskforce to quantify the extent of the overall administrative burden on small business remains the only comprehensive domestic study.[2] While the Taskforce recommended that a future study be undertaken, this has not been acted on. Consequently, there is no empirical basis for evaluating progress in reducing the costs of 'red-tape'.

There is some anecdotal evidence that compliance costs are increasing in Australia, as they are across the OECD.[3] Nearly 80 per cent of the Australian firms surveyed

[2] An example of a sectoral study is the recently released Productivity Commission research report on administrative and compliance costs for General Practitioners (GPs) (PC 2003). In response to specific concerns raised by GPs, the Government asked the Commission to examine the nature and magnitude of administrative and compliance costs associated with certain Commonwealth programs. Under the Commission's base case, administrative costs to GPs were estimated to have been about $228 million in 2001-02 (about 5 per cent of GPs' estimated total income from public and private sources). This is equivalent to an average of about $13 100 per GP per year — for GPs who work at least one day per week.

[3] OECD (2002b, p. 58).

by the OECD (2001a) believed that compliance costs had increased over the two years to 1997-98 due to an increase in new regulation and an increase in the complexity of existing regulations. Also, evidence presented to the recent Senate Small Business Employment Inquiry by business groups suggests that the burden of regulation on small business is likely to have increased since 1996, largely as a result of the introduction of the New Tax System and new environmental regulations (CoA 2003, p. 69).

Concerns about the cost and quality of regulations

The OECD report *Businesses' Views on Red-Tape* (2001a) found that Australian businesses are among the most critical of the quality of regulations. There was some variation between areas of regulation, with SME's generally more critical of the quality of tax and employment regulation than environmental regulations. This was consistent with most of the surveyed countries. The range of results for Australian businesses, across the three areas of regulation were:

- 59 to 69 per cent considered that regulations are not easy to understand;
- 84 to 94 per cent considered that regulations do not achieve their objectives as simply as possible;
- 82 to 93 per cent considered that regulations are not flexible enough to be implemented efficiently;
- 63 to 75 per cent considered that regulation changes are not predictable;
- 67 to 77 per cent considered that regulations are not consistent with each other; and
- 62 to 75 per cent considered that it is not possible to comply fully with all regulations.

Australian businesses were also particularly dissatisfied with the level of consultation and the clarity of appeals and complaints processes.

Other evidence indicative of ongoing concerns about regulatory costs, include:

- The March 2003 Certified Practising Accountants Australia national survey of the compliance burden on small businesses which:
  - identified major concerns about the time it takes to do paperwork and difficulties understanding obligations and keeping up with compliance changes;
  - found that more than 40 per cent of surveyed small businesses feel that the paperwork burden (especially relating to tax and occupational health and

safety obligations) has increased to the point where 'they are questioning the value of staying in business'; and

  - recommended that compliance costs be measured by all levels of government and reviewed on a regular basis.

- Australian Business Limited (ABL) has called for further improvements in the quality of regulation and its administration after a recent survey revealed that 55 per cent of member companies regard the cost of regulation as a very important concern, particularly environmental regulations, privacy requirements and corporate law requirements (ABL 2001);
- the complexity of government regulations and the cost of compliance with regulations were among the ten most important issues nominated by small and medium sized businesses in an Australian Chamber of Commerce and Industry (ACCI) survey conducted prior to the 2001 Federal election (ACCI 2001);
- respondents to ACCI's quarterly *Survey of Investor Confidence* consistently nominate government charges and business taxes as major factors constraining business investment (ACCI 2003); and
- the February 2003 Yellow Pages Quarterly *Business Index* of small and medium enterprises found that:

  - the most significant criticism of Federal Government policies was the belief that they are only concerned with big business and, consistent with previous surveys, that there is too much paperwork due to the Goods and Services Tax (Sensis 2003).

Some regulatory compliance costs are inevitable and, as Banks (2003) has observed 'represent the price of the benefits which regulation brings'. However, the above concerns expressed by business reinforce the need for effective processes covering both the flow of new regulations and the stock of existing regulations to ensure that 'quality' objectives are met. The next chapter examines some of the recommendations and principles of the OECD in relation to improving regulatory quality.

3 Regulatory quality policies in the OECD

3.1 Introduction

Almost all OECD countries have now adopted explicit policies to improve regulatory quality. Their policies are underpinned by a general consensus that good regulatory development processes are the key to ensuring high quality regulatory outcomes.

Varying political, constitutional, and administrative environments imply different models for different countries. However, the OECD (2002b) reports that experience in member countries suggests that an effective regulatory management system requires three basic components:

- it should be adopted and supported at the highest political levels;
- it should contain explicit and measurable regulatory quality standards; and
- it should provide for a continuing regulatory management capacity.

Member countries have introduced a range of policy tools and institutions as part of their regulatory management programs. These need to be mutually supportive and part of an integrated approach if they are to be most effective in improving regulatory quality.

3.2 OECD Regulatory quality principles

In 1995, the OECD published the first internationally accepted standard on regulatory quality. The *Recommendation of the OECD Council on Improving the Quality of Government Regulation* includes the *Reference Checklist for Regulatory Decision-making* (see box 3.1). The ten questions in the Checklist 'reflect principles of good decision making that are used in OECD countries to improve the effectiveness and efficiency of government regulation …' (OECD 1995, p. 9).

Box 3.1 The OECD reference checklist for regulatory decision making

1. **Is the problem correctly defined?** The problem to be solved should be precisely stated, giving evidence of its nature and magnitude, and explaining why it has arisen (identifying the incentives of affected entities).
2. **Is government action justified?** Government intervention should be based on explicit evidence that government action is justified, given the nature of the problem, the likely benefits and costs of action (based on a realistic assessment of government effectiveness), and alternative mechanisms for addressing the problem.
3. **Is regulation the best form of government action?** Regulators should carry out, early in the regulatory process, an informed comparison of a variety of regulatory and non-regulatory policy instruments, considering relevant issues such as costs, benefits, distributional effects and administrative requirements.
4. **Is there a legal basis for regulation?** Regulatory processes should be structured so that all regulatory decisions rigorously respect the 'rule of law'; that is, responsibility should be explicit for ensuring that all regulations are authorised by higher level regulations and consistent with treaty obligations, and comply with relevant legal principles such as certainty, proportionality and applicable procedural requirements.
5. **What is the appropriate level (or levels) of government for this action?** Regulators should choose the most appropriate level of government to take action, or if multiple levels are involved, should design effective systems of coordination between levels of government.
6. **Do the benefits of regulation justify the costs?** Regulators should estimate the total expected costs and benefits of each regulatory proposal and of feasible alternatives, and should make the estimates available in accessible format to decision makers. The costs of government action should be justified by its benefits before action is taken.
7. **Is the distribution of effects across society transparent?** To the extent that distributive and equity values are affected by government intervention, regulators should make transparent the distribution of regulatory costs and benefits across social groups.
8. **Is the regulation clear, consistent, comprehensible and accessible to users?** Regulators should assess whether rules will be understood by likely users, and to that end should take steps to ensure that the text and structure of rules are as clear as possible.
9. **Have all interested parties had the opportunity to present their views?** Regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses and trade unions, other interest groups, or other levels of government.
10. **How will compliance be achieved?** Regulators should assess the incentives and institutions through which the regulation will take effect, and should design responsive implementation strategies that make the best use of them.

Source: OECD (1995).

The 1995 Reference Checklist provides a basis for sound regulatory decision-making processes. The Commonwealth Government's Regulation Impact Statement (RIS) framework (see chapter 5) has a high degree of consistency with the questions/criteria in the Checklist. However, such a checklist needs to be integrated into a broader regulatory reform system that includes a range of complementary strategies, tools and institutional arrangements for improving the quality of regulations.

> The Checklist … cannot stand alone — it must be applied within a broader regulatory management system that includes elements such as information collection and analysis, consultation processes, and systematic evaluation of existing regulations (OECD 1995, p. 9).

In recognition of this, the 1997 OECD *Report on Regulatory Reform* (1997b) made a number of further policy recommendations for regulatory reform and presented a set of broad strategies for improving regulatory quality. These have been combined with other practices recommended by the OECD (2002b) to produce the guidelines outlined in box 3.2.

The guidelines are essentially focused on *processes* and institutional mechanisms for achieving better quality regulations. These relate to both the flow of new regulations and the review of, and amendments to, the stock of existing regulations. In contrast, the checklist for assessing regulatory quality (see box 2.1 in chapter 2) focuses on regulatory outcomes. In particular, it considers design standards for individual regulations — that is the attributes and characteristics of high quality regulation — rather than the inputs or systems designed to generate good design. Establishing such standards or regulatory quality principles is, therefore, one of the processes included in box 3.2.

3.3 Variety of approaches adopted

While the list of strategies in box 3.2 has been accepted by OECD member countries as representing good practice, they are generally stated in terms of broad principles. Member countries have adopted a variety of specific approaches to implement each of these broad strategies. Chapters 5 and 6 review a number of these approaches that may provide lessons or possible models for future reforms of Commonwealth regulatory quality policies.

Box 3.2 **OECD guidelines for improving regulatory quality**

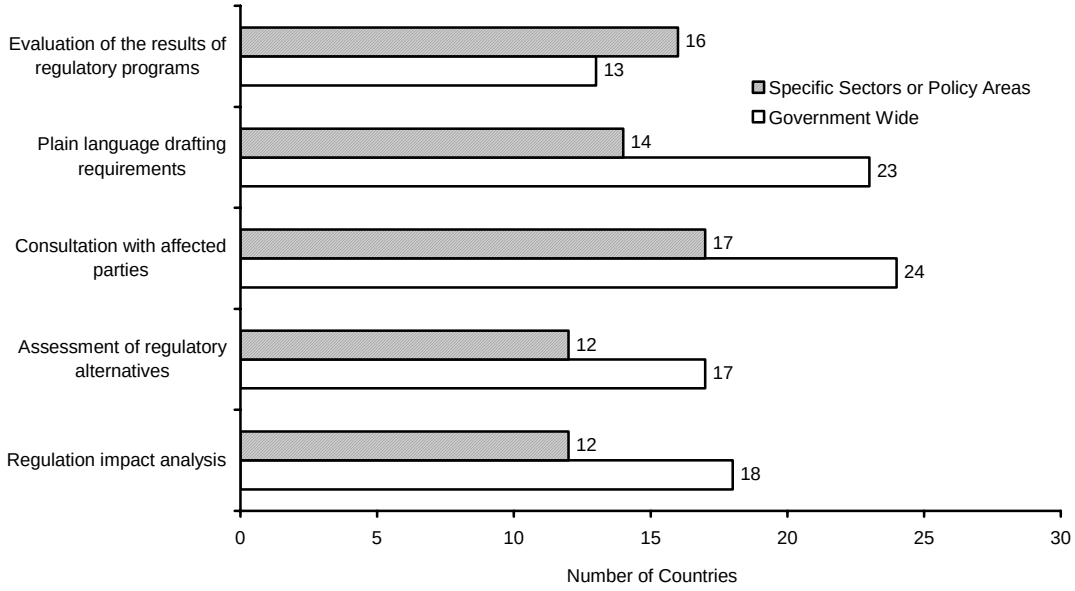
1. Adopt an explicit regulatory reform policy at the highest political levels.
2. Establish explicit standards for regulatory quality (see checklist for assessing regulatory quality, box 2.1 in chapter 2) and principles of regulatory decision making.
3. Build regulatory management capacities — create effective and credible mechanisms for managing and coordinating regulation and its reform.
4. Regulatory impact analysis (see OECD ten best practices, box 5.1 in chapter 5).
5. Ensure that regulations and regulatory processes are transparent, non-discriminatory and efficiently applied:
   (a) ensure that reform goals and strategies are articulated clearly to the public;
   (b) institute systematic public consultation procedures with affected interests;
   (c) create and update on a continuing basis public registries of regulations and business formalities, or use other means of ensuring that domestic and foreign businesses can easily identify all requirements applicable to them; and
   (d) ensure that procedures for applying regulations are transparent, non-discriminatory, contain an appeals process and do not unduly delay business decisions.
6. Systematic consideration of regulatory and non-regulatory alternatives.
7. Integrate consideration of compliance and enforcement issues into regulatory development.
8. Improve regulatory coordination.
9. Review and update existing regulations:
   (a) review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively;
   (b) integrate RIA into the review of regulations;
   (c) target reviews at regulations where change will yield the highest and most visible benefits, particularly regulations restricting competition and trade, and affecting enterprises, including SMEs; and
   (d) update regulations through automatic review methods, such as sun-setting.
10. Administrative simplification and reduction of compliance burdens.
11. Evaluate results of regulatory programs.

Source: Based on recommendations and strategies in OECD (1997b, 1997c, 2002b).

Since 1998, the Secretariat of the OECD has been sponsoring detailed reviews of the regulatory governance programs in member countries. Sixteen country reviews were completed from 1998 to 2002 and several more are underway or planned. (To date, there has been no OECD review of Australia's regulatory governance.) This Working Paper draws extensively on these country reports,[1] as well as the findings of two OECD surveys, undertaken in 1998 and 2000, on government capacities to assure high quality regulation (OECD 2001d).

Based on the OECD's 2000 survey, the most common feature of member countries' regulatory management programs is a requirement that affected parties be consulted on regulatory proposals. Regulation impact analysis, requirements that regulatory alternatives be considered, and plain language drafting requirements have also been adopted in a majority of OECD countries. Formal evaluation requirements for existing rules are less widespread (see figure 3.1).

Figure 3.1 **Selected regulatory quality tools contained in regulatory reform policies in OECD countries**



Data source: OECD (2001d), Responses to the Survey on Regulatory Capacities in OECD Countries.

Most OECD member countries have reviewed their policies on regulatory quality, notwithstanding that many of these policies have been introduced relatively recently — in a number of cases in the last five years. As a result, the policies have progressively become more comprehensive and rigorous. Policies are also evolving in countries that have more mature regulatory quality management systems, such as

[1] For this study, the ORR focused on the results of nine OECD country reviews: Canada (2002c,d); Denmark (2000a); Ireland (2001b); Italy (2001c); Korea (2000b); Mexico (1999a); the Netherlands (1999b); United Kingdom (2002e); and the United States (1999c).

the United States, the United Kingdom and Canada. This has encompassed better integrating existing tools into policy development processes, as well as incorporating new elements.

3.4 Other international developments

While the focus of this chapter is on developments within the OECD, the adoption of regulatory quality policies is not confined to OECD countries. The Asia Pacific Economic Co-operation (APEC) has adopted regulatory reform principles which parallel those of the OECD.

The Commission of the European Union has required impact assessments for European regulation since 1990 and recently announced a new more comprehensive and integrated RIA assessment methodology. A global impact assessment has replaced previous requirements for a number of partial and sectoral assessments. This is part of a broader regulatory reform action agenda covering a number of good governance principles, including: minimum standards for consultation; administrative simplification; and better communication of regulations.

Better empirical justification of regulatory decisions is also a feature of international trade agreements. For example, the General Agreement on Trade in Services (GATS) requires that standards on the supply of services be 'based on objective and transparent criteria' and be 'not more burdensome than necessary to ensure the quality of the service' (WTO 1994).

3.5 Evaluation of policies

International debate on improving regulatory quality is moving towards the evaluation of the design and implementation of specific tools and strategies and learning about successes and failures, rather than the question of whether regulatory reform programs are necessary.

To date, the key benchmarks for assessing the quality of a regulatory process have been largely qualitative in nature, being based primarily on best practice principles and procedural standards. While there is little empirical data to confirm the benefits of adopting regulatory quality policies, there are a number of indicators that suggest their effectiveness.

Specifically in relation to RIA, the OECD (2002b) notes that most central oversight units argue that they have had a significant impact on the quality of regulations. However, their role in improving regulatory quality — through identifying bad

regulations, improving transparency of processes, and recommending options with higher net benefits — is almost always unquantified. Some partial indicators of success include:

- evidence from the Netherlands that 20 per cent of regulatory proposals were modified or retracted as a result of RIA conducted as part of a targeted review program (OECD 2002b, p. 48);
- a study conducted in Victoria in the early 1990s also found that about 20 per cent of proposals for which RISs were submitted to the Victorian Office of Regulation Reform were withdrawn or modified (OECD 1999d, p. 37);
- in the first year of Korea's RIA requirement, more than 25 per cent of regulatory proposals were rejected by the Regulation Reform Committee (OECD 2002b, p. 48);
- in its report on the United States, the OECD (1999c, p. 153) indicated that some 60 per cent of regulations are changed during review by the Office of Management and Budget;
- an independent study (The Regulatory Consulting Group Inc & the Delphi Group 2000) found that the implementation of RIA in Canada had induced a cultural change among regulators:

  > … the RIA and RIAS requirements have changed the decision-making process. More attention is paid to alternatives and costs and benefits … Officials were sensitive to RIA requirements and departments had systems in place to consider regulatory options and costs and benefits … and a core of expertise was available in several departments (pp. 5-6); and

- a 1996 evaluation of the Netherlands' RIA program (see OECD 1999b, p. 137) found that most regulators see RIA as 'an essential and natural part of their policy choices'. They also 'expect it to speed the decision-making process on legislation in the Council of Ministers due to the improved preparation'.

In relation to regulatory quality policies more generally, very broad indicators of effectiveness include:

- The OECD's country reviews of regulatory reform suggest a relationship between the adoption of regulatory policies and better economic performance. Gains in terms of higher productivity and wealth creation are particularly evident in countries such as Canada, the US, and the UK with longstanding regulatory policies;

  > … countries with explicit regulatory policies consistently make more rapid and sustained progress than countries without clear policies. The more complete the principles, and the more concrete and accountable the action program, the wider and more effective was reform. (OECD 2002b, p. 40);

- governments continue to devote resources to regulatory quality programs and these programs are tending to broaden and expand over time;
- at the same time an increasing number of countries are adopting explicit regulatory policies; and
- no countries appear to have abandoned or scaled back their reform activities.

The OECD (2002b) has identified improving *ex post* evaluation of regulatory policies, tools and institutions, as a key challenge for the future:

> … while substantial progress has been made, the full adoption and implementation of the regulatory policy concept is far from complete in any OECD country, while in many it has barely begun. The completion of this process necessarily requires that more resources are devoted to understanding the outcomes of the steps taken to date, addressing failures and systematising and embedding successes (p. 115).
>
> Further progress in measuring the effectiveness of different elements of regulatory policy and the benefits of regulatory policy overall require intensified efforts to identify clearer, more quantitatively based indicators and to evaluate performance in relation to empirical evidence on the relative costs and benefits of the use of different regulatory tools and institutions (p. 106).

The core elements of the Commonwealth Government's regulatory quality policies, discussed in the next chapter, have been in place since 1997, but have not yet been subjected to any formal comprehensive review to evaluate strengths and weaknesses and to consider the merits of some of the approaches from other jurisdictions.

4 Commonwealth regulatory quality policies

In response to concerns about the quality of regulations, there has been a major re-orientation of the Commonwealth Government's regulatory framework. New regulations are now often explicitly pro-competitive and outcome focused and there is general agreement about the need to periodically review and reform regulatory arrangements to ensure that they remain appropriate.

Almost every sector of the economy has been touched to some degree by regulatory reform. Important reforms have included:

- reductions in barriers to trade and foreign direct investment;
- deregulation of financial markets;
- reforms to introduce greater competition in key sectors such as transport, telecommunications, energy and other infrastructure services markets; and
- the introduction of greater flexibility into workplaces.

There is growing evidence that such reform has played a significant part in Australia's relatively strong economic performance since the early 1990s and has contributed to rising productivity, incomes and living standards (Banks 2001b; PC 1999a).

The Commonwealth Government has in place a range of requirements for regulation making and review that seek to improve the quality of regulations and reduce the regulatory burden. This chapter outlines the key features of these regulatory quality policies, in order to provide further context for the discussion of specific arrangements in other jurisdictions. No attempt has been made to evaluate the effectiveness of individual policies and tools (although some comments are made at the end of this chapter on aspects of compliance with RISs). Rather, the aim is to provide a brief description of the major elements of current arrangements, as a reference point for comparison with other jurisdictions.

The key elements are:

- Regulation Impact Statement (RIS) requirements for new or amended regulation and for reviews of existing regulations;

- Cost Recovery Guidelines and Cost Recovery Impact Statement (CRIS) requirements;
- reviews of existing regulation under the Commonwealth's Legislation Review Schedule and complementary review processes;
- compliance burden and 'red-tape' reduction strategies; and
- regulatory performance monitoring and accountability initiatives.

Regulation making at a national or interjurisdictional level can also have implications for the regulations adopted by the Commonwealth Government. Under the COAG Principles and Guidelines (COAG 1997), separate RIS requirements apply to decisions on national regulations and standards.

These and other elements of the Government's regulatory quality policies are discussed below under headings that relate to OECD principles and good practices identified in the previous chapter.

4.1 Commonwealth policies and OECD good practices

Explicit policy on regulatory quality

Since 1997, the major element of the Commonwealth Government's strategy for reviewing and reforming regulations has been the requirement for regulatory proposals that affect business to be accompanied by a RIS.

The RIS process is intended to improve the quality of regulations by ensuring that new and amended regulations achieve their objectives in an effective and efficient manner. The RIS requirements are at the heart of the Government's regulatory management framework. They also effectively integrate with, or link to, most other regulatory quality tools, for example: establishment of standards for regulatory quality; consultation; consideration of alternatives; and red-tape reduction.

RIS requirements

The Commonwealth introduced RIS requirements in 1986. However, ministers and regulatory departments/agencies routinely eschewed preparation of RISs. Therefore, with the Prime Minister's statement *More Time for Business* (CoA 1997), the requirements were strengthened and RISs made mandatory (see box 4.1).

The RIS requirements are outlined in *A Guide to Regulation*, first issued in October 1997 and revised in December 1998 (ORR 1998) (mainly to explicitly include quasi-regulation).

Box 4.1 **Origins of Commonwealth RIS requirements and the ORR**

- **1985** — the Commonwealth Government established the Business Regulation Review Unit (BRRU) in the then Department of Industry, Technology and Commerce.
- **1986** — RIS requirements were introduced for Cabinet proposals affecting business. These requirements were set out in a BRRU circular to departments and in the Cabinet Handbook.
- **1989** — the BRRU was moved to the then Industry Commission and renamed the Office of Regulation Review (ORR).
- **1996** — the new Government asked the Industry Commission to report on progress in microeconomic reform. In the regulation reform part of its report (PC 1996), the Commission recommended enhanced quality controls on new or amended regulations. The report recognised that the existing RIS requirements were being largely ignored because there were no sanctions for not preparing them. Later in 1996, in its report *Time for Business* (SBDTF 1996), the Government appointed Small Business Deregulation Taskforce (the Taskforce) made a number of recommendations for improving regulation reform processes, consistent with the Commission's recommendations.
- **1997** — the Prime Minister's statement *More Time for Business* (CoA 1997) accepted many of the Taskforce's recommendations, including: widening the scope of the RIS requirements; giving the ORR a stronger gatekeeper role; and increased incentives for compliance and sanctions for non-compliance. The new mandatory RIS requirements were subsequently consolidated in *A Guide to Regulation* (the Guide) which was endorsed by the Government in September 1997.
- **1998** — the second edition of the Guide was published (ORR 1998) and endorsed by Cabinet.
- **2001** — prior to the election in 2001, the Government publicly reaffirmed its support for the RIS process (LNP 2001).

Sources: PC (1996, 1997, 1999b), SBDTF (1996), CoA (1997), LNP (2001).

Subject to limited exceptions, preparation of a RIS is mandatory for all reviews of existing regulation, proposed new and amended regulation and proposed treaties involving regulation, which will directly affect business (that is, impose a cost or confer a benefit), have a significant indirect effect on business, or restrict competition. Regulation includes primary legislation and subordinate legislation,

treaties and quasi-regulation.[1] RIS requirements apply to all government departments, agencies, statutory authorities and boards, including those with administrative or statutory independence. Further information on the RIS requirements is provided below in the discussion of 'Explicit standards for regulatory quality and principles of regulatory decision making'.

Cost recovery policy

At the end of 2002, following a public inquiry and report by the Productivity Commission (PC 2001), the Government adopted a formal cost recovery policy '… to improve the consistency, transparency and accountability of Commonwealth cost recovery arrangements and promote the efficient allocation of resources' (DoFA 2002). Cost recovery charges fall into two broad categories:

- fees for goods and services; and
- 'cost recovery' levies and taxes.[2]

Guidelines have been developed to assist regulatory agencies to design and implement appropriate cost recovery arrangements. A Cost Recovery Impact Statement (CRIS), which addresses the issues discussed in the Guidelines, will need to be prepared for all significant new or amended cost recovery arrangements and when undertaking reviews of existing cost recovery arrangements (see below for discussion of reviews). Where the RIS requirements are triggered by a regulatory proposal which includes a cost recovery element, then the CRIS Guidelines must be addressed in the RIS itself, rather than in a separate CRIS.

COAG Principles and Guidelines

Since 1995, Ministerial Councils and national standard-setting bodies have had to comply with the COAG Principles and Guidelines when making decisions on national standards or regulations — the major element of which is the preparation of a RIS to serve as an input to the decision-making process (COAG 1997). These requirements promote better quality regulations by incorporating:

- a presumption against new or increased regulation — regulation should be the minimum required to achieve objectives;
- a presumption in favour of adopting existing international standards; and

[1] Quasi-regulation was defined in chapter 2.

[2] Levies and taxes are only considered cost recovery measures where there is a direct link between the revenues and the funding of a specific activity.

- a presumption in favour of performance-based regulation, minimising restrictions on competition, and of regulatory flexibility.

Regulatory management capacities and institutions

Independent oversight by ORR

The ORR promotes best practice regulation making and vets agency compliance with the RIS requirements. The ORR's principal activities, as set out in its charter, include:

- advising on quality control mechanisms for regulation making and review;
- examining and advising on RISs prepared by Commonwealth departments and agencies;
- providing training and guidance to officials;
- reporting annually on compliance with the Commonwealth Government's RIS requirements;
- advising Ministerial Councils and national standard-setting bodies on regulation making (see 'Coordination' below);
- lodging submissions and publishing reports on regulatory issues; and
- monitoring regulatory reform developments in the States and Territories, and in other countries.

The ORR has an ongoing program of training and briefings for department and agency officials, with the aim of assisting them to improve their internal processes for the development and review of regulatory proposals. In addition to formal training, the ORR provides advice and guidance to officials as particular issues arise. This training and advice supplements the extensive explanatory material on all aspects of the preparation of a RIS, contained in *A Guide to Regulation*.

RIS compliance incentives/sanctions

The main incentives/sanctions for compliance/non-compliance with the RIS requirements are:

- the ORR reports to the decision maker (for example, Cabinet) on the adequacy of RISs, prior to decisions being taken;

- the ORR can also report cases of non-compliance to the Parliamentary Secretary to the Treasurer, who may take the matter up with the relevant Minister or decision maker; and
- the ORR maintains a compliance database and its assessment of compliance with RIS requirements is published annually as part of the Productivity Commission's Annual Report on Regulation and its Review.

Minister responsible for regulatory best practice

The Parliamentary Secretary to the Treasurer has been given responsibility for Regulatory Best Practice. The ORR, together with the Treasury, provides advice to the Parliamentary Secretary in this role.

Quality control within regulatory agencies

A limited number of regulatory agencies have introduced 'gatekeeper' roles by adopting a centralised or coordinated approach to managing the preparation of RISs. The internal regulatory oversight processes include features such as:

- the adoption of a simple checklist approach managed by the cabinet liaison area;
- agency-specific best practice policy development guidance material; and
- in-house training on RIS and other policy development requirements.

Gatekeeper processes within the Department of the Prime Minister and Cabinet

Several areas within the Department of the Prime Minister and Cabinet perform a minor 'gatekeeper' role potentially contributing to improved compliance with the RIS requirements by alerting departments and agencies to the requirements.

- In relation to submissions and memoranda for Cabinet consideration, the Cabinet Secretariat, a unit within the Department, advises officials developing policy of the requirement to contact the ORR and prepare a RIS if necessary. The *Cabinet Handbook* (PM&C 2002) also provides an outline of the RIS requirements and in particular highlights the need for consultation with the ORR and development of RISs to occur at an early stage in the policy-making process.
- The Legislation Section within the Department requires that departments, when submitting legislation bids, indicate for each proposed Bill whether a RIS will be required and whether the ORR was consulted. The ORR is provided with a copy of these legislation bids and is able to contact agencies, where necessary, to remind them of the need to comply with the RIS requirements. The *Legislation*

Handbook (PM&C 2000b) provides guidance on the procedures involved in making primary legislation and on the RIS requirements.

- The Federal Executive Council Secretariat reminds departments and agencies that RISs are required when it receives documentation, related to proposals for delegated legislation. The *Federal Executive Handbook* (PM&C 2000a) sets out the procedures for making subordinate legislation and makes reference to the RIS requirements.

The latter two gatekeeper and alert functions occur at the concluding stage of the policy-development and drafting process. They do not have a direct bearing on compliance at the more important decision-making stage, but are designed to ensure that RISs are available for tabling and parliamentary scrutiny of Bills, statutory rules and disallowable instruments. This performs a transparency role and also contributes to improved awareness of the RIS requirements, which can over time also contribute to better compliance at the decision-making stage.

Other institutional arrangements

Other key elements of the institutional framework for regulatory management and reform at the Commonwealth level are listed below:

- The Office of Small Business (OSB), located within the Department of Industry, Tourism and Resources, carries out activities aimed at creating a more competitive environment for small business. The Office provides advice on, and coordinates, the preparation of regulatory plans and regulatory performance indicators (see below).
- The Senate Standing Committee on Regulations and Ordinances and the Senate Standing Committee for the Scrutiny of Bills examine, respectively, disallowable instruments of delegated legislation; and bills. Both Committees engage in technical legislative scrutiny, rather than considering the policy merits of legislation, and focus, in particular, on adherence to principles of personal rights and parliamentary propriety.
- The Treasury Department provides advice to the Government on regulatory policy, including the overall analytical framework for structural reform issues. The Department also has specific responsibilities for matters relating to competition policy, including a primary coordinating role in the implementation of National Competition Policy.
- The Australian Competition and Consumer Commission (ACCC) is a statutory authority responsible for ensuring compliance with the Trade Practices Act (TPA) and the provisions of the Conduct Code and for administering the Prices Surveillance Act. The Commission seeks to improve competition and efficiency

in markets and foster fair trading practices. The Commission has a role in prescribing Codes of Practice under the TPA.

- Independent Regulators have been set up by the Commonwealth Government in several sectors. These include: Australian Prudential Regulation Authority; Australian Securities and Investments Commission; Civil Aviation Safety Authority; Australian Communications Authority; and Australian Broadcasting Authority. Accountability mechanisms are set out in their relevant statutes.
- The Productivity Commission is the Commonwealth Government's principal review and advisory body on microeconomic policy and regulation (see review and evaluation sections below).
- Other permanent or *ad hoc* committees, advisory panels and taskforces have played a role in advising the Government on regulatory issues. These include: the Australian Law Reform Commission; the Small Business Deregulation Taskforce; Self-Regulation Taskforce; Small Business Consultative Committee; and the New Tax System Advisory Board. Parliamentary Committees have also, from time to time, considered regulatory reform issues, for example, the recent Senate Employment, Workplace Relations and Education References Committee's Small Business Employment Inquiry (CoA 2003).

Explicit standards for regulatory quality and principles of regulatory decision making

A Guide to Regulation (ORR 1998) sets out minimum standards for RISs and provides guidance on aspects of best practice regulatory design. The Guide stipulates that RISs should be developed at an early stage in the policy-making process, and in consultation with the ORR. The Cabinet Handbook (PM&C 2002) includes guidance for officials on the RIS requirements specifically as they relate to the preparation of material for Cabinet consideration.

The ORR has also promoted best practice design principles in various research papers and in *Regulation and its Review*, which is part of the Productivity Commission's annual reporting program.

The RIS is intended to provide greater assurance that new or amended regulatory proposals are subject to proper analysis and scrutiny and that the policy adopted not only provides a net benefit to the community, but minimises any associated negative side effects on competition, prices, compliance costs, consumer choice, environmental amenity and other community goals. A key feature of the Commonwealth RIS requirements is that they call for an economy-wide perspective

in identifying which groups benefit from the proposals and those who incur the costs.

The RIS has seven key elements: identification of the problem to be addressed; the desired objective(s); regulatory and non-regulatory options that constitute viable means for achieving the objective(s); an assessment of the impact on consumers, business, government and the community of each option; a consultation statement; a recommended option; and a strategy to implement and review the preferred option.[3]

RISs must, where relevant, include a specific assessment of the impact on small business and of ways to minimise the paperwork burden associated with regulation. A Trade Impact Assessment should be included in RISs for all proposals that have a *direct* bearing on export performance. In June 2001, the Government decided that, where applicable, RISs must also include an assessment of Ecologically Sustainable Development impacts.[4]

Consistent with requirements under the COAG Competition Principles Agreement (CPA), for proposals which maintain or establish restrictions on competition (such as barriers to entry for new businesses or restrictions on the quality or range of goods and services available), it must be established that:

- the benefits to the community outweigh the costs; and
- the Government's objective can be achieved only by restricting competition.

As noted above, all new and substantially amended significant cost recovery arrangements should be assessed against the Government's cost recovery guidelines.

More information on aspects of the Commonwealth RIS requirements is provided in the next chapter (see section 5.2).

Transparency of procedures to create new laws and regulations

Consultation

As part of the Commonwealth RIS requirements there is a requirement that those affected by proposed regulation are consulted unless it is considered inappropriate.

[3] A more limited RIS is required for taxation proposals. The Tax RIS is required to examine the administrative options for ensuring compliance with the proposed measures and the cost of each option to ensure that compliance cost considerations are fully taken into account.

[4] *A Guide to Regulation* is to be amended to reflect this requirement.

A RIS must incorporate a consultation statement detailing the consultation undertaken and a summary of the views elicited from the main affected parties. Where consultation was limited or not undertaken, the statement must explain why full consultation was inappropriate.

The ORR encourages departments and agencies to prepare and release a draft RIS for public consultation, but there is no requirement to do so and the practice is rarely followed.[5] In contrast, under the COAG *Principles and Guidelines*, RISs prepared for national standards and regulations must be released in draft form for formal public consultation.

Consistent with CPA requirements, template terms of reference for reviews under the Commonwealth's Legislation Review Schedule include a requirement that the Review Body advertise nationally, consult with key interest groups and affected parties, and publish a report. The report should list the individuals and groups consulted during the review and outline their views, or reasons why consultation was inappropriate.

Forward planning

All Commonwealth Government departments and agencies are required to prepare and publish (including on their web sites) Annual Regulatory Plans. The Plans must record the previous year's regulatory activity and, more importantly, intentions for the year ahead. This is designed to provide business and the community with ready access to information about planned changes to Commonwealth regulation, making it easier for those affected to take part in the development of regulations. In the longer term, if effectively implemented, this would help bring a strategic focus to the activities of regulatory agencies and put pressure on agencies to make greater use of RISs early in policy development.

Communication

All Commonwealth primary legislation and statutory rules are accessible electronically via SCALEplus and Legislative Instruments databases on the web site of the Attorney-General's Department. Where RISs are incorporated as part of explanatory material, they are also accessible via these databases.

[5] For proposals to prescribe industry codes of conduct under the Trade Practices Act, in addition to satisfying the Commonwealth RIS requirements, the Department/Agency with policy carriage of the code must prepare a Draft RIS and make it available for consultation (CoA 1999).

The Office of Parliamentary Counsel (OPC) and the Office of Legislative Drafting (OLD) are specialist units in the Attorney-General's Department responsible for the drafting of Bills and legislative instruments, respectively. Expert drafters are employed and provide advice about drafting (including guidance on plain English drafting) and interpreting legislative instruments.

Accountability and Appeals processes

Key components of the Commonwealth's accountability and appeals framework include:

- the Administrative Appeals Tribunal, which is the principle merits review tribunal;
- Judicial review of Administrative decisions (to test the lawfulness of a decision, as defined under the *Administrative Decisions (Judicial Review) Act 1977*);
- the Australian National Audit Office, that undertakes performance and financial statement audits of Commonwealth entities;
- Commonwealth Ombudsman and separate Sectoral Ombudsmen — these investigate complaints about administration within a Commonwealth agency;
- specialist/independent regulators that are in most cases subject to separate consultation and appeal requirements under their enabling Legislation;
- internal review — in some areas of administration there is now a formal system (created and regulated by legislation) for the internal review of agency decisions. Even where there is no statutory requirement, it is common for internal review systems to be established on an administrative basis within agencies (often outlined in the service charter); and
- *Freedom of Information Act 1982*, which enables a person to obtain access to government documents (a similar right of access to documents exists under the *Archives Act 1983*).

Assessment of regulatory alternatives

Commonwealth RIS requirements for new or amended regulation, as set out in *A Guide to Regulation*, require that a range of viable options be assessed, including as appropriate, non-regulatory options. The Guide includes information on regulatory and non-regulatory options, including a checklist for the assessment of regulatory forms for their suitability. The Report of the Commonwealth Interdepartmental Committee on Quasi-regulation (CICQ 1997) also provides guidance on regulatory alternatives and factors relevant to choosing the best regulatory form.

As part of the Government's commitment to encourage industry to develop effective self-regulation approaches, in August 1999 the Minister for Financial Services and Regulation announced the establishment of a taskforce to inquire into the operation of industry self-regulation in Australia. The final report of the *Taskforce on Industry Self-regulation*, released in August 2000, sets out good practice principles for self-regulatory schemes.[6]

In response to one of the recommendations of the Taskforce, the Government announced in December 2000 that a guideline would be published, providing practical advice on self-regulation and a gateway to other resources. As a first step, a web site (http://www.selfregulation.gov.au) has been set up to promote self-regulation policy and provide useful information and links. The web site allows stakeholders to present submissions on current review processes on-line and encourages the provision of feedback on self-regulation practices around Australia.

The National Occupational Health and Safety Commission's *Occupational Health and Safety Practical Solutions Database*[7] is one mechanism for the sharing of experiences with regulatory alternatives. It uses the Internet to spread information about different approaches.

Administrative simplification and reduction of compliance burden

At the Commonwealth level, some of the more important measures to improve the cost-effectiveness of regulations and to reduce compliance burdens and red-tape, include:

- the increased adoption of performance-based regulation;
- the consideration and adoption of implementation options that minimise red-tape;
- the improvement of regulatory services through the employment of new technology;
- increased electronic publication of regulatory related information;
- licence reform and reduction;
- streamlining of government paperwork requirements;
- privatisation of certification functions; and

6 The report is available at http://www.selfregulation.gov.au/publications/TaskForceOnIndustrySelf-Regulation/FinalReport/contents.asp.

7 The Database is available at http://www.nohsc.gov.au.

- business focus groups and pilot test programs.

Many of these specific measures resulted from *More Time for Business* — the Government's March 1997 response to the recommendations of the Bell Taskforce (CoA 1997).

The Commonwealth Government's Business Entry Point (BEP) provides a single entry point for business to access information from Commonwealth, State and Territory Governments. The Internet portal provides access to the Business Licence Information Service (BLIS) and to the National Business Information Service and facilitates a number of business-to-government e-commerce transactions. BLIS offers intending and existing businesses a first-stop point of inquiry for all Commonwealth, State, Territory and local government business licensing requirements. BLIS services are available via CD-ROM and the Internet.

Commonwealth Government forms to be completed by small businesses must include a box indicating the length of time the form took to complete. Steps taken to reduce unnecessary compliance burdens imposed by government forms include: making forms available electronically; consulting with clients on form design; electronic completion of forms; and streamlining information requirements so that businesses are not required to submit the same information repeatedly.

Compliance and enforcement

A Guide to Regulation states that the implementation and review section of a RIS should consider how the regulatory proposal will be implemented and enforced (ORR 1998, p. D14). While the Guide touches on some principles relevant to improving compliance and enforcement, it does not provide any detailed guidance on the questions to consider or alternative compliance and enforcement strategies.

Coordination

Various institutions and mechanisms facilitate cooperation and coordination on regulatory reform issues, between the Commonwealth Government and the governments in other Australian jurisdictions (and in many cases also New Zealand). Some of the more important of these are discussed briefly below.

National reforms (for example, relating to food, therapeutic goods, agricultural and veterinary chemicals, building codes, occupational health and safety, workers compensation and some environmental regulation) are reducing overlap and duplication and encouraging greater consistency between jurisdictions, thereby reducing compliance costs for businesses operating across borders.

Council of Australian Governments

The Council of Australian Governments (COAG) comprises the Prime Minister, Premiers, Chief Ministers and the President of the Australian Local Government Association. The role of COAG is:

- to increase cooperation among governments in the national interest;
- to facilitate cooperation among governments on reforms so as to achieve an integrated, efficient national economy and single national market;
- to continue structural reform of government and review of relationships among governments consistent with the national interest; and
- to consult on major issues by agreement such as: major whole-of-government issues arising from Ministerial Council deliberations; and major initiatives of one government which impact on other governments.

Beneath COAG, there are Ministerial Councils and various committees of officials, including the COAG Senior Officials' Group (comprising heads of the relevant Commonwealth, State and Territory central agencies and the Chief Executive Officer of the Australian Local Government Association), and the Committee on Regulation Reform (see below).

Ministerial Councils and national standard-setting bodies

Ministerial Councils are formal meetings of ministers, from the Commonwealth, State and Territory governments, responsible for particular portfolio areas. The role of Ministerial Councils is to facilitate consultation and cooperation between governments, to develop and review policy jointly, and to take joint action in the resolution of issues which arise between Australian governments. Committees of officials support each Ministerial Council.

Some 40 Ministerial Councils are involved in national regulation making. New Zealand representation on Councils is by invitation. While it is often considered desirable, such representation should not 'intrude on the central functions of the development and coordination of policy, problem solving and joint action by jurisdictions within the Federation' (PM&C 1999, p. vii). However, New Zealand has full membership and voting rights in Ministerial Councils in relation to any decision involving the Trans-Tasman Mutual Recognition Arrangement (see below).

National standard-setting bodies are intergovernmental regulatory bodies made up of officials. They play a similar role to Ministerial Councils in assisting the coordination and harmonisation of various government actions across Australia.

National standard-setting bodies develop standards to be applied across Australia (and sometimes New Zealand). Most national standard-setting bodies are concerned with health and safety issues.

Ministerial Councils and national standard-setting bodies are required to follow RIS requirements agreed to by COAG. These are similar to the Commonwealth's requirements and the ORR provides advice to help ensure they are met. The ORR also monitors and reports on compliance. Compliance is linked to payments (associated with the National Competition Policy Agreement) from the Commonwealth to the States and Territories.

Committee on Regulatory Reform

The COAG Committee on Regulatory Reform (CRR) is a forum for senior officials to oversight action on regulation reform issues of national significance. The committee is currently chaired by NSW (an official from the Cabinet Office). The CRR was originally established following agreement by Australian Heads of Government in 1990 to develop a comprehensive approach to regulatory reform to help accelerate microeconomic reform. The role of CRR has broadened considerably since its establishment. For instance, since 1998, CRR has been responsible for coordinating national competition reform processes, including national legislation reviews.

Other institutions and mechanisms that facilitate coordination

Other relevant institutions or mechanisms that contribute to better coordination between jurisdictions on regulatory issues, include:

- Liaison between regulation review units — representatives from the Commonwealth ORR meet periodically with officers from the equivalent regulation review units in other jurisdictions to discuss regulation review issues of common interest. New Zealand's Business Cost Compliance Unit also attends these meetings.[8]
- The National Competition Council (NCC) — responsibilities include assisting public awareness of competition reform agendas, making recommendations on the design and coverage of infrastructure access regimes under *Part IIIA of the*

[8] Many Australian jurisdictions have dedicated regulation review units within their administration. These units manage and coordinate regulation reform activities and compliance with regulation impact statement or other quality assurance requirements. In other jurisdictions these responsibilities rest with the Cabinet Office or a section 'within' a particular department.

Trade Practices Act 1974 (TPA) and assessing whether States and Territories have made satisfactory progress towards competition policy reform.[9]

- National Interest Analysis (NIA) for treaties — intergovernmental coordination is also a feature of the requirement for a NIA to be prepared as part of the treaty making process. The NIA is tabled in Parliament with the treaty and must outline the likely impacts of the agreement for the States and Territories.[10]
- MRA and TTMRA — the Mutual Recognition Agreement (MRA) between Australian jurisdictions and the Trans-Tasman Mutual Recognition Arrangement (TTMRA) between all Australian jurisdictions and New Zealand seek to address regulatory impediments to trade by adopting (subject to some exceptions and qualifications) two basic principles:
  - a good that may be legally sold in one jurisdiction may be sold in the other, regardless of differences in standards or other sale-related regulatory requirements; and
  - a person registered to practise an occupation in one jurisdiction is entitled to practise an equivalent occupation in another without the need to undergo further testing or examination.[11]
- Various bilateral and plurilateral treaties or arrangements — these also contribute to greater recognition or alignment of regulations and standards, including:
  - Closer Economic Relations (CER) Agreement with New Zealand;
  - Singapore–Australia Free Trade Agreement (expected to enter into force in 2003); and
  - Mutual Recognition Agreements on conformity assessment.[12]

9 The NCC is an independent advisory body for all Australian governments. It was established to oversee and to assist with the implementation of National Competition Policy (NCP). The Commonwealth Government funds the Council and its Secretariat, but it is a national body.

10 While the RIS should be an integral part of the policy development process, the NIA is more of a transparency tool — with preparation normally commencing much later.

11 The MRA and TTMRA are currently being reviewed by the Productivity Commission, at the request of heads of Government. The draft report is available on the Commission's website (see http://www.pc.gov.au).

12 Such agreements (signed with the EC, EFTA and Singapore) facilitate trade by enabling Australian manufacturers to have their products tested and certified in Australia for compliance with the regulatory requirements in the importing country.

Review of existing regulations

A number of government processes are designed to review and improve the stock of existing regulation.

The Productivity Commission, an independent statutory authority, is the Commonwealth Government's principal review and advisory body on microeconomic policy and regulation. The Commission conducts public inquiries and research into a broad range of issues affecting the welfare of Australians, and makes recommendations to Government on improving the quality of specific regulations, sectoral policies, programs and processes. In all its reviews, the Commission seeks to identify options for meeting regulatory objectives in ways that maximise the benefits to the community as a whole.

Under the April 1995 Competition Principles Agreement (CPA) (COAG 1995), all Australian governments made a commitment to review and, in the absence of offsetting public benefits, reform legislation which potentially restricts competition. Some 1800 reviews have been carried out since 1996.

The Commonwealth's Legislation Review program was broader than the CPA requirement, including legislation that may impose costs or confer benefits on business. The Commonwealth's Review Schedule, when announced in June 1996, identified 98 separate reviews to be conducted over a four year period ending in 2000. Further reviews were later added bringing the total number of reviews listed to 101. In late 2000 COAG decided to extend the deadline for jurisdictions to have conducted reviews and implemented any required reforms, to 30 June 2002. As at that date, eight reviews were still in progress and nine had not yet commenced (PC 2002, p. 65).

Although competition issues have been the primary focus, in most cases Commonwealth reviews have involved a broader examination of the effectiveness and efficiency of the regulatory regimes. This has generally included consideration of whether the regulatory objectives can be achieved in a way that reduces compliance costs.

Also, under the CPA, there is a requirement that once legislation has been reviewed, the legislation must be systematically reviewed at least every ten years.

For reviews of existing regulation, the terms of reference should reflect the key elements of the RIS, with any reports, studies, reviews or discussion papers using a RIS framework. Template terms of reference for Commonwealth CPA reviews are consistent with the elements of a RIS.

RISs must specifically address how proposed new regulations or amended regulations will be monitored/reviewed.

The Government has recently announced a five year schedule of reviews of existing significant cost recovery arrangements. CRISs will be prepared to ensure these arrangements comply with the Government's cost recovery policy. Where possible, cost recovery arrangements will be reviewed in conjunction with other relevant agency reviews, as part of the normal budget process. After initial review, all significant cost recovery arrangements are to be subject to periodic review — at least every five years.

Evaluation of results of regulatory programs

The Productivity Commission's *Annual Report* typically highlights selected developments in regulatory reform and identifies priority areas for future reform. The ORR's contribution to the Commission's annual reporting is *Regulation and its Review*, with the main focus of this publication being the reporting of agency compliance with the RIS requirements.

Two of the main functions of the National Competition Council (see 'Coordination' discussion above) are to assess the progress of governments (including the Commonwealth) with implementing National Competition Policy and related reforms; and to promote debate and discussion of the potential consequences of reform.

Under the Commonwealth *Financial Management Accountability Act 1997*, Chief Executives are required to manage their department or agency in a way that promotes effectiveness and efficiency of Commonwealth resources. Partly in order to meet these obligations, departments and agencies undertake internal monitoring and evaluation of the programs (including regulatory programs) that they administer. However, managers have considerable flexibility in their approach to program evaluation. Thus, practices vary significantly between agencies. Some have set up evaluation units to plan and coordinate evaluations. The Department of Finance and Administration issues guidance for departments and agencies on conducting program evaluations.

The Australian National Audit Office conducts independent performance audits of Commonwealth entities and programs, including regulatory programs.

Commonwealth departments and agencies are required to report annually against nine Regulatory Performance Indicators (RPIs) (see table 4.1).

The RPIs provide a measure of the extent to which Commonwealth agencies involved in regulatory activities are demonstrating good regulatory practice, for example, by:

- minimising the impact of regulation on business;
- applying appropriate scrutiny and consultation processes; and
- producing regulations that meet the tests of transparency, fairness and accessibility.

Table 4.1 **Regulatory performance indicators**

Key Objective	*Performance indicators*
To ensure that all new or revised regulation confers a net benefit on the community.	1. Proportion of regulations for which the Regulation Impact Statement (RIS) adequately addressed net benefit to the community. *This indicator is monitored by the ORR.*
To achieve essential regulatory objectives without unduly restricting business in the way in which these objectives are achieved.	2. Proportion of regulations for which the RIS adequately justified the compliance burden on business. *This indicator is monitored by the ORR.* 3. Proportion of regulations which provide businesses and stakeholders with some appropriate flexibility (as defined) to determine the most cost-effective means of achieving regulatory objectives.
To ensure that regulatory decision-making processes are transparent and lead to fair outcomes.	4. Proportion of cases in which external review of decisions (as defined) led to a decision being reversed or overturned. 5. Proportion of regulatory agencies whose mechanisms for internal review of decisions meet standards for complaints handling outlined in *Principles for Developing a Service Charter*, published by the Department of Finance and Administration.
To ensure that information and details on regulation and how to comply with it are accessible and understood by business.	6. Proportion of regulatory agencies having communication strategies for regulation, or formal consultative channels for communicating information about regulation. Guidelines for this purpose should be documented.
To create a predictable regulatory environment so business can make decisions with some surety of future environment.	7. Proportion of regulatory agencies publishing an adequate (as defined) forward plan for introduction and review of regulation.
To ensure that consultation processes are accessible and responsive to business and the community.	8. Proportion of regulations for which the RIS included an adequate statement of consultation. *This indicator is monitored by the ORR.* 9. Proportion of regulatory agencies with organisational guidelines outlining consultation processes, procedures and standards. Guidelines for this purpose should be documented.

Source: DEWRSB (1999).

With the help of the ORR, the Office of Small Business collects and publishes RPI data. The indicators have been designed as a first step towards enabling benchmarking of government performance in regulatory reform.

4.2 Need for ongoing review and reform

As is evident from this chapter, the Commonwealth Government has introduced a range of regulatory policies, tools and institutional arrangements that are contributing to the achievement of improvements in regulatory quality.

As a result, the regulatory environment today is in many respects considerably better than that of 15 or 20 years ago. However, the process of ensuring that regulations lead to appropriate economic, environmental and social outcomes is ongoing. The evidence presented in chapter 2 on business concerns about regulations, suggests that more needs to be done to improve the cost-effectiveness of regulations.

According to the Productivity Commission (PC 2002), there remains scope for Australian governments, including the Commonwealth Government, to do more to ensure that regulations do not impose unnecessary costs on business and the community. While appropriate regulations and regulatory systems will always impose some compliance costs, it is notable that some OECD countries (including New Zealand) have lower regulatory compliance costs than Australia (OECD 2001a).

The Commission (PC 2002) also found significant scope for improvement in the implementation of RIA in some Commonwealth departments and agencies, and in particular a need for its greater integration into the policy-development process. While compliance with the Government's RIS requirements has generally improved, disaggregated information indicates that certain issues need to be addressed:

- compliance varies significantly both among and within portfolios — departments and agencies often fail to comply fully with the requirements;
- there is a noticeably lower compliance rate for the more important regulatory proposals;
- there is a tendency for RISs prepared for significant proposals to be undertaken in compressed time frames, raising doubts about the extent to which they were able to contribute to the policy-development process; and
- feedback from some departments and agencies that preparing a RIS involves considerable additional work.

These findings, reported in *Regulation and its Review 2001–02* (PC 2002), suggest that a number of departments and agencies are still giving relatively low priority to the requirements, with some essentially treating the RIS as an 'add on' task — after a course of action has already been agreed.

Finally, the Commission noted that the standard of analysis in many RISs, particularly the level of analysis of compliance costs and small business impacts, needed to be improved. At present, RISs typically contain a relatively brief qualitative assessment of the compliance cost burden of regulatory proposals. Only about 30 per cent of RISs considered by the ORR also contain quantitative assessments, including estimates of the number of businesses affected or the likely financial cost per business.

In practice, measuring compliance costs is difficult. At this point in time, there is no generally agreed methodology, although progress is being made on a number of fronts, including work by the OECD (see chapter 2). 'In some cases, departments and agencies appear not to have sufficient internal expertise to adequately perform an assessment' (Banks 2003). However, there also appears to be a lack of recognition of the importance of considering compliance cost burdens associated with new or amended regulation. The ORR has recognised these problems and has been attempting to raise standards through training programs for officials, and by requiring a greater level of analysis about compliance costs in RISs before they can be assessed as adequate.

The Senate Small Business Employment Report (CoA 2003) has also called for better analysis of compliance costs and *ex post* reviews of the accuracy of compliance cost estimates.

> … guidelines should be amended to require that quantitative assessments of compliance costs are provided for [in] all RIS[s], unless there are compelling reasons why this is impractical. (p. 139)
>
> [The Committee] … also recommends that the Commonwealth Government commissions regular reviews of the accuracy of compliance estimates in the RIS for regulations with a major impact on business. (p. 140)

As was noted in chapter 3, the OECD considers that the development of better methodologies and indicators for evaluating the performance of the RIS requirements and other existing regulatory quality processes is a high priority for future work. The measures and design characteristics that are most effective in achieving the objective of more efficient and effective regulation need to be better identified. Notwithstanding the limited information available on the comparative performance of different policies and tools, much can be learned by looking at some of the approaches/practices in other jurisdictions outlined in the following chapters.

5 Regulation Impact Analysis in other jurisdictions

This chapter examines various aspects of Regulation Impact Analysis (RIA) — typically called Regulation Impact Statements (RIS) in Australian jurisdictions — used in selected OECD countries and Australian jurisdictions.

As noted earlier, RIA is designed to provide a better informed and objective basis for making regulations, by providing a framework for adopting good practice in regulation making and review. RIA is both a process and a method for communicating results to decision makers and the community.

- It is firstly an approach to policy development, involving the consistent, systematic and transparent assessment of alternative approaches to problems which may warrant government intervention. Fully integrating RIA into policy-making processes within departments and agencies can enhance regulators' ability to identify the solutions that will meet government objectives in the most effective and efficient manner.
- Secondly, RIA is a vehicle for communicating relevant information to decision makers. The RIA document identifies problems and objectives and the relative impacts of a range of feasible regulatory and non-regulatory options. After government decisions are taken, RIA can enhance accountability by making the basis for them transparent to the community.

The 1997 *OECD Report on Regulatory Reform* recommended that governments 'integrate regulation impact analysis into the development, review, and reform of regulations' (OECD 1997b, p. 39). By the end of 2000, 14 out of 28 OECD countries had adopted wide-ranging RIA programs and another eight were using RIA for at least some regulations or in defined circumstances (OECD 2001d). The scope and analytical rigour of RIA continues to expand, with RIA programs tending to broaden and deepen over time as governments gain experience and expertise in their preparation and use.

All Australian States and the ACT conduct formal RIA. In the case of Western Australia, however, this does not include the preparation of a single comprehensive RIS-type document and analysis is limited to small business and regional impacts.

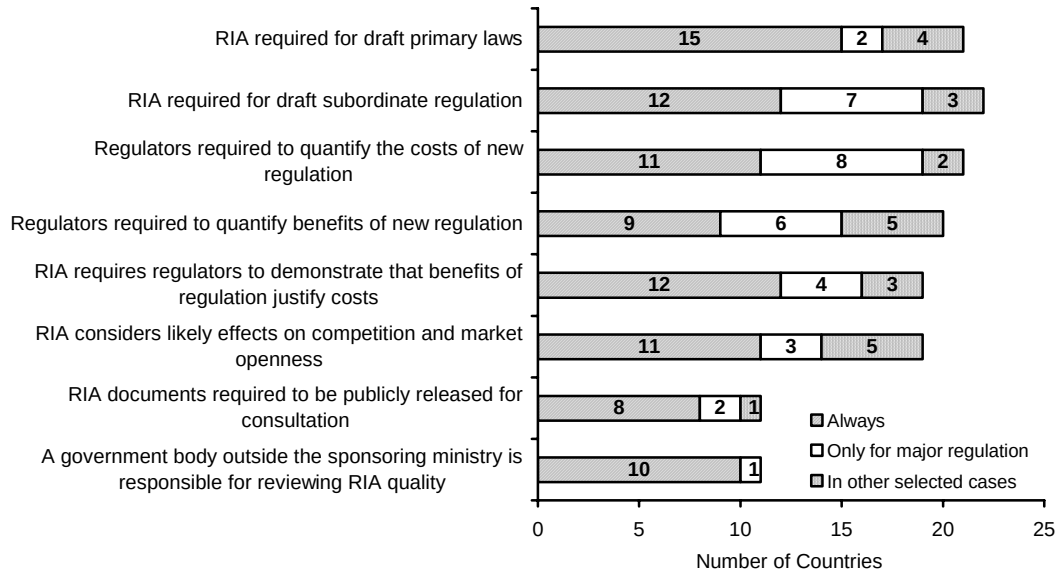
The Northern Territory Government is currently implementing a RIS process, primarily based on the Commonwealth's RIS requirements.

5.1 Best practice RIA

There is no single, ideal model for a good RIA program — institutional, social, cultural and legal differences between jurisdictions need to be taken into account in system design. However, the ten best practices identified in the OECD's Report, *Regulatory Impact Analysis* (1997a), remain good reference points for designing an effective program (see box 5.1) and are being used as the basis for evaluating the RIA programs in the country reviews prepared under the OECD's Regulatory Reform Program (see chapter 3).

An indication of the extent to which various aspects of RIA systems have been adopted across OECD countries is provided in figure 5.1.

Figure 5.1 **Aspects of RIA in OECD countries**



Note: There were 28 respondent countries.

Data source: OECD (2002b).

Box 5.1 **OECD ten best practices for RIA**

According to the OECD, these elements of 'best practice' serve as starting points for the design of a system likely to maximise the benefits of RIA.

1. **Maximise political commitment to RIA**. Reform principles and the use of RIA should be endorsed at the highest levels of government. RIA should be supported by clear ministerial accountability for compliance.
2. **Allocate responsibilities for RIA program elements carefully**. Locating responsibility for RIA with regulators improves 'ownership' and integration into decision making. A central body is needed to oversee the RIA process and ensure consistency, credibility and quality. It needs adequate authority and skills to perform this function.
3. **Train the regulators**. Ensure that formal, properly designed programs exist to give regulators the skills required to do high quality RIA.
4. **Use a consistent but flexible analytical method**. The benefit-cost principle should be adopted for all regulations, but analytical methods can vary as long as RIA identifies and weighs all significant positive and negative effects and integrates qualitative and quantitative analyses. Mandatory guidelines should be issued to maximise consistency.
5. **Develop and implement data collection strategies**. Data quality is essential to useful analysis. An explicit policy should clarify quality standards for acceptable data and suggest strategies for collecting high quality data at minimum cost within time constraints.
6. **Target RIA efforts**. Resources should be applied to those regulations where impacts are most significant and where the prospects are best for altering regulatory outcomes. RIA should be applied to all significant policy proposals, whether implemented by law, lower level rules or ministerial actions.
7. **Integrate RIA with the policy-making process**, beginning as early as possible. Regulators should see RIA insights as integral to policy decisions, rather than as an 'add-on' requirement for external consumption.
8. **Communicate the results**. Policy makers are rarely analysts. Results of RIA must be communicated clearly with concrete implications and options explicitly identified. The use of common format aids effective communication.
9. **Involve the public extensively**. Interest groups should be consulted widely and in a timely fashion — likely to mean a consultation process with a number of steps.
10. **Apply RIA to existing as well as new regulation**. RIA disciplines should also be applied to reviews of existing regulation.

Source: OECD (1997a).

The use of RIA in OECD countries is improving the scrutiny of regulatory proposals (and, in some countries, existing regulations) and the empirical basis for decision making. While acknowledging non-compliance and quality problems associated with incomplete implementation of RIA, the OECD (2002b) noted:

> … there is nearly universal agreement among regulatory management offices that RIA, when it is done well, improves the cost-effectiveness of regulatory decisions and reduces the number of low-quality and unnecessary regulations. RIA has also improved the transparency of decisions, and enhances consultation and the participation of affected groups. Undertaken in advance, RIA has also contributed to improve[d] governmental coherence and intra-ministerial communication. (p. 48)

5.2 Commonwealth RIA and OECD best practice

The key features of the Commonwealth Government's RIS requirements were outlined in the previous chapter. To better appreciate the basis for selecting RIA practices in other jurisdictions for discussion in this chapter, it is useful to make some observations about the Commonwealth's process in relation to OECD best practices.

The Commonwealth Government is recognised amongst OECD member countries as being one of the leaders in the implementation of RIA. The RIS requirements set out in *A Guide to Regulation* (ORR 1998) have a high degree of consistency with OECD RIA best practices (see box 5.1). Table 5.1 provides an overview of the key features of the Commonwealth's RIA process, in relation to these best practices.

The strengths of the Commonwealth Government's system include:

- its wide scope, both in terms of the regulatory instruments and types of bodies covered;
- RIS requirements apply to reviews of existing regulations as well as to new proposals;
- a cost-benefit methodology that seeks to assess all important economic, social and environmental impacts, but at the same time is flexibly applied based on the principle of proportionality;
- independent assessment of RISs by the ORR; and
- the monitoring and reporting of compliance (where Australia is well ahead of most countries).

Table 5.1 **Commonwealth RIS requirements compared to OECD best practices**

OECD Best Practice	*Features of Commonwealth System*
Maximise political commitment to RIA	• Current RIS requirements announced by the Prime Minister (CoA 1997). • Requirements set out in *A Guide to Regulation* (ORR 1998), endorsed by Cabinet in September 1997. • ORR provides advice on adequacy of RISs, but no formal certification requirement on ministers or their officials.
Allocate responsibilities for RIA program elements carefully	• Departments and agencies responsible for preparation of RISs. • Independent assessment by ORR. • Failure to comply does not affect the validity of regulation — up to Cabinet/Government to determine whether to dispense with RIS requirements, postpone policy approval, or require subsequent preparation. For major instances of non-compliance, ORR can inform Parliamentary Secretary to the Treasurer (not a member of Cabinet), who is responsible for ensuring regulatory best practice. • ORR reports annually on compliance with requirements as part of the Productivity Commission's Annual Report series.
Train the regulators	• Training of officials by ORR, ranging from formal seminars to meetings/advice. • Manual on RIS requirements *A Guide to Regulation* (the Guide) and example RISs available, including on web site. • Limited in-house training and guidance provided by some departments and agencies.
Use a consistent, but flexible analytical method	• All significant economic, social and environmental costs and benefits must be identified, but degree of detail and depth of analysis (and requirement for quantification) depends on the significance and impact of proposals. • Must include specific assessment of the impact on small business and ways to minimise the paperwork burden, and a Trade Impact Assessment if the proposal affects exports. • COAG CPA[a] requirements must be met for proposals which maintain or establish restrictions on competition. • RIS has seven elements: identification of the problem; objective(s); feasible regulatory and non-regulatory options; assessment of impacts of each option; consultation statement; recommended option; and a strategy for implementation and review. • A more limited RIS is required for taxation proposals.
Develop and implement data collection strategies	• Some guidance material provided in the Guide. ORR provides advice on data issues and consultation strategies.

(Continued next page)

Table 5.1 **(continued)**

OECD Best Practice	*Features of Commonwealth System*
Target RIA efforts	• Subject to limited exceptions, a RIS is mandatory for all proposed regulation or review of regulation which affects business (imposes a cost or confers a benefit) or restricts competition. Regulation includes primary and subordinate legislation, treaties and quasi-regulation. • Requirements apply to all bodies proposing regulations. • A RIS is not mandatory for regulation that: – is of a minor or machinery nature and does not substantially alter existing arrangements; – involves consideration of specific Government purchases; – is required in the interest of national security; – is legislation which merely meets an obligation of the Commonwealth under an international agreement; – is excluded from consultation in the Legislation Instruments Bill 2002; or – is a regulation of a State or self-governing Territory that applies in a non-self-governing Territory. • In emergency situations, RISs need to be prepared *after* regulatory action has been taken. • No specific guidance provided on how the terms 'significant' and 'substantial' should be interpreted. • ORR devotes more resources to proposals of high significance where a higher level of analysis is expected.
Integrate RIA with the policy-making process	• Departments and agencies required to consult the ORR at an early stage in the policy development process. • RIS should be prepared once an administrative decision is made that regulation may be necessary and must be presented to the relevant decision maker. • Review terms of reference should reflect key elements of the RIS, with any reports, studies or discussion papers using a RIS framework.
Communicate the results	• Common format generally required, addressing seven elements of a RIS, as set out in the Guide.
Involve the public extensively	• Requirement that those affected are consulted unless consultation considered inappropriate. • RIS must incorporate consultation statement, summarising views or reasons why consultation was inappropriate. • Final RIS for Bills and disallowable instruments must be tabled. RISs for other instruments should be otherwise made public (for example, on a web site), but not a requirement. • Release of 'draft' RIS for public consultation is encouraged, but not required.
Apply RIA to existing as well as new regulation	• RIS required for reviews of existing regulations.

a COAG (1995).

Sources: OECD (1997a); ORR (1998).

The discussion in this chapter focuses on aspects of the implementation of RIA systems where the experience of other jurisdictions is of most interest to the Commonwealth. The features of RIA programs that are highlighted have been chosen because they:

- address perceived gaps or weaknesses in current Commonwealth policies;
- have been identified by the OECD as promising or possible best practices; or
- are interesting or novel approaches to common problems with the implementation or application of RIA policies and tools currently employed by the Commonwealth Government.

As noted in earlier chapters, there has been limited *ex post* evaluation of the performance of specific regulatory quality tools and strategies. The inclusion of practices from other jurisdictions in this and the next chapter should not be taken as necessarily indicating their effectiveness in practice. Also, what might be appropriate for one country may not be successful in another because of political, cultural and administrative differences.

The rest of the discussion in this chapter should be read in conjunction with the information on best practices outlined in box 5.1.

5.3 Maximise political commitment to RIA

In most OECD countries, RIA requirements are embodied in high level instruments such as laws, prime ministerial decrees, or presidential orders. As noted in chapter 4, the Commonwealth RIS requirements were announced by the Prime Minister and are set out in the Cabinet endorsed *A Guide to Regulation* (ORR 1998).

In most Australian jurisdictions and many OECD countries, RIA requirements and other regulatory policy tools have been adopted in legislation. This can promote transparency and signal the importance that the Government places on the processes, which in turn can contribute to a higher level of commitment by ministers and government officials. Because of the difficulties and delays typically associated with making legislative amendments, regulatory quality policies embodied in legislation can be harder to change. One advantage of this is that any requirements become less susceptible to pressures for their removal or watering down. However, a disadvantage is that making worthwhile refinements to the policies can also be more difficult.

It is important that governments periodically communicate their continuing commitment to regulatory quality policies, including RIA. The OECD (2002b, p. 29) noted that 'by 2000, all OECD member countries with regulatory quality policies stated that the policies have been either issued, revised, or reaffirmed by the present government'. In April 2003, the United Kingdom Cabinet (Cabinet Office (UK) 2003b) reaffirmed the Government's commitment to the RIA process and to improving compliance with the requirements, with the following statement:

> We will keep this [compliance] under 6 monthly review and strive not only to maintain this level of compliance but improve it. In addition, we recognise the need to increase the quality of RIAs and the value they add to the policy-making process. We are working closely with departments to identify ways of achieving this.

Recognition of the political benefits of RIA and other regulatory quality tools can be an important motivation for ensuring a strong and ongoing commitment by governments. As noted by the OECD (1999d, p. 10):

> RIA can aid the political success of Governments by improving policy efficiency, thereby releasing resources to pursue other goals. Recognition of this aspect of RIA at the political level is key to obtaining the support of politicians and interest groups for its continued use and development.

Ministerial accountability

The previous chapter noted that the Parliamentary Secretary to the Treasurer has responsibility for Regulatory Best Practice at the Commonwealth Government level. This includes an oversight role in relation to compliance with the RIS requirements.

The OECD (2002b) found that having a minister responsible for RIA and the promotion of regulatory quality increases effectiveness. Such a minister (preferably a senior minister/member of Cabinet) can 'champion' RIA and good process more generally, creating additional pressure on ministerial colleagues to apply such best practice processes.

In the United Kingdom, a Minister for Regulatory Reform is appointed to each of the key regulatory departments. These ministers are responsible for the quality of RIA within the department. They are required to report regularly to the Panel for Regulatory Accountability on their regulatory activities and the performance of their department (see box 5.2).

In countries such as Canada, the Netherlands, Korea, and Mexico a Committee of Ministers has responsibility for managing and coordinating regulatory reform — in

the latter two cases the Committees also have private sector representatives. In Canada, a Cabinet Committee (The Special Committee of Council) is responsible for 'the oversight, review and overall government co-ordination of regulations' (OECD 2002d, p. 59). The institutional arrangements in the other three countries are discussed in the next chapter (see section 6.2).

Box 5.2 **Regulatory Reform Ministers in the United Kingdom**

Ministers for Regulatory Reform — appointed to each of the key regulatory departments — are charged with removing any regulations which are outdated or burdensome, and ensuring that new regulations are not introduced unless they are necessary and impose the minimum cost on business.

Regulatory Reform ministers report to the Panel for Regulatory Accountability on progress on regulatory issues, including how many new regulations each government department has introduced and how many it has abolished. Departments report their regulatory performance to the Cabinet Office, with ministers being responsible for signing off the RIAs of their departments.

Source: OECD (2002e).

Certification

The OECD suggests that, to 'further increase accountability, it seems to be useful to require that RIAs be signed by ministers or by high level officials' (2002b, p. 126).

In the Commonwealth system, the ORR is required to assess RIAs and advise the responsible Minister or Cabinet of its assessment of the adequacy of the analysis. However, there is no formal certification requirement on ministers or their officials.

In the United Kingdom, Canada and Victoria (see box 5.3), ministers with regulatory responsibilities must personally sign off the impact assessment or provide a compliance certificate. Similarly, for the development of national standards and regulations, under the requirements of COAG's *Principles and Guidelines* (1997), RISs must be certified by the relevant Ministerial Council or national standard-setting body.

A variation on this approach involves senior officials certifying compliance. For example, it is a requirement under the Commonwealth Government's Cost Recovery Policy that CRISs are certified by agency heads.

Box 5.3 **Ministerial certification of RISs in Victoria**

Under the *Subordinate Legislation Act 1994*, the responsible Minister must, before a statutory rule in respect of which a RIS is required is made, provide a compliance certificate in writing specifying that:

- the requirements relating to the RIS have been complied with; and
- in the opinion of the Minister, the RIS adequately assesses the likely impact of the proposed rule.

The certificate is signed by the Minister when the RIS process is complete. A copy of the certificate must be given to the Scrutiny of Acts and Regulations Committee as soon as practicable after the statutory rule is made.

Source: Information supplied by the Victorian Office of Regulation Reform in response to an ORR survey in 2002.

In Mexico, RIAs for proposed laws, presidential regulations and decrees must be signed off by high-level officials such as the Deputy Minister, and for other subordinate regulations by general directors, before being sent to the Unidad de Desregulacion Economica (UDE) — an economic deregulation unit in the Ministry of Trade and Industry. While a lack of credible sanctions for non-compliance is considered by the OECD to be a major weakness in most RIA systems, Mexico has adopted very heavy penalties for non-compliance. Officials can be removed from their post and face a one year suspension from the public service.

In New Zealand, officials preparing Cabinet papers on behalf of the Minister must include a certifying statement in the Cabinet paper that the RIS and Business Cost Compliance Statement (BCCS), where relevant, comply with the requirements. In Tasmania, the responsible Minister must, after the RIA is prepared, obtain a certificate from the Secretary of the responsible agency certifying that the RIA complies with the requirements and that the nature and extent of the consultation is appropriate. Failure to abide by this process results in the required endorsement to have the regulations approved by Executive Council not being provided. In Queensland, agency heads must sign a compliance certificate, which must accompany the proposed instrument for the information of Cabinet and Executive Council.

Further discussion of policies and institutional arrangements relevant to maximising political commitment is included in the next chapter under the heading ‘Managing and coordinating regulatory reform’.

5.4 Allocate responsibilities for RIA program elements carefully

Experiences in OECD countries suggest that RIA is unlikely to be effective if left entirely to regulators, or if it is too centralised. In the Commonwealth, as in virtually all jurisdictions, responsibility for preparing the RIA rests with the department or agency sponsoring the regulation. This improves 'ownership' and contributes to cultural change and integration of RIA into decision making. Also, the regulatory bodies typically have access to the best information and expertise. In its report on the Netherlands (OECD 1999b), the OECD suggested that the very active and interventionist role taken by the help desk (see 'Train the regulators' below) had meant that regulating ministries felt a diminished sense of responsibility for the conduct of RIA and, arguably, for the quality of the final product.

Quality control within regulatory agencies

Officers responsible for drafting RIAs need to have the required skills and there should be sufficient coordination, oversight and quality assurance within agencies. The systematic implementation of internal quality control mechanisms is perhaps even more important than external oversight for the achievement of the necessary long-term cultural change within agencies.

While there have been some encouraging recent developments (see chapter 4 and PC 2002, p. 42), some Commonwealth departments and agencies have not introduced internal RIS quality control processes. In this context, certain practices employed in other jurisdictions to achieve better internal oversight are of interest.

In the United Kingdom, Departmental Regulatory Impact Units (DRIUs) have been established in each government department. These are satellites of the central Cabinet Office Regulatory Impact Unit (RIU), which is responsible for independent external oversight of impact assessments and regulatory quality overall. The DRIUs carry out the day-to-day work of coordinating regulation activities and advising regulators. DRIUs act to cull unnecessarily burdensome regulations and inadequate RIAs. There are between one and four staff in each DRIU.

In Korea, responsibility for RIA has been allocated to senior officials within each Ministry and it is expected that adequate skills will be committed to the task of developing RIA. Regulatory agency heads have a responsibility to review the validity of the RIA conducted. This includes a requirement that they seek and obtain views from relevant experts.

In Ireland, a senior official of the Department of the Prime Minister, in charge of the Strategic Management Initiative, is responsible for the implementation of the regulatory reform policy. Senior officials at an equivalent level are responsible in each department for implementation of the regulatory reform program in their respective departments and for reporting on progress.

In accordance with a new law, the United States' Office of Management and Budget recently issued government-wide guidelines covering the quality of information disseminated by federal agencies. More critical 'influential' information is subject to higher quality standards. Each agency must now issue their own tailored guidance compatible with the general guidelines, with the objective of ensuring the quality, objectivity, utility and integrity of information distributed by the agency. The guidelines state that data and analytical results presented in RIA will generally be taken to have satisfied the objectivity criterion if they have undergone formal independent external peer review (see box 5.4).

Independent oversight

The OECD has found that an external independent quality control unit is also desirable to oversee quality and consistency. According to the OECD, where countries have not clearly identified independent oversight functions and authorities, regulating ministries and agencies have shown less commitment to RIA. By 2000, 11 OECD countries had established central oversight bodies to review RIA quality. Ten of these require the central oversight body to review all RIAs prepared (OECD 2001d).

Oversight bodies perform a variety of functions, including reporting on compliance with RIA, providing technical assistance and reviewing the quality of individual RIAs. The most powerful oversight bodies are established at the centre of government and have the resources and technical capacities to conduct reviews and the power to enforce RIA requirements.

As noted in chapter 4, for regulation making at the Commonwealth level, the oversight function is performed by the Office of Regulation Review, located in the Productivity Commission — an independent statutory body.

In the United States, the Office of Information and Regulatory Affairs (OIRA), part of the Office of Management and Budget (OMB), located in the Executive Office of the President, has substantial authority under a Presidential Executive Order to review rule-making proposals. OIRA reviews the most important regulations three times:

1. at the planning stage during preparation of the annual Regulatory Plan;
2. before they are published for comment in the Federal Register (the national gazette); and
3. at the final stage before publication as a finished rule.

OIRA's role is: to review the regulations and the impact analyses in order to identify decisions and policies that are not consistent with the President's policies, principles and priorities; to coordinate among agencies; to discuss any inconsistencies with the regulators; and to suggest alternatives that would be consistent. OIRA generally has up to 90 days to perform its regulatory reviews. OIRA has recently diversified its skills base by recruiting staff with science and engineering expertise — the aim being to enhance the ability of the Office to deal with more technical issues. In a complementary initiative, OIRA is forming a scientific advisory panel comprised of academics with specialised expertise in economics, administrative law, regulatory analysis, risk assessment, engineering, statistics and health and medical science.

In some jurisdictions, central agencies (or different areas within the same agency) work together to ensure adequate scrutiny of regulatory proposals. For instance, in several countries (for example, the United States and the United Kingdom) agencies with responsibility for small business interests coordinate with the bodies responsible for RIA oversight on appropriate small business impact analysis. In the ACT, the Microeconomic Reform Section of the Department of Treasury oversees the RIS process, but other Treasury sections provide an opportunity for peer review of RISs where specialist expertise is required. The Policy Group within the Chief Minister's Department also acts as a source of quality control on the RIS process, reviewing all submissions prior to their lodgement with Cabinet.

In Victoria, the responsible Minister must ensure that independent advice is sought to confirm the adequacy of the RIS. This advice can be provided by the Victorian Office of Regulation Reform, a consultant, or a unit within Government that has the necessary expertise and is independent from those developing the policy and the proposed statutory rules.

In the United States, OIRA recommends that draft RIAs be subjected to formal, external peer review by independent experts. OIRA has developed some guiding principles for peer review procedures (see box 5.4) and gives 'a measure of deference to agency analysis that has been developed in conjunction with such peer review procedures' (see OMB 2002).

Box 5.4 **Guiding principles for peer review**

In the United States, the Office of Information and Regulatory Affairs (OIRA), part of the Office of Management and Budget (OMB), recommends the following guiding principles for peer review.

1. Peer reviewers should be selected primarily on the basis of necessary technical expertise.
2. Peer reviewers should be expected to disclose to agencies prior technical/policy positions they may have taken on the issues at hand.
3. Peer reviewers should be expected to disclose to agencies their sources of personal and institutional funding (public and private).
4. Peer reviews should be conducted in an open and rigorous manner.

Source: OMB (2002).

Enforcing RIA requirements

Credible sanctions for non-compliance can be an important strategy for achieving better integration of RIA into policy-development processes and the necessary cultural change within regulatory agencies.

There are three main mechanisms by which the Commonwealth Government encourages compliance with its RIS requirements. As outlined in the previous chapter, these are:

- ORR reporting to the decision maker (for example, Cabinet) on the adequacy of RISs, prior to decisions being taken — but the ORR has no power to delay or prevent the consideration of any regulatory proposal not accompanied by a RIS or one for which an inadequate RIS has been prepared;
- ORR reporting of serious non-compliance issues to the Parliamentary Secretary to the Treasurer (responsible within the Government for regulatory best practice); and
- annual public reporting of compliance for individual departments and agencies, including noting of any non-compliance for significant regulations.

While the above measures do provide an incentive for improved compliance, they represent relatively mild sanctions in the case of non-compliance. In some jurisdictions stronger sanctions take the form of giving independent oversight bodies effective 'challenge' or 'gatekeeper' powers to enforce RIA requirements.

In Canada, the Regulatory Affairs and Orders in Council Secretariat (RAOICS) of the Privy Council has the power to refuse to allow a proposal to go to Cabinet on the basis of inadequate analysis. The Special Committee of Council needs a completed RIA and written confidential comments on the RIA provided by RAOICS before considering and deciding on the proposals that ministers submit to the Governor in Council for approval.

In the United States, OIRA has the power to return regulatory proposals to agencies for reconsideration if there are significant concerns about the proposal or if it is not supported by adequate impact analysis. Under President Bush's administration, the number of 'return letters' has increased substantially, a reflection of how serious OMB is about ensuring the quality of new regulations. This has provided a strong incentive for agencies to involve OIRA at an earlier stage of the regulatory development process (OMB 2002).

In Korea, legislation requires agencies to submit both the RIA and the results of their internal self-reviews to the Regulatory Reform Committee, along with a summary of the views of parties consulted. This material forms the basis of the review by the Committee. The Committee (supported by a Secretariat located within the Office of the Prime Minister) comprises the Prime Minister, six ministers and representatives from the economics profession, business and academia. The Committee has the power to recommend that proposals be withdrawn or modified.

In Italy, the Department of Legal and Legislative Affairs (DAGL) determines, directly or through the Regulatory Simplification Unit (Nucleo), whether the RIA requires further work. Although the DAGL cannot block an individual measure, it has the authority to delay it and can, with the Nucleo, send a report directly to the Prime Minister on the inadequacy of ATN (mandatory report on legal drafting) and RIA reports.

In Mexico, UDE's statutory powers permit it to delay the implementation of regulatory proposals, oppose the establishment of business formalities,[1] and make public its opinion. The Office of the President's Legal Council requires that any proposals submitted to it without an accompanying RIA be returned to the proposing ministry and resubmitted.

In the ACT, Draft Cabinet submissions do not receive Treasury endorsement if their associated RIS fails scrutiny either in terms of analysis or content. Departments/agencies are required to address Treasury concerns prior to final

[1] Formalities are essentially paperwork and other procedural requirements (sometimes called 'red-tape') associated with the administration of, and compliance with, regulations.

submissions going to Cabinet for decision. Cabinet Office in the Chief Minister's Department may reject submissions not meeting the required standard.

It has been suggested that there may be a potential conflict between an independent oversight bodies' performance of its RIA advice and support function and its role as enforcer. The OECD (2002b) has argued that there may be a case for a separation of the challenge function and the advisory function:

> Because an objective assessment can be very disruptive in terms of regulatory processes (especially if RIA is not conducted and assessed as early as possible in the policy process), a clear separation between the regulatory oversight body, as the examiner of RIA, and the gatekeeper to the Cabinet, may be required in order to preserve the independence and freedom to act on the former. Similarly, the requirement for a clear distance between the role of assessor and of enforcer needs to be maintained, in order to safeguard a robust assessment process, reduce any potential 'conflict of interests', and create a tension for the regulatory oversight body between its challenge function and its advice and support function. Developing too close relationships in the context of carrying out the latter can clearly tend to undermine its ability to carry out the former role in a strong and independent manner. (p. 89)

Oversight by the Parliament

RISs are tabled in the Commonwealth Parliament with draft legislation. Debate on Bills, disallowance motions for subordinate instruments and certain Committee deliberations sometimes draw on the analysis contained in RISs. However, as is the case in most OECD countries, there is no real oversight of RIA by the Parliament.

In several Australian States, Parliament has specific responsibilities, set out in subordinate instruments legislation, for ensuring that RIA requirements are properly met. For example, in NSW, the Parliamentary Regulation Review Committee examines all regulations in accordance with various criteria, including whether the regulation adversely impacts on business and whether there are better alternatives. It receives RISs and submissions in respect of them within 14 days after the publication of a principal statutory rule in the Government Gazette.

Monitoring and reporting of compliance

As noted in the introduction to this chapter, the Commonwealth Government is relatively advanced in the area of compliance reporting. The ORR has well developed databases and methodologies for monitoring and evaluating compliance with RIS requirements and these continue to be refined. Nevertheless there are some practices in other jurisdictions that are worth examining. Of particular interest is the practice of making individual RIA assessments public before regulations are

finalised. This contrasts with Australia's compliance reporting, which is published only after the regulations are made or tabled.

In the United States, the process of review of regulations by OIRA is impressively transparent. OIRA publishes detailed information (updated daily) on the OMB website about the regulations and impact analyses it has reviewed. This includes a table of regulations by agency and type of action taken. Copies of correspondence with agencies is also available on the website, which makes transparent the reasons for action taken (including returns — see 'Enforcing RIA requirements' above). Information on meetings (meeting date, topic, lead agency and participants) and written correspondence from outside parties on regulations under review by OIRA is also posted on the website and copies of the letters are available on request.

Mexico's UDE publishes, on its web page, a listing of all proposals currently under review and indicates if they complied with RIA requirements. The UDE also sends fortnightly reports to the Comptroller General on the degree of compliance with RIA requirements. These reports allow the Comptroller General to issue warnings to non-compliant ministries. To track the quality of RIAs and to identify systematic problems, the UDE has implemented a simple internal RIA scoring system. Fourteen elements of RIAs are assessed, and a grade ranging from minus 2 (very bad) to plus 2 (very good) is assigned to each.

Although there is no public reporting of non-compliance in New Zealand, Cabinet papers (which from 1 August 2002 include comments on the adequacy of the RIS/BCCS) are subject to the Official Information Act regime and, generally, will be publicly released if requested.

In the Australian States, the Parliament plays a key role in monitoring compliance with RIS requirements. In the case of NSW, the Parliamentary Regulation Review Committee's role includes reporting instances of non-compliance with the RIS requirements.

5.5 Use a consistent, but flexible analytical method

Several RIA methods are employed in OECD member countries: cost-benefit analysis, cost-effectiveness or cost-output analysis, fiscal or budget analysis, socio-economic impact analysis, consequence analysis, compliance cost analysis and business impact tests. Some countries assess only selected impacts such as those on small business, administrative and paperwork burdens, environmental impacts, international trade, effects on sub-national governments, women, employment and rural communities.

There is a strong international trend toward the adoption of more rigorous and comprehensive methodologies over time. More countries are using cost-benefit analysis — 19 OECD countries were using it for some or all regulations in 2000, compared with only two or three countries in 1990 (OECD 2002b). For example, Canada's 'socio-economic impact analysis' requirement changed in 1986 to 'general impact analysis' and to the use of formal cost-benefit and cost-effectiveness analyses in 1992. In 1998, New Zealand moved from a compliance cost assessment framework to a more comprehensive cost-benefit framework, including a requirement that RISs include a statement of the proposal's net benefit. No country has dismantled an RIA policy or moved to a substantially less rigorous form of analysis. All important costs and benefits are now required to be assessed in almost half of OECD countries, while just over a quarter of OECD countries assess selected benefits and costs (OECD 2001d).

Cost-benefit test

Consistent with best practice, the Commonwealth RIS requirements are based on a cost-benefit framework. The analysis must include an assessment of all significant economic, social and environmental costs and benefits for all affected groups, with the depth of analysis commensurate with the significance of the impacts (see below).

In many countries, including Australia, there are pressures from sectional interests for special sectoral analysis to be included in RIA, for example, impacts on small business, regional impacts and effects on people with disabilities. It is important that impacts on different segments of society are identified, measured and discussed in RIA, wherever they are significant. As noted below, the depth of analysis should be proportional, with the impacts on stakeholder groups most affected analysed in more detail. However, placing undue priority on effects on specific groups or sectors can risk a loss of focus on the main objective of ensuring that aggregate benefits, for the community as a whole, are maximised.

To enhance objectivity and comparability, RIA must make use, where cost effective, of quantitative data. The United States carries out perhaps the most rigorous and comprehensive quantitative analysis of any OECD country, with quantitative benefit-cost analyses prepared for nearly all major social regulations. Principles in place since 1981 require that regulations not be issued unless regulators demonstrate that benefits exceed costs. Regulators must show why they should regulate, and demonstrate that regulation is the most beneficial feasible approach. Similarly, in Canada, there is a requirement that each regulatory proposal 'maximises net benefits to Canadians' (OECD 2002d, p. 56).

The Australian COAG RIS requirements have a similar net benefit test. An adequate RIS must demonstrate 'that the benefits of introducing regulation outweigh the costs (including administrative costs)' (COAG 1997, p. 13). In the Commonwealth RIS requirements, such a test is identified as an underlying principle 'the benefits of any regulation to the community should outweigh the costs' (ORR 1998, p. A1). Notwithstanding this principle, demonstration of a net benefit is not an explicit part of the adequacy criteria, except for proposals which maintain or establish restrictions on competition. Consistent with requirements under the *Competition Principles Agreement* (COAG 1995), for such proposals it must be established that:

- the benefits to the community outweigh the costs; and
- the Government's objective can be achieved only by restricting competition.

Analysis commensurate with significance

An important feature of the Commonwealth RIS process is the overriding requirement that 'the degree of detail and depth of analysis must be commensurate with the magnitude of the problem and with the size of the potential impact of the proposals' (ORR 1998, p. D19). This is consistent with OECD advice (2002b, pp. 129–130) that regulators should have some flexibility in the analytical methods applied and the extent of quantification required.

> This recognises that good economic analysis requires professional judgement, and cannot be the result of applying a formula. The number of permissible analytical methods should be reduced to a few, essentially consisting of a more rigorous method for high-cost regulations and a less rigorous method for low-cost regulations.

No specific written guidance is available to Commonwealth regulators on how to determine the appropriate level of analysis. The ORR advises departments and agencies on a case-by-case basis. By contrast, in Mexico, guidelines specify three broad levels of analytical rigour and effort, depending on the importance of the regulation. Importance is indicated by a combination of monetary and qualitative tests (see box 5.5).

Box 5.5 **Mexico's approach to determining the appropriate level of analysis**

Low impact. Total annual costs do not exceed 5 million pesos (A$1 million[a]). Negligible impact on employment and business productivity — no quantification required; qualitative description of costs and benefits.

Medium impact. Annual costs between 5 and 500 million pesos (A$1 million to A$100 million[a]). Non-negligible impact on employment and productivity. Affects some economic sectors, but effects are neither substantial nor generalised — quantification of costs and benefits that are suited to quantification; and qualitative description of the rest.

High impact. Annual costs greater than 500 million pesos (A$100 million[a]). Generalised impact on multiple sectors of the economy, employment and business productivity. Substantial impact on a particular sector, industry or region — complete quantification of all costs and benefits.

a Australian dollar value equivalents have been calculated using the purchasing power parity adjusted exchange rate, sourced from OECD (2002a).

Source: OECD (1999a).

Staged RIA process

The Commonwealth RIS requirements call for a RIS at the decision-making stage and at the tabling (or transparency) stage. However, at both stages a full impact analysis is required and generally the tabling RIS is virtually identical to the earlier decision RIS.[2] There is no provision for draft or preliminary impact assessments.

A staged RIA process — with an initial screening involving preliminary analysis to determine whether more detailed RIA analysis is necessary — can help ensure cost-effectiveness. In the United Kingdom, for example, an RIA has to be available, in the form of a partial RIA when collective ministerial agreement is being sought to the principle of legislation or regulation in a particular area. An expanded RIA is required when public consultation is being carried out. Subsequently, a full regulatory impact assessment is developed to include the results of public consultation and is the basis on which ministers decide on action.

2 Where the proposal or alternatives considered have changed after a decision is made, the RIS may be revised. The transparency RIS, which is made public, may also not contain confidential or sensitive information that was made available to decision makers.

RIA is also based on a two-stage process in Italy, Canada, the United States and the European Commission (EC). In Italy, a preliminary assessment needs to be prepared before the text of the law is written — focusing mainly on justification and alternatives — and a full RIA with more in-depth analysis of compliance costs must accompany the final text when submitted to the Council of Ministers for approval (or before adoption of a subordinate regulation not reviewed by the Council). In the EC's impact assessment requirements, the two stages are Preliminary Impact Analysis (PIA) and Extended Impact Analysis (EIA). The PIA resembles the first four sections of a Commonwealth RIS, while the EIA addresses the full set of Commonwealth RIS requirements.

Assessment of compliance costs

The Commonwealth Government's requirements, as set out in the Guide (ORR 1998), make it clear that compliance costs imposed on business must be addressed in RISs where significant. However, as noted in the previous chapter, the Productivity Commission has stated that there is considerable scope for improvement in the standard of analysis of these costs, notwithstanding inherent difficulties often encountered in assessing compliance costs. At present RISs usually contain a relatively brief, and typically qualitative, assessment of the compliance cost burden.

In countries such as the United States, United Kingdom and New Zealand, departments and agencies routinely undertake more considered quantified assessments of regulatory compliance costs.

In New Zealand, departments are obliged to give detailed consideration to the compliance cost implications of proposed regulations (see box 5.6). All policy proposals submitted to Cabinet which require a RIS and which have compliance cost implications for business should include a Business Compliance Cost Statement (BCCS).

While the ORR is seeking to improve the general standard of compliance cost analysis, it is important not to lose sight of the fundamental requirement, already mentioned above, that the level of analysis needs to be commensurate with the significance of the proposals and the likely magnitude of impacts. Quantitative estimates of compliance costs will therefore not always be efficient for less significant proposals.

The Commonwealth Guide provides some helpful information on the nature of compliance costs, however, only limited guidance is provided on approaches to measurement. Other jurisdictions provide more detailed guidance on assessment of compliance costs.

Box 5.6 **Business compliance cost analysis in New Zealand**

A Cabinet Office Circular sets out the requirements for Business Compliance Cost Statements. The statements should identify:

- the source of any compliance costs;
- the parties likely to be affected, by sector and size of firm;
- quantitative (if possible) or qualitative estimates of compliance costs (both in aggregate and upon individual firms, persons);
- the longer term implications of the compliance cost for business — are they one-off costs? Will they be reducing over time?
- an assessment of the risks associated with any estimates and the level of confidence that can be placed on the compliance cost assessment;
- the key issues related to compliance costs identified in consultation;
- any overlapping compliance requirements with other agencies; and
- the steps that were taken to ensure that compliance costs were minimised.

Source: MED (2001).

The OECD (2002b, p. 128) highlights the guide produced by the RIU in the United Kingdom as a particularly good example[3]:

> … the … 'Guide to Regulatory Impact Assessment' provides an exceptionally well-designed set of tasks guiding the analyst in drawing a vivid picture of cost and benefit magnitudes and their distribution across those affected by regulation. Total cost estimates must be accompanied by analyses showing the effects on a 'typical' business and on small businesses.

In New Zealand, the *Business Compliance Cost Statements — Guidelines for Departments* (MED 2001) also contain relatively comprehensive guidance on analysing compliance costs, including key steps and worked examples. The Ministry of Economic Development has reinforced this written guidance with specific training presentations that have a significant focus on practical methods for quantifying compliance costs.

A more general discussion of training and guidance material is included in section 5.7. Further discussion of the measurement of compliance costs is included under the 'Data collection strategies' heading below and in the next chapter (section 6.6).

[3] A revised guide was recently published — *Better Policy Making: A Guide To Regulatory Impact Assessment* (Cabinet Office (UK) 2003a).

Consideration of implementation and enforcement issues

As noted in chapter 4, *A Guide to Regulation* indicates that Commonwealth RISs should address compliance and enforcement issues, but detailed guidance is not provided.

Implementation and enforcement issues are addressed particularly well in the RIA requirements of Mexico and the Netherlands. In Mexico, implementation and enforcement schemes must be described in detail (sanctions, verification mechanisms, etc) and the regulatory ministry/agency has to explain where it expects to obtain the resources needed to apply the proposed regulation effectively. In the Netherlands, four of the 15 specific questions that guide RIA preparation, deal with feasibility and enforceability. In addition, separate requirements address compliance and enforcement as part of the process of making legislation and Cabinet regulations. A detailed checklist is available to help guide regulators in a systematic consideration of compliance and enforcement issues (see discussion of compliance and enforcement in chapter 6).

5.6 Target RIA efforts

RIA efforts should be targeted and prioritised. Effort and resources should be concentrated on those regulations where impacts are most significant and where the prospects are best for improving regulatory outcomes. Tailoring the depth of analysis to the significance of the impacts and the use of preliminary screening were discussed above as methods for improving the cost-effectiveness of RIA once requirements have been triggered. It is also important that tests of significance are used to identify those regulations that are likely to fall below a threshold at which RIA is likely to be cost effective.

Targeting mechanisms must be well designed, with clear and objective criteria that minimise the risk of politicisation of the process or the possibility that important regulations will slip through without appropriate scrutiny.

Under the Commonwealth RIS requirements, proposals must be ‘non-minor’ in order to trigger the need for a RIS. This mechanism for targeting more significant proposals is given effect through an exception for regulation that ‘is of a minor or machinery nature and does not substantially alter existing arrangements’ (ORR 1998, p. A3). However, no specific guidance is provided on how ‘minor’ should be defined and it has been left to the ORR to ensure a consistent interpretation. Further, once the requirements are triggered, departments and agencies must submit all RISs prepared to the ORR for advice and an assessment of their adequacy prior to decision making.

The RIS requirements in Australian State and Territory subordinate legislation Acts have, in one sense, a broader trigger than the Commonwealth requirements in that they cover impacts on the 'community' rather than being confined to business impacts. However, in other respects the Commonwealth requirements are wider in scope.

- The Commonwealth requirements cover all forms of regulation, including quasi-regulation, while RIS requirements in some States are confined to subordinate legislation.[4]
- State and Territory arrangements focus only on negative impacts, while proposals that afford significant benefits also require a RIS under the Commonwealth arrangements.[5]

The States and Territories all have fairly similar threshold significance tests:

- Queensland and ACT — appreciable costs on the community or a part of the community;
- Victoria — appreciable economic or social burden on a sector of the public;
- South Australia — non-trivial impacts on the community;
- Tasmania — significant burden, cost or disadvantage on any sector of the public; and
- New South Wales — appreciable burden on the public.

In Queensland, the question of whether the impacts are 'appreciable' remains a matter of judgement, but guidance is provided, including a range for monetary costs (see box 5.7).

Several OECD countries are also using monetary thresholds as a 'rule of thumb' for determining significance, usually in conjunction with other criteria. A risk associated with relying solely on such thresholds is that regulators have an incentive to understate impacts so that they come in just below thresholds or package ('unbundle') several related proposals in such a way as to avoid triggering the requirements.

[4] RIS requirements apply to primary legislation in South Australia and the ACT. In Tasmania, the implementation of National Competition Policy requirements has also extended RIS requirements to certain primary legislation.

[5] The South Australian requirements do not distinguish between positive and negative impacts in determining whether a RIS is required.

Box 5.7 **Threshold significance test in Queensland**

In determining whether there is an appreciable impact that triggers the RIS requirements, departments may have regard to whether the legislation:

- involves major government spending for which Cabinet approval has not previously been sought and which may flow on as indirect costs to the community;
- is likely to impose costs or burdens on the community in the vicinity of $500 000 a year or $5 million over a ten year period, in present value terms;
- affects a sensitive policy area;
- is likely to have a significant impact on particular groups within the community;
- is likely to have a significant impact on the legal rights of any particular part of the community; and
- is likely to have a significant social or environmental impact.

Departments can seek advice from the Business Regulation Reform Unit (BRRU) on the necessity for a RIS, but consultation with the BRRU is not mandatory.

Source: Information supplied by the Queensland Business Regulation Reform Unit in response to an ORR survey in 2002.

The Korean RIA system requires at least a rough estimate of costs for all regulations, while significant regulations are subject to the full RIA requirements. Significant regulation is defined as those that have an annual impact exceeding 10 billion Won (A$18 million[6]); an impact on more than 1 million people; a clear restriction on market competition; or a clear departure from international standards.

The United States adopts similar criteria, requiring a full cost-benefit analysis where annual costs are estimated to exceed US$100 million (A$133 million) or where rules are likely to impose major increases in costs for a specific sector or region, or have significant adverse effects on competition, employment, investment, productivity or innovation. Out of around 4500 federal regulatory actions that occur on average each year, roughly 500 are judged to be 'significant' and only about 70 are considered 'economically significant'. To maximise the expected benefits of the review process, only significant actions are subject to independent review by OIRA. Only the economically significant rules are required to be supported by an RIA — between 1 and 2 per cent of the final regulations published each year (OMB 2002).

In the United Kingdom, the criteria for judging whether a proposal requires a full RIA include: significant costs (for instance, costs in any year in excess of

6 All Australian dollar value equivalents in this section have been calculated using the relevant purchasing power parity adjusted exchange rate, sourced from OECD (2002a).

£20 million (A$41 million)); high topicality or sensitivity; or a disproportionate impact on a particular group (for example, small business). The Scrutiny Team tends to focus on those RIAs with the potential for a very significant effect on business, typically about half the RIAs produced.

The Netherlands adopts a two part approach to targeting RIA effort. The first stage involves the application of a set of criteria (similar to those outlined above), with the effect that only about 8 to 10 per cent of draft regulations are subjected to RIA. In the second stage, a Ministerial Committee reviews the regulatory proposal and determines which of the 15 standard questions contained in the Directive governing RIA must be answered for each regulation.

5.7 Train the regulators/data collection strategies

Regulators must have the skills to conduct high quality RIA, including an understanding of essential methodological and data collection issues. It is also essential that they understand the purpose of RIA and the need for it to be integrated into policy development processes. Although, it must be added that the skills required to prepare a good RIA should not be considered novel or extra skills. They are the same 'core' skills required by departments and agencies to make good policy.

Formal training and guidance materials, typically provided by independent oversight bodies, but increasingly being developed 'in house' by regulatory agencies, are the main tools used to educate officials charged with preparing RIA. In some countries, including Australia, external consultants are, increasingly, being commissioned to undertake the preparation of the RIA document. In such cases, if the RIA is not to be simply an 'add-on' at the end of the process, it is vital that the officials who have responsibility for advising decision makers understand and use the RIA framework in designing and managing the consultancies.

Training and guidance material

The OECD (2002b) emphasises the value of examples and case studies in guidance material. The best materials also include practical guidance on data collection and methodologies. Regular revision of guidance documents is also recommended.

> Updating [including example RISs] is also important in order to ensure that new learning about regulatory tools, methods and institutions is properly reflected in the guidance material. (OECD 2002b, p. 128)

Effective guidance material must be accessible and easily understood by regulatory officials with limited technical training. However, at the same time there is a need to provide detailed guidance to support high quality RIA. While the Commonwealth Government has a single guide that seeks to strike the required balance, other jurisdictions supplement general 'high level' guidance with more detailed materials on specific topics, such as principles of good regulation, use of regulatory alternatives, compliance cost assessment, and other methodological aspects.

In the United Kingdom, the RIU in the Cabinet Office and other departments and agencies such as Treasury and the Small Business Service, have produced detailed guidance on different aspects of conducting RIA. Guidance exists on the procedural aspects of conducting RIA, on consultation and on methodological issues, as well as approaches toward small firms. Particularly comprehensive and detailed guidance is provided on the assessment of compliance costs. The RIU regularly runs seminars, formal training sessions and workshops on RIA. RIU is also involved in training officials through the Civil Service College's training courses on policy making. Specific RIA training courses are also incorporated into broader training programs for civil servants in Italy and Korea.

The United States' guide is very comprehensive and helpful guidance is provided on a range of methodological issues. OIRA is in the process of refining these guidance documents and has sought input from agencies as well as public comment on the particular analytical issues that should be addressed.

Canada provides training courses and one of the most extensive ranges of manuals and guidance material. Many of these are available electronically via the website of the Privy Council Office. Subject matter covered in guidance documents includes: assessing regulatory alternatives; undertaking cost-benefit analysis; composing RIAs; developing compliance policies; managing regulatory programs; international regulatory collaboration; the federal regulatory process; and enlightened practices in regulatory programs. Training courses on regulation making are provided by Consulting and Audit Canada. RAOICS has joined with the Canadian Centre for Management Development in providing regulatory best practice seminars directed at regulators and regulatory managers and has also contributed to training courses directed at the government legal community.

A key point of difference with the Commonwealth's implementation of its RIS requirements is that, in Canada, departments themselves also offer extensive in-house training to their staff, tailored to the specific regulatory programs they manage. Departments have hired cost-benefit specialists to improve the quality of analysis, strengthened internal coordination and priority setting through enhanced regulatory affairs units and internal regulatory affairs committees, and improved departmental process manuals and training programs. RAOICS and departments

have provided guidance and training materials on-line. This includes a simplified process guide and interactive access to Government policies and information on best practices in analysis of regulatory proposals.

In Queensland, the Business Regulation Reform Unit (BRRU) runs a structured training program on the RIS process and encourages the examination and adoption of alternatives to prescriptive regulation. There are a number of guides available, including RIS Guidelines and Guidelines on Alternatives to Prescriptive Regulation (BRRU 2000). Special software is also available to agencies to assist in the development of RISs.

Some OECD countries have established help desks as a means of offering expert advice to ministries. An inter-ministerial help desk in the Netherlands permits regulators to discuss assessments with specialists in the relevant areas (for example, business impact, environmental impact) at an early stage.

Mexico has used the scoring system (see above) as the basis for targeting technical RIA assistance — greater assistance has been provided to those ministries and agencies where previous scores have been low and this has been successful in raising the quality of RIAs. For the 30 per cent of RIAs where assistance was provided, average scores were about 25 per cent higher than the average score for all RIAs reviewed.

Data collection strategies

Public consultation is one important means of collecting information, verifying data quality and checking the assumptions that underlie regulatory proposals. This can be particularly effective if consultation is conducted on the basis of a draft RIA (see 'Involve the public …' below).

In addition to consultation, other targeted means of collecting information have been developed by a number of countries. For example, in Denmark, Business Test Panels facilitate feedback from a cross-section of businesses about the expected administrative burdens of proposed legislation. As the precision of test panel data appears to be low, the system is largely used as an 'early warning system' for unanticipated major impacts. The Commonwealth has made use of business focus groups and pilot test programs, but not on a systematic basis.

The Danish model enterprise program is intended to produce more robust data than the Business Test Panels. It consists of the selection of a number of 'model' enterprises that are statistically representative of their particular industry segment

and the use of existing statistical databases to compute total administrative burdens from extensive interviews with a limited number of model enterprises.

Canada also has a program to improve data collection for RIA. There are two cost-estimating aids, an interactive, software-based 'Business Impact Test' and a 'Business Impact Cost Accounting Protocol' (see box 5.8). A further discussion of the measurement of compliance costs is included in the next chapter (section 6.6).

The Netherlands help desk is able to assist ministries with the design of analyses, the collection of necessary data and its analysis and interpretation. The help desk's resources include the services of a statistician, who is available without charge to ministries. The help desk can also make funds available to agencies to finance necessary research.

Box 5.8 **Canadian Business Impact Test Process**

The business impact test *process* has two stages. The first is the BIT, which is a survey used to identify business expectations of the impacts of proposed regulation. In the second stage, these expectations are verified and analysed using the Business Impact Cost Analysis Protocol (BICAP).

Business Impact Test (BIT)

The BIT is a survey tool that is focused on identifying the sources and causes of regulatory problems. It assists in the gathering of information on how regulations affect firms' operations. It also provides a consistent, structured, framework within which businesses can contribute to regulatory discussions. This gives some protection against unexpected consequences and allows fuller and more informed comparison of various regulatory options.

A BIT software package is available. It can be used to design electronic surveys.

Business Impact Cost Analysis Protocol (BICAP)

The BICAP is an interview-based approach to verifying cost data combined with an accounting methodology for costing regulatory impacts. The interviews are with business managers and are aimed at establishing how practices change as a result of regulation.

BICAP includes two accounting protocols that are aimed at identifying the cost of regulation. These are focused on estimating a firm's cost of complying with current regulations and proposed new regulation.

The BICAP methodology is based on business function analysis, cost reduction and cost accounting methodologies.

Source: Industry Canada and Treasury Board (nd).

5.8 Integrate RIA with policy-making process

Integrating RIA with the policy-making process is essential if the scrutiny and analytical rigour it brings are to become a routine part of policy development and potential benefits are to be maximised. Integration is a long-term process, which often requires significant cultural changes both within regulatory agencies and by decision makers that use the analysis. This cultural change is yet to be effectively realised in most jurisdictions:

> [RIA's] degree of integration with policy decision making is low in almost all cases. It is typically regarded as an additional procedural requirement that, at best, explains the merits of a policy decision rather than determining the decision itself. This is a certain symptom of the absence of the cultural change required within the administration to implement the regulatory policy agenda. (OECD 2002b, p. 101)

Notwithstanding the Commonwealth Government's requirement that RISs be provided to decision makers (and the advice in the Guide that they should be prepared as early as possible in the policy development process), the ORR has reported that RISs for Commonwealth regulatory proposals are often prepared too late, after decisions have effectively been taken (see chapter 4).

Good system design, strong political commitment, effective training and guidance, and appropriate incentives/sanctions and accountability mechanisms can all play a part in achieving the cultural change necessary for the effective integration of RISs into policy development.

In Denmark, a preliminary RIA justifying proposals on cost-benefit grounds, is required at a relatively early stage. Before the Regulation Committee considers proposals for inclusion on the legislative program at the start of each parliamentary year, ministries must provide:

- a thorough description of the policy problem;
- a description of the purpose of the Bill;
- a description of the expected impacts on business, citizens, the environment and public authorities; and
- demonstrate that alternatives to traditional 'command and control' regulation have been considered.

The two-stage nature of the RIA requirements in Canada, together with the integration of RIA with the consultation process and the use of the RIAs as supporting documents to inform Cabinet decisions, have contributed to better integration.

5.9 Involve the public extensively

Public involvement in RIA has several benefits. The public, and especially those affected by regulations, can provide the data necessary for the analysis. Consultation can provide valuable feedback on the feasibility of proposals and on the range of alternatives considered. It can also contribute to greater acceptance of the proposed regulation by affected parties.

The Italian RIA manual suggests a number of consultation strategies, including opinion surveys, direct interviews and the use of focus groups. More open consultation mechanisms reduce the risk that selective provision of data by particular sectional interests will unduly influence policy. The use of independent expert groups, such as academic and other research bodies, can also be an important strategy for ensuring the quality of data. These and other good practice principles for consultation are discussed in chapter 6.

Denmark has several mechanisms designed to ensure public involvement. At the earliest stages of policy development, the committee structure used for developing legislative proposals ensures wide representation of both experts and interest groups and can facilitate collection of RIA data. The Business Test Panels facilitate input on specific proposals from a large number of businesses. The practice of releasing legislative proposals for public consultation provides another opportunity for input into policy content and impact assessments. The results of business impact assessments conducted as part of the RIA process are made available on the Internet.

Public release of draft RIA

Releasing RIAs for consultation, along with the draft regulatory texts, can improve the quality of information on the likely impacts of regulatory proposals. It can also contribute to greater acceptance of the RIA as a basis for decision making.

While the ORR encourages departments and agencies to use draft RISs to better inform and focus public consultation, it is not a requirement under the Commonwealth system. In contrast, the release of draft RISs is an important feature of the RIS requirements under the COAG Principles and Guidelines for intergovernmental standard setting and regulatory action. This provides an opportunity for 'valuable feedback on the costs and benefits of regulation and on the impact analysis generally' (COAG 1997, p. 12). It is not unusual for the impact analysis to change quite significantly between the draft and final RIS in response to comment from stakeholders. This suggests that the practice of releasing draft RISs

has been effective in improving the quality of information provided to decision makers.

A minority of OECD countries that use RIA consistently make the draft RIA public at the consultation stage. However, it is common practice in Australian States and Territories.

The Canadian RIA is an evolving document, commencing at the time of 'pre-publication' of a regulatory proposal for comment. It is published again in amended form prior to the adoption of the final regulation and is also sent to Cabinet as a supporting document to inform its decision to adopt the regulation.

The United States is another country that has fully integrated public consultation into RIA. RIAs are required to be released to the public at both the proposed and final stages as part of the 'notice and comment' process that allows all interested members of the public to comment on the assumptions and results of the impact analysis. OMB has attempted to become more closely involved with agencies during the drafting of major rules. Input at an earlier stage of development potentially maximises OMB's ability to achieve change, improve quality and reduce conflict at the formal review stage. In its report on the United States, the OECD reported that some 60 per cent of regulations are changed during OMB review (OECD 1999c).

In New South Wales, Victoria and Tasmania, a RIS must be released as part of the consultation process, with a minimum period allowed for comments. For example, in Tasmania, consultation is mandatory for both primary and subordinate legislation where RIA is considered necessary. Once the RIA and the overall public consultation program has been approved by the State's Competition Policy Unit, advertisements need to be placed in relevant local newspapers or other publications inviting submissions on the RIA. A minimum of 21 days must be allowed for receipt of submissions. In most instances, particular interest groups are directly provided with a copy of the RIA. All submissions made on the RIA need to be fully considered and documented.

5.10 Communicate the results

RIA must be communicated to decision makers with impacts and options clearly identified. Use of a common format aids effective communication and an executive summary or page limit may maximise usefulness in informing decision making. It is also important that the final RIA (and as noted above, ideally a draft RIA) is made available to the public so that the basis for regulatory decisions is transparent to the broader community.

Commonwealth RISs have a standard format, which addresses the seven essential elements. There is no requirement for executive summaries and no page limit applies, although the ORR provides advice to agencies, where appropriate, on strategies for improving the reader friendliness of RISs. Final Commonwealth RISs for bills and disallowable instruments must be tabled in Parliament and, although the publication of RISs for other instruments is strongly encouraged, there is no requirement to do so.

In New Zealand, the RIS usually has a three page limit and the BCCS has a one page limit. However, this is intended to be a guide only. The rule is not applied at the expense of comprehensive disclosure and analysis, and supporting documentation is expected to be available on request. European Commission impact assessments must include an explanatory memorandum, which is similar to an executive summary.

In New Zealand, RIS/BCCSs are required to be attached to the press statement announcing any new policy, lodged on the responsible department's website and a dedicated Ministry of Economic Development website, and included in the Explanatory Note to Bills that are introduced to Parliament.

5.11 Summary findings

The analysis in this chapter suggests that a number of aspects of the design and implementation of RIA systems in operation overseas and in other Australian jurisdictions may merit further consideration. In particular, there would appear to be significant scope for learning from the approaches of other governments in the areas of:

- maximising political commitment;
- targeting to ensure that RIA resources are allocated most efficiently;
- integrating requirements into policy development processes;
- data collection strategies; and
- sanctions for non-compliance.

A summary of selected RIA practices in relation to the above points and other areas, is provided in table 5.2. These have been linked to the OECD best practices that were presented in box 5.1. This summary should also be read in conjunction with table 5.1, which compared key features of the Commonwealth RIS requirements with OECD best practices.

Table 5.2 **Summary of selected RIA practices in other jurisdictions mapped to OECD best practices**

OECD Best Practice	*Selected RIA practices from other jurisdictions*
Maximise political commitment to RIA	• High level ministerial committees responsible for the oversight, review and coordination of regulations. Examples include the Special Committee of Council in Canada (a Cabinet Committee) and the Regulatory Reform Committee in Korea (includes the Prime Minister and six ministers as well as non-government members). • In the UK, ministers for Regulatory Reform assigned to key departments are required to report to Panel for Regulatory Accountability. • Ministerial sign-off or certification of RIA, for example, in United Kingdom, Canada and Victoria and for national standards and regulations under the COAG Principles and Guidelines. • Sign-off or certification of RIA by senior officials in Mexico, New Zealand, Tasmania and Queensland.
Allocate responsibilities for RIA program elements carefully	• Responsibility for RIA allocated to senior officials within each ministry; this is the case for example in Korea where agency heads must also review validity of RIA. • UK Cabinet Office Regulatory Impact Unit (RIU) at the centre of a system of satellite departmental Regulatory Impact Units (DRIUs). • In the US, agencies are required to issue their own guidance ensuring and maximising the quality and objectivity of information, including RIAs. • In the US, OIRA has the power to return proposals and require further analysis. In Canada, RAOICS can stop a proposal going to Cabinet and, in Mexico, the Office of the President's Legal Council will not consider any proposals submitted without a RIS. In the ACT, the Cabinet Office may reject submissions with inadequate RIA. • In the Netherlands, comments on RIAs are received from other ministries and the Helpdesk. • In Victoria, responsible Minister must ensure that independent advice is sought to confirm adequacy of RIS — either from a consultant, the Victorian Office of Regulation Reform or other units within Government with suitable expertise and independence. • In several Australian states Parliament has specific responsibilities for ensuring RIA requirements are met. • OIRA in the USA and the UDE in Mexico publish information on their web pages on current proposals under review, including RIA compliance status. The UDE also sends fortnightly reports on compliance to the Comptroller General, who can issue warnings to non-compliant ministries. UDE has also implemented a simple internal RIA scoring system. • In NZ, Cabinet papers — which include comments on adequacy of RISs/BCCSs — are generally released to the public on request.
Train the regulators	• UK RIU has comprehensive approach to training, including providing training through Civil Service College training courses on policy making (Italy and Korea also include such training for officials as part of their overall strategies).

(Continued next page)

Table 5.2 **(continued)**

OECD Best Practice	*Selected RIA practices from other jurisdictions*
	• Help desks offer a means of providing expert advice (used for example in the Netherlands). • In the UK, detailed guidance available on different aspects of conducting RIA, including procedural aspects, compliance costs, methodological issues, consultation and assessing small business impacts. US and Canada also have particularly good guidance material. • Software aids used, for example in Canada and Queensland. • In Canada, departments offer extensive in-house training, and develop regulatory process manuals tailored to the specific regulatory programs they manage, and many have hired cost-benefit specialists.
Use a consistent, but flexible analytical method	• US carries out perhaps the most rigorous and comprehensive quantitative analysis of any OECD country, but this detailed benefit-cost analyses is targeted at major regulations. • Explicit net-benefit test (for example, US, Canada and COAG). • In Mexico, three broad levels of analytical rigour and effort are distinguished by guidelines, depending on the importance of the regulations. • Many jurisdictions use a two or three-stage RIA process to improve cost-effectiveness — with an initial screening involving preliminary analysis to determine whether more detailed analysis is necessary (for example, Italy, Canada, the US and the UK). • Detailed guidance on compliance cost assessment (for example, UK and NZ). • Implementation and enforcement issues are addressed particularly well in the RIA requirements of Mexico and the Netherlands (a detailed checklist is available to guide regulators). • Mexican RIAs must include a very detailed description and justification of any formalities created, modified or maintained by proposed regulation.
Develop and implement data collection strategies	• Denmark's Business Test Panels and Model Enterprise Program are used for collecting information on compliance costs. • Two cost-estimating aids are used in Canada — 'Business Impact Test' software and a Business Impact Cost Analysis Protocol — to improve data collection for RIA. • Netherlands Help Desk assists ministries with the design of analyses, data collection, the analysis and interpretation of data, access to a statistician and funding for necessary research.
Target RIA efforts	• Several jurisdictions use monetary tests as a 'rule of thumb' for determining those regulations that meet threshold significance requirements or a combination of a monetary and other tests (for example,US, Korea, UK and Queensland). • In the States and Territories (with the exception of South Australia), only negative impacts trigger the RIS requirements. All have threshold significance tests that are broadly similar — appreciable costs; appreciable economic or social burden; non-trivial impacts; or significant burden, cost or disadvantage.

(Continued next page)

Table 5.2 **(continued)**

OECD Best Practice	*Selected RIA practices from other jurisdictions*
	• Independent review of RISs by oversight bodies is typically selective, focusing on RISs for more important regulations only (for example, UK and US).
Integrate RIA with the policy-making process	• Adoption of a staged RIS process can facilitate integration and improve cost-effectiveness (for example, the UK, Canada and the US). Release of draft RISs for consultation can also contribute to better integration (see 'Involve the public…' below). • In Denmark, preliminary RIA is required quite early — at the time of consideration of proposals for inclusion on the legislative program at the start of each parliamentary year.
Involve the public extensively	• Releasing draft RIAs for consultation can improve the quality of information on impacts of regulatory proposals. This practice is used, for example, in Canada, the US and most Australian States and Territories and is a requirement under the COAG Guidelines. A minimum period must be allowed for comments in NSW, Victoria and Tasmania. • Denmark employs several strategies to ensure public involvement including: standard use of consultative committees for developing legislative proposals; release of proposals for broader public consultation; business test panels; and publication on the Internet of business impact assessments (part of RIA process).
Communicate the results	• Executive summary or page limit (for example, NZ) may maximise usefulness in informing decision making, provided that supporting detail is available on request. • In NZ, RISs/BCCSs must be attached to the press statement announcing any new policy and published on the web.

6 Other regulatory quality strategies

6.1 Introduction

Regulation Impact Analysis (RIA) is just one of a range of strategies used to improve the quality of regulation. This chapter highlights some of the complementary practices that have been implemented overseas or in other Australian jurisdictions.[1] Whilst these practices can be employed as stand alone strategies they are most effective when implemented in a mutually supporting manner. Indeed one of the advantages of a comprehensive RIA approach is that it effectively embodies many of the individual strategies and tools, for example: public consultation; consideration of regulatory alternatives and strategies for reducing regulatory compliance burdens.

The intention in this chapter is not to provide a comprehensive discussion of the range of practices used in other jurisdictions, but instead to identify particular experiences that might have lessons for the Commonwealth. It is important to recognise that there has generally been insufficient evaluation of the performance of specific approaches to determine clear best practices. Further, what is appropriate for one jurisdiction, may not necessarily be suitable for another.

Selected practices in other jurisdictions — in relation to a number of the OECD recommended strategies identified in chapter 3 (see box 3.2) — are discussed under the following headings:

- managing and coordinating regulatory reform;
- ensuring regulatory transparency;
- consultation;
- assessment of regulatory alternatives;
- administrative simplification and reduction of compliance burden;
- review of existing regulation;

[1] As noted earlier, the discussion draws mainly on a series of country reports, prepared under the OECD's Regulatory Reform Program (see chapter 3), and on material supplied by the New Zealand and Australian governments in response to an ORR survey in 2002.

- compliance and enforcement; and
- evaluation of results of regulatory programs.

These are discussed in this chapter in sequential order.

6.2 Managing and coordinating regulatory reform

A well designed institutional framework is a very important element of a regulatory quality system. The role of the ORR and other key elements of the Commonwealth Government's institutional framework for regulatory management and reform were outlined in chapter 4.

A notable feature of systems in OECD countries is the variety of institutional arrangements that contribute to the achievement of better regulations. In response to an OECD survey at the end of 2000 (OECD 2001d), 23 out of 28 member countries reported that they had established a dedicated body to manage regulatory quality. These bodies take a number of forms, including: Cabinet committees or other inter-ministerial bodies; committees of senior officials; dedicated bodies within the administration (usually centrally located); oversight bodies comprising a mix of government and non-government stakeholders; and other bodies external to government. The functions of these bodies are varied, but nearly all are consulted when new regulations are considered. In more than half of respondent OECD countries, such bodies also conduct independent analysis of regulatory impacts, and just over 40 per cent have responsibility for reporting on overall reform progress made by governments. The functions of these regulation review bodies in relation to overseeing the quality of RIA were discussed in chapter 5. The following discussion focuses on the advocacy and performance monitoring functions.

There is a general consensus in OECD countries on the merits of having a dedicated body able to focus strategically on developing new tools and practices and on promoting long-term regulatory policy and institutional changes. This is closely linked to a performance assessment role, since reform advocacy should be based on an understanding of the benefits and costs of different approaches. Disseminating such information within government and to the community builds a better understanding of the impacts and benefits of certain reforms.

The institutional framework in the United Kingdom appears to have been especially effective in developing and promoting the regulatory reform agenda, with three institutions in particular playing important advocacy and performance monitoring roles. The Panel for Regulatory Accountability takes an overall view of the regulatory implications of the Government's regulatory plans and ensures necessary

improvements in the regulatory system and the performance of individual departments (see box 5.2, in chapter 5). The Panel comprises senior ministers and officials (including the Chief Executive of the Small Business Service) and the Chairman of the Better Regulation Task Force (see below). The Cabinet Office Regulatory Impact Unit (RIU) provides the secretariat to the Panel.

Private sector advocates of reform, such as advisory bodies, think tanks or other research bodies, can be helpful in identifying priorities and proposing reforms. The OECD (2002b, p. 90) highlights the United Kingdom's Better Regulation Task Force (BRTF) as an example of an oversight body that has played a 'large role' in advocacy of regulatory reform, that is:

> … the promotion of long-term regulatory policy considerations, including policy change, development of new and improved tools and institutional change …

The BRTF is an independent advisory group established to advise the Government on action which improves the effectiveness and credibility of regulation. The membership comes from business, citizen and consumer groups, unions, the voluntary sector and those responsible for enforcing regulations. The Task Force, which is supported by the RIU, has had a strong influence on setting the regulatory reform agenda and developed the 'Principles of Good Regulation' (Cabinet Office (UK) 2000c), which all government agencies must consider when making regulatory proposals. The Task Force undertakes studies of particular issues which it generally selects itself, but it also responds to requests by the Government. Reports are sent to the relevant ministers. The Prime Minister has instructed that ministers must respond to the BRTF reports within 60 days of publication. The Government has accepted and implemented a large proportion of BRTF's recommendations.

The OECD (2002b, p. 87) has found that some of the 'strongest central units to promote and oversee regulatory quality are in three countries with presidential systems — Mexico, Korea and the United States'. Mexico and Korea have created high level committees, with responsibilities for setting goals and priorities, monitoring compliance and reporting on outcomes (see below). In the United States, regulatory quality management has been built into the central management and budgeting institution (see chapter 5).

Two main bodies promote regulatory reform in Mexico — the Ministerial Council for Economic Deregulation (CDE) and, at the administrative level, the Economic Deregulation Unit (UDE) in the Ministry of Trade and Industry. The CDE is chaired by the Minister for Trade and Industry who reports directly to the President. Other senior ministers and officials are members, together with representatives of business, unions, rural workers and academics. At each meeting, the CDE considers

detailed performance indicators summarising the state of reform and a comprehensive list of approved and implemented proposals. The UDE provides the secretariat to the CDE.

The functions of the Regulatory Reform Committee in Korea include:

- responsibility for the basic direction of regulatory policy and research and development on the regulatory system;
- obtaining and responding to public opinions on regulatory improvement; and
- monitoring and evaluation of regulatory improvement efforts.

The Committee, which is supported by a unit within the Prime Minister's Office, includes the Prime Minister and six ministers, sitting alongside non-government members drawn from academia, the economics profession and business.

In the Netherlands a large number of centralised oversight bodies have been established with responsibility for different elements of regulatory management and reform (see box 6.1). The OECD notes that in some respects these institutional arrangements 'are among the most developed in OECD countries' and one of the advantages associated with multiple oversight bodies is that 'reform is carried out across a broad front and has numerous supporters or champions' (1999b, p. 123). However, more complex institutional arrangements can make coordination between reform bodies difficult.

Box 6.1 **Managing regulatory reform in the Netherlands**

- A Ministerial Committee chaired by the Prime Minister directs the reform process. Members include the Ministers of Justice and of Economic Affairs (also responsible for competition policy) — considered the 'co-ordinating ministers' for the reform program. All Cabinet ministers have a standing invitation to attend the Commission and, in practice, other ministers often participate.
- A high level independent Civil Service Commission identifies reform priorities and appoints *ad hoc* working groups to prepare specific proposals for the Ministerial Committee.
- The working groups comprise civil service members, but may also include experts from the private sector, academia, or local or provincial governments.
- Day to day centralised oversight and quality management (including operation of RIA 'helpdesk' — see chapter 5) is conducted by the Ministries of Justice and Economic Affairs.

Source: OECD (1999b).

In most jurisdictions, the Parliament does not play a very active role in advocating and managing regulatory quality issues. However, as noted in chapter 5, several Australian State Parliaments have a role in ensuring RIA requirements are met.[2] In Italy, the legislature also plays an important role. Every six months the Parliamentary Committee on Legislation prepares a report for the Parliament on the main problems identified in its reviews of draft legislation and the measures adopted. The report includes suggestions for further initiatives. The Committee has also promoted conferences on regulatory issues involving government and non-government organisations. The contribution of the legislature in this way can help to reinforce the quality controls adopted in the administration and help achieve the necessary cultural change within regulatory agencies.

Other noteworthy approaches to management and coordination of regulation review and reform include:

- Canada's *Deputy Minister's Challenge Team on Law-Making and Governance* was set up to promote effective regulatory management — it 'acts as a consultative think tank for the Government on regulatory policies … and has developed as an important forum for senior officials to discuss regulatory policy and propose developments' (OECD 2002d, p. 59).
- Denmark's *Regulation Committee* (comprising the Permanent Secretaries of the Prime Minister's Office and of the ministries of Finance, Justice, Economic Affairs, and Business and Industry) is responsible for developing policy on legislative quality and monitoring and ensuring its implementation.
- Ireland's *Implementation Group of Secretaries*, which comprises the heads of all Government departments and offices, is responsible for managing overall implementation, monitoring and development of the reform program and reporting progress across departments to the Congress.

6.3 Ensuring regulatory transparency

Transparency is a broad concept with a number of facets, including:

- transparency of the overall management of the regulatory system;
- transparency of processes for making, changing and reviewing regulations;
- transparency in communicating regulations; and

[2] While the Commonwealth Parliament's Senate Standing Committee on Regulations and Ordinances has no formal role in monitoring or enforcing RIS quality, the Committee does on occasion utilise RISs, published in explanatory materials, as part of its review of delegated legislation.

- transparency in applying and enforcing regulations.

The importance of ensuring regulatory transparency is reflected in the following statements by the OECD (2002b):

> Among all the governance reforms now underway, an increase in transparency may be the most fundamental and far-reaching in changing relationships. (p. 65)
>
> Transparency's importance to the regulatory policy agenda springs from the fact that it can address many of the causes of regulatory failures, such as regulatory capture and bias toward concentrated benefits, inadequate information in the public sector, rigidity, market uncertainty and inability to understand policy risk, and lack of accountability. (pp. 65–66)
>
> Transparency encourages the development of better policy options, and helps reduce the incidence and impact of arbitrary decisions in regulatory implementation. Transparency is also rightfully considered to be the sharpest sword in the war against corruption. (p. 66)

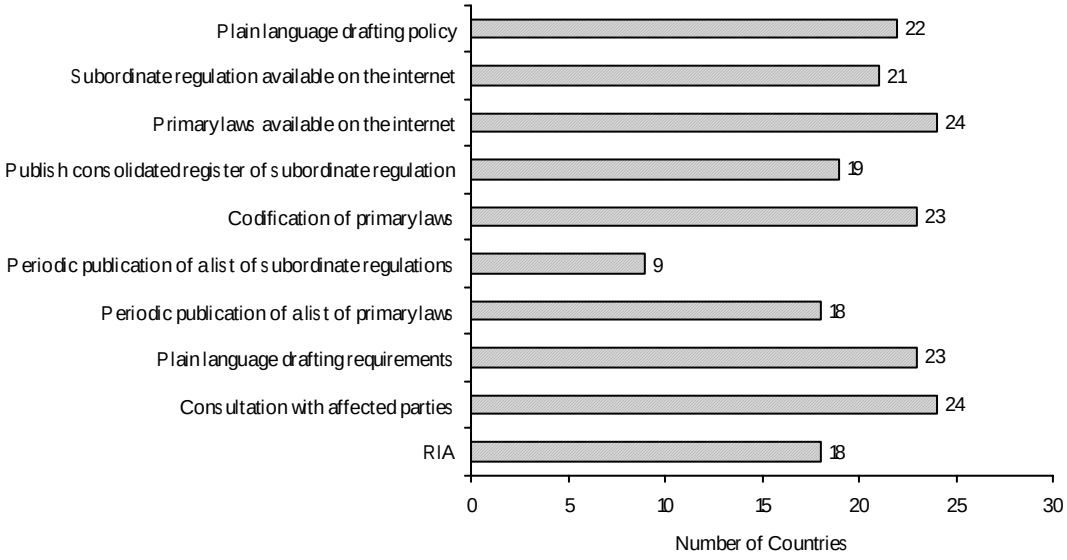
A number of specific regulatory quality tools employed in OECD countries (see figure 6.1) and in Australian jurisdictions contribute to greater transparency. Some of the main ones are:

- consultation with interested parties;
- forward planning of regulatory activities;
- regulation impact analysis;
- plain language drafting;
- legislative simplification and codification;
- registers of existing and proposed regulation;
- electronic dissemination of regulatory material; and
- controls on administrative discretion and corruption, including appeals processes.

In several OECD countries, for example Korea, Italy and the United States, many of these transparency tools are integrated into administrative procedures laws. These typically set out standard requirements for making, implementing, enforcing and revising regulations and also specify appeals processes.

The focus in the following discussion is on forward planning, plain language drafting and registers of regulation. Consultation is discussed under a separate section heading below.

Figure 6.1 **Transparency strategies in OECD countries**



Note: 28 OECD countries were surveyed.

Data source: OECD (2001d).

Forward planning

Commonwealth Government departments and agencies are required to prepare and publish (including on their web sites) annual regulatory plans — although compliance appears to be uneven and patchy. The Government's Regulatory Performance Indicators (see chapter 4, table 4.1) include 'proportion of regulatory agencies publishing an adequate forward plan'. According to DEWRSB (1999) guidance, an adequate plan should:

- be published in a way which makes it readily accessible to the business community; for example in an annual report, on the Internet, or by distribution to relevant business organisations;
- outline planned or likely regulatory activity expected to occur within a specified period, and should be published before that period starts;
- include information about reviews of legislation to be undertaken in the relevant period, including reviews underway at the beginning of the period;
- include information about policy development processes which will be taking place during the relevant period which could affect business regulation, where information about those processes is publicly available; and

- include information about Government decisions to develop or implement legislation during the relevant period to the extent where those decisions have been publicly announced.

Publication of plans is also an increasingly common strategy for improving transparency in other Australian and overseas jurisdictions. Some of the forward plans in these other jurisdictions include preliminary impact analysis. This is a strategy recommended by the recent Senate Small Business Employment Report.

> The Committee recommends that the Commonwealth maintains and publishes an annual consolidated register of regulatory changes with a summary of their objectives and impact on business as a tool to monitor the growing body of regulation. (CoA 2003, p. 115)

The approach adopted in the United States is one of the most comprehensive. It has three main elements.

- The *Unified Agenda of Federal Regulatory and Deregulatory Actions* is published twice a year and covers the entire administration. It includes details on the priority of regulations and preliminary analysis of impacts on SMEs and on other levels of government.
- The *Regulatory Plan* is published annually, but is restricted to the most important regulations. This document includes — for each proposed regulation — a statement of need and a description of the alternatives considered and of the magnitude of risks and risk reduction expected.
- Under the current Administration of President Bush, OIRA is taking a proactive role in suggesting regulatory priorities for agency consideration. This is done using 'prompt' letters to agencies, which are also made public. OIRA also invites members of the public to suggest ideas for prompt letters.

In Canada, regulatory plans provide Parliament with summary information on expected impacts of proposed regulations. In Korea, the focus is on planned reviews of existing regulations and consultation must be undertaken before formulating the plans. In Mexico, a longer-term strategic plan is published at the beginning of each six-year presidential term. From this overarching plan, programs are developed for individual ministries in consultation with interested parties. In addition, the President must submit an annual progress report to Congress.

In Queensland, interested members of the public can provide direct, low cost, feedback on proposed regulatory activities, via an interactive website that outlines the Government forward planning agenda.

Plain language drafting

Plain language drafting helps ensure that regulatory goals, strategies and requirements are clearly communicated to the public. Regulations must be easily understood if a high level of compliance is to be achieved and costs, associated with learning what is required, are to be kept to a minimum.

Plain language drafting is encouraged for Commonwealth primary and subordinate legislation. Expert drafters are employed, but it is not mandated under any formal policy.

Most OECD member governments have a general policy that requires the use of plain language drafting. These policies are typically supported by guidance material and/or specific training.

Registers of regulations

Registers of regulation enhance accessibility and therefore contribute to better understanding of laws and improved compliance. In addition to enhancing transparency, registers allow the size and scope of the regulatory system to be determined and monitored over time. They also contribute to better coordination within and between jurisdictions.

While all Commonwealth primary legislation and statutory rules are accessible via databases on the web site of the Attorney-General's Department, there is not a consolidated and comprehensive register of all subordinate instruments.

The adoption of centralised registers of laws and regulations is now widespread amongst OECD member countries. An important feature of many of these registers, for example in Korea, is that only those regulations that are included on the register are enforceable. The Commonwealth Parliament is currently considering a proposal to implement such a register of enforceable instruments as part of a broader Legislative Instruments Bill.

In Mexico, there is a clear link between RIA and the register of formalities.[3] Mexican RIAs must list and describe all formalities created, modified or maintained by the proposed regulation. New formalities cannot be added to the register unless justified in an RIA.

[3] Formalities are paperwork and other procedural requirements (sometimes called 'red-tape') associated with the administration of, and compliance with, regulation.

6.4 Consultation

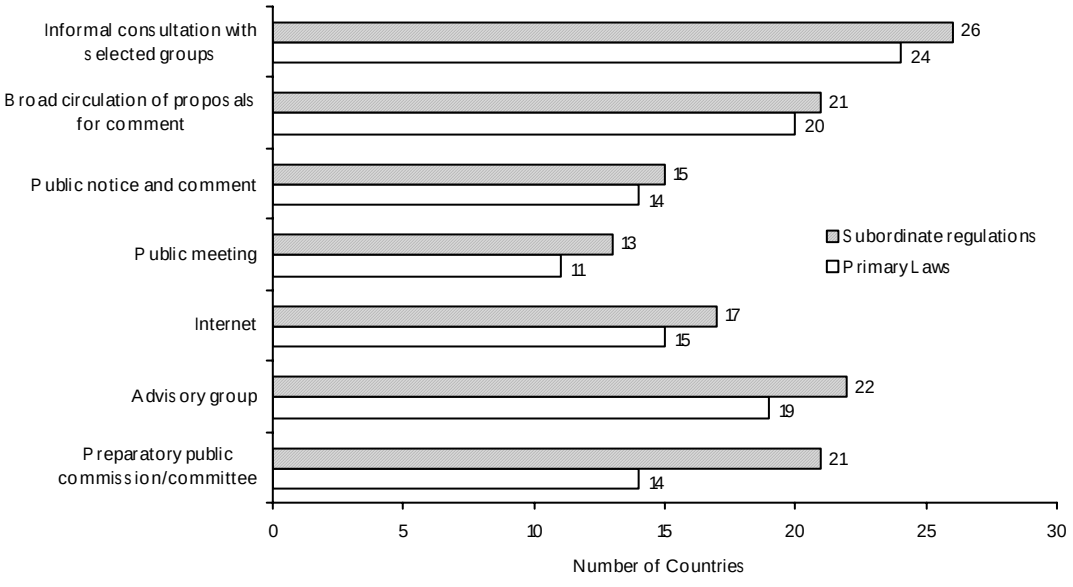
As noted in chapter 4, consultation is an important element of the Commonwealth's RIS process. There is, therefore, a general requirement to consult on new proposals or reviews of existing regulations that have a significant impact on business or restrict competition. Consultation contributes to regulatory quality in many ways. The 1995 *OECD Recommendation* (OECD 1995, p. 18) identifies a number of the benefits of consultation.

> i) bringing into the discussion the expertise, perspectives, and ideas for alternative actions of those directly affected; ii) helping regulators to balance opposing interests; iii) identifying unintended effects and practical problems; iv) providing a quality check on the administration's assessment of costs and benefits; and v) identifying interactions between regulations from various parts of government. Consultation processes can also enhance voluntary compliance, reducing reliance on enforcement and sanctions.

As well as building support amongst stakeholders for individual regulations, open, transparent and timely consultation processes enhance public confidence in the regulatory system generally.

In 2000, 20 out of 28 member countries applied systematic public consultation procedures to the development of new primary laws and another seven sometimes used public consultation. For subordinate regulations, only 14 countries reported that they have systematic public consultation procedures. The other half used public consultation sometimes or in some specific areas (OECD 2001d). A wide range of consultation strategies are employed (see figure 6.2).

Figure 6.2 **Forms of public consultation used in OECD countries**



Note: 28 OECD countries were surveyed.

Data source: OECD (2001d).

These range from informal contacts with selected stakeholders to the highly structured public notice and comment processes, which give all interested parties the opportunity to comment. In many countries, systematic consultation procedures are set out in legislation, for example Korea and the United States, while in other countries — such as the United Kingdom — detailed guidance is provided in policy directives or Codes.

The trend in OECD countries is generally toward more open, transparent and systematic processes. At the same time, there is increasing recognition of the benefits of flexibly combining different consultation tools — depending on the circumstances — including at different stages of the policy development process. There is substantial agreement amongst OECD countries on a number of best practice design principles for consultation processes (see box 6.2).

The United States has one of the most formal and standardised systems of public consultation. The Administrative Procedure Act of 1946 establishes a legal right for citizens to be consulted and mandates notice and comment procedures that must be followed by all agencies. While the Act allows agencies flexibility to develop their own procedures, certain minimum steps are required. In issuing a substantive rule, an agency must:

- publish a notice of proposed rulemaking in the Federal Register, including the text or substance of the proposed rule;
- provide all interested persons with an opportunity to participate in the rulemaking — the public must generally be given at least 30 days to comment in writing;
- consider any comments received and make all comments public in a formal rulemaking 'record'; and
- publish the final rule at least 30 days before the effective date of the rule.

The OECD (2002b) reports that more countries are adopting minimum standards for public consultation. For example, in the United Kingdom, a *Consultation Code of Practice* sets standards for consultation documents issued by government departments and agencies. Where they have not been followed, the document must include an explanation for any departure. A key element of the Code is the setting of twelve weeks as the standard minimum period for consultation (see box 6.3). The equivalent period is eight weeks in the European Commission's *General Principles and Minimum Standards for Consultation* (EC 2002b). In addition, the EC consultation principles and standards — which have a high degree of consistency with the OECD best practice principles set out in box 6.2 — suggest a minimum of 20 working days notice for meetings.

Box 6.2 **OECD best practice principles for consultation**

Consistency and Flexibility

Consultation programs must be flexible enough to be used in very different circumstances, but operate within a framework of minimum standards, in order to provide consistency and confidence.

- Minimum standards allow all parties to assess whether consultation has been properly undertaken and provide clear guidance for regulatory policy makers. Where widely understood procedures are employed, procedural problems can be identified.
- Consultation programs should include a range of strategies and approaches so as to offer wide access to affected groups and maximise information gathering.

Consultation should be broadly based and balanced

- Maximise participation (especially by less organised interests), minimise discretion in deciding who and when; make information widely accessible by:
  - innovative information dissemination including use of information technology;
  - plain language drafting and reader friendly formatting; and
  - clearly setting out issues and relationships between issues and outcomes.
- Structuring a continuing dialogue between parties can enhance the benefits derived from consultation.

Integration

- Consultation is most effective when information is made available early.
- Early consultation helps identify optimal policy options.
- Information on regulatory impacts can be collected more effectively if preliminary impact assessments are made available to the public.

Transparency and Responsiveness

- A systematic consultation policy facilitates public understanding of consultation. Consultation programs are more effective when regulators:
  - clarify why information is needed;
  - explain the process of decision making and opportunities for participation;
  - ensure public comments are appropriately taken into account; and
  - respond substantively to public comments.

Consultation 'habit' part of administrative culture

- Consultation policies must be explicitly supported at high political levels, and reinforced with staff training, incentives and resources.
- Ongoing investment in evaluation and review of consultation arrangements.

Source: Adapted from OECD (2002b).

Box 6.3 **United Kingdom Consultation Code of Practice**

The following criteria should be followed in all consultation documents of UK government departments and agencies:

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
2. It should be clear who is being consulted, about what questions, in what time scale and for what purpose.
3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.
5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.
6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed and reasons for decisions finally taken.
7. Departments should monitor and evaluate consultations, designating a consultation coordinator who will ensure the lessons are disseminated.

Source: Cabinet Office (UK 2000a).

Subordinate instruments Acts in several Australian States and Territories specify mandatory consultation procedures. For example, in New South Wales, comments and submissions on a proposed new regulation must be invited for a period of not less than 21 days. The responsible Minister is required to ensure that the notice — and information on how a copy of the regulation impact statement can be obtained — is published in the *Government Gazette*, newspapers and, where relevant, in professional magazines.

In some Australian jurisdictions, the government's policy on consultation is formalised in guidance material. For example:

- the Western Australian Government has issued best practice guidelines for consultation, *Consulting Citizens: A Resource Guide* (P&C (WA) 2002);
- the ACT Government's *Consultation Manual 2001* has been developed to help Government agencies with their consultation strategies (Department of Treasury (ACT) 2001); and

- in Queensland, consultation protocols are contained in *The Queensland Cabinet Handbook* (P&C (Qld) 2000).

Consultation fatigue — where stakeholders feel overwhelmed by requests for their input — is claimed to be emerging in some jurisdictions where there are frequent consultation opportunities. Well designed consultation processes that are consistent with the sorts of best practice principles outlined above in box 6.2 can minimise the risk of consultation fatigue. In particular, consultation should incorporate strategies to:

- reduce the cost of participation (including use of draft RIA; see chapter 5);
- allow adequate periods for responses; and
- generate confidence that feedback will be taken into account.

Notwithstanding that consultation is an integral element of the RIS requirements, the Commonwealth Government has issued little practical guidance on appropriate consultation mechanisms and there are no mandatory minimum standards. Therefore in practice ministers, departments and agencies have a considerable degree of discretion in deciding who, when and how to consult. As a consequence, there is significant variation in consultation practices between Commonwealth regulators.

6.5 Assessment of regulatory alternatives

A wide range of regulatory and non-regulatory alternatives are available to policy makers when considering solutions to problems that may require government action. These are part of a continuing regulatory spectrum ranging from:

- at one end — no regulation and self-regulation where there is no government involvement;
- at the other end — 'black-letter law' where government formulates and enforces legislation or regulation (some of the specific types of instruments were discussed in chapter 2); and
- in between — various quasi-regulatory regimes and mechanisms with increasing degrees of government involvement.[4]

Each of these broad alternatives has advantages and disadvantages when applied to different situations and therefore the question of which is best for dealing with a

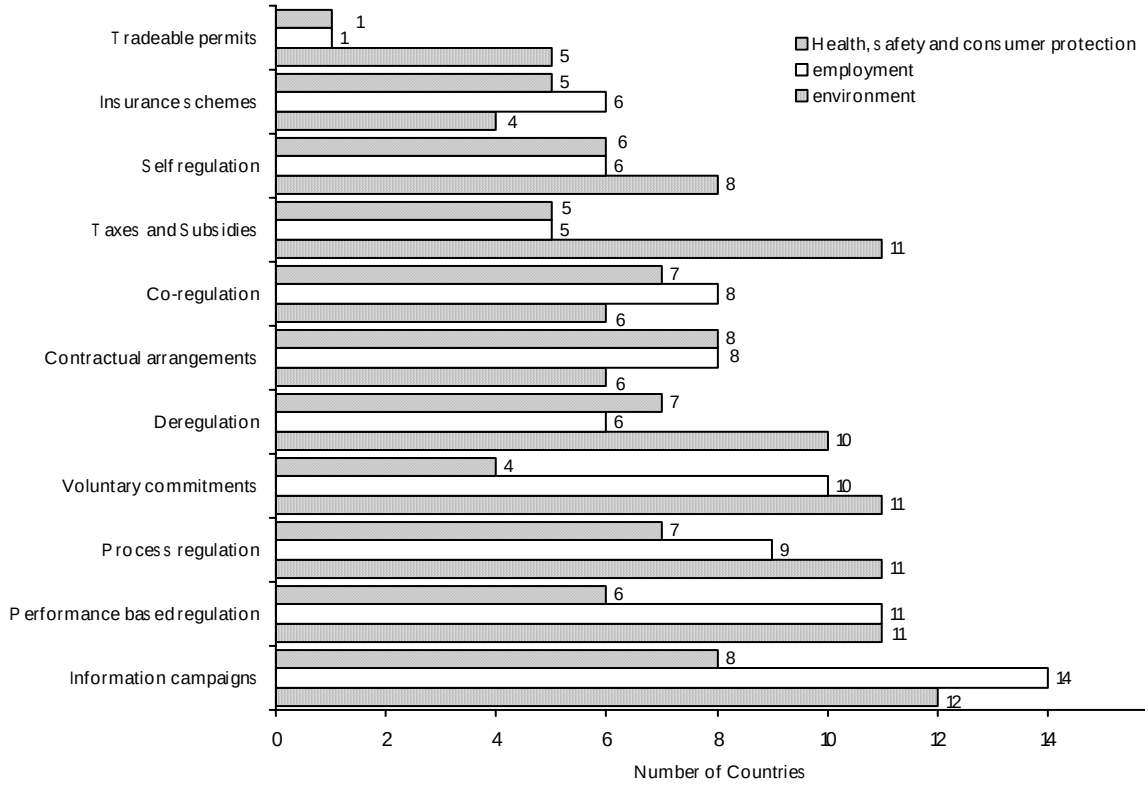
[4] Quasi-regulation was defined in chapter 2. For a detailed discussion of quasi-regulation, see CICQ (1997).

given problem needs to be addressed on a case-by-case basis. Having decided on the principal form of regulation, there are numerous specific approaches to choose from. Some of these more specific alternatives are included in figure 6.3.

Like the majority of OECD member countries, and other Australian jurisdictions, the Commonwealth Government requires regulators to assess regulatory and non-regulatory alternatives before adopting new regulation. The evaluation of feasible alternatives is an essential element of Commonwealth RISs and therefore the relative merits of a range of feasible options must be analysed.

Alternatives to black letter law (or traditional command and control) regulation are, increasingly, being used across a range of policy areas in OECD countries. The use of alternatives is most widespread in the area of environmental regulation (see figure 6.3). Member countries are also increasingly experimenting with combinations of different measures or instruments, in order to more effectively and efficiently address specific aspects of a regulatory problem.

Figure 6.3 **Policy alternatives used in OECD countries in major policy areas**



Note: 28 OECD Countries were surveyed.

Data source: OECD (2002b).

In addition to implementing processes that ensure systematic consideration of regulatory and non-regulatory alternatives, the OECD (2002b) has identified the provision of guidance to regulators on the use of alternatives, and the publication of a regular review of the impact and performance of regulatory alternatives, as best practice.

Good guidance material and training can be very effective in generating greater understanding and acceptance of the use of alternatives. The Commonwealth provides guidance on the use of alternative policy instruments in *A Guide to Regulation* (ORR 1998) and in training and advice provided by the ORR. The Guide includes a checklist to help officials identify the most suitable regulatory or non-regulatory approach.

Some jurisdictions provide more extensive guidance. Among the most comprehensive are the Canadian guidelines, including *Assessing Regulatory Alternatives* (RAOICS 1994), which were developed with input from industry, academic and departmental representatives. The Business Regulation Reform Unit (BRRU) in Queensland has also produced separate guidance material — *Guidelines on Alternatives to Prescriptive Regulation* (2000).

There is, understandably, some resistance amongst policy makers to experimenting with alternatives to command and control regulation because of the perception of greater risk associated with relatively untried approaches. Therefore, it is important that experiences with innovative policy tools are shared, so as to better understand their characteristics and effectiveness in different applications. In NSW, for example, innovative examples are posted on government web sites and shared within government through various fora. Benchmarking exercises like those conducted in Mexico (see evaluation and review below) can also lead to the spread of low cost regulatory alternatives and healthy policy competition between jurisdictions.

The evaluation of the performance of alternative instruments can contribute to a better understanding of their relative strengths and weaknesses and the improvement of instruments over time. Where such evaluations are publicly released, the wider community benefits as well as policy makers from this learning. This can build support for reforms. In Denmark, there is a policy to promote the evaluation and modification of policy programs involving alternative instruments. The Danish Ministry of Finance strongly recommends the use of evaluations, particularly where subsidies are employed. In the United Kingdom, the Better Regulation Task Force (see management and coordination above) has played an important role in monitoring experience with the implementation of alternatives and in promoting a better understanding of successes and failures. In the United States, the requirement, under the Performance Management and Results Act of 1993, that

regulators establish and submit to Congress clear program evaluation strategies and performance measures, strengthens the incentive to innovate and achieve better results.

A requirement that an explicit justification be provided where viable alternatives have not been adopted, can also be a useful mechanism for creating stronger incentives to consider alternatives. For example, in the Netherlands, the Ministry of Justice's Directives on Legislation include a requirement that alternatives be considered and used where possible, and in the case of primary legislation, that reasons for their non-use be set out explicitly and explained to Parliament.

Several Australian jurisdictions, including Victoria and New South Wales, have considered the adoption of 'regulatory flexibility' processes.[5] Such processes permit businesses to use lower-cost alternative compliance methods if they can show that they are as effective as an existing regulation. This can achieve many of the advantages of performance based regulation, where such regulation has not been used. If regulatory flexibility processes include the public gazettal of any approved alternative compliance mechanism, this can lead to rapid and widespread adoption of more effective and efficient methods. This has an important demonstration effect and may eventually be reflected in the design of regulatory instruments. Canada has adopted the regulatory flexibility concept in its Environmental Performance Agreements (under the Environmental Protection Act 1999) and, in Mexico, the Ministry of Environment has adopted a similar principle in relation to technical standards.

6.6 Administrative simplification and reduction of compliance burden

Nearly all OECD countries have programs to reduce the administrative burdens of complying with regulations and there is a vast array of different strategies used. Regulation impact analysis and a range of tools already mentioned in this chapter such as: central registries; plain language drafting; business test panels and regulatory flexibility processes can all form part of an overall strategy to reduce compliance costs. Other approaches include:

- one-stop shops (single contact points);
- quantitative targets for burden reduction;
- streamlining of government process and paperwork requirements;

[5] Otherwise known as variance processes or equivalence of performance tests.

- legislative simplification and codification;
- simplification and elimination of business licences and permits (and a move towards 'negative licensing' and *ex post* checking)[6];
- privatisation of certification functions;
- computerised dissemination of regulations;
- facilitating the conduct of transactions with government by electronic means;
- controls on excessive administrative discretion; and
- adoption of rules to promote responsiveness, such as legislated time limits to respond to applications and 'silence is consent' clauses (automatic authorisations if decisions are not made within a specified time).

The Commonwealth Government has employed most of the strategies listed above. This has been either as part of systematic government-wide policies, *ad hoc* sectoral reforms, and/or as the result of one-off reviews.

Reducing compliance costs was one of the key drivers behind the introduction of Commonwealth RIS requirements, following the report of the Small Business Deregulation Taskforce (CoA 1997). Proposals for new or amended regulation and reviews of existing regulation must specifically address the impact on small business and ways to minimise the paperwork burden (ORR 1998, p. A10). Clearly, a systematic approach to ensuring compliance costs are justified, through *ex ante* impact analysis, can be a more effective strategy than trying to address problems *ex post*.

The 'silence is consent', or tacit authorisations rule, does not appear to have been used in Australia. More than one-third of OECD countries employ 'silence is consent' in some circumstances (OECD 2001d). Under this rule, statutory time limits are imposed for the completion of administrative procedures and if the relevant authority has not, within the specified period, rejected an application (for an approval, permit, licence, etc) the applicant can consider it authorised. It has been adopted in Italy as part of a larger effort, under the Administrative Procedure Law, to improve the accountability and efficiency of official decisions.

6 A negative licensing program provides licences on application, but then in order to retain their licence, holders are required to perform at a specified standard. Thus, performance checking is conducted by regulators after the granting of a licence (that is, *ex post*), rather than checking of applicants against criteria prior to the issuing of a licence.

Assessment of compliance costs

To help focus efforts to reduce compliance costs and 'red-tape' some jurisdictions (including the Commonwealth) have used quantitative targets for compliance burden reduction. If such targets are to be meaningful, governments must have a sound understanding of the size of the problem at a reference point in time.

Notwithstanding that the OECD 2000 survey of regulatory capacities (OECD 2001d) revealed that 58 per cent of respondent countries had established some sort of system for measuring the administrative burden of regulation, measurement of the compliance burden is complex and has its limitations.

As was noted in chapter 2, the Bell Taskforce and the OECD have produced some useful measures of compliance costs, based on data from the mid to late 1990s. The Senate Small Business Employment Report (CoA 2003) suggests regular quantitative and qualitative assessments of compliance costs as a means of tracking changes over time and identifying problem areas. The Committee recommended that the Commonwealth Government undertake a follow-up to the Bell Task Force survey of the time and money that small business spends on compliance related matters. The Committee further recommended:

> … that the Commonwealth Government, in consultation with State and Territory governments, develops a consistent methodology for measuring the compliance burden of government regulations. It also recommends that the Commonwealth proposes to the OECD that it undertakes regular reviews of the effect of compliance on small and medium enterprise, with Australian participation, as a further means of tracking changes in the regulatory burden over time. (p. 113)

Important initiatives in Canada and Denmark, in the area of measuring compliance costs, were outlined in the previous chapter (section 5.7). The efforts of the Netherlands in the assessment of compliance costs are also of particular interest (see box 6.4). This is an important element in a broad program to reduce administrative burdens. The program includes: reviews by administering agencies; quantitative targets for reducing aggregate compliance costs (after a 10 per cent target was met a commitment was made to a second stage target of 25 per cent); consultations with a panel of entrepreneurs; re-engineering of formalities; and technology based projects.

Box 6.4 **Assessment of compliance costs in the Netherlands**

A computer model, 'MISTRAL', has been developed to evaluate the impact of regulations on business and to quantify direct administrative compliance costs of different laws and regulations. MISTRAL works in three stages:

1. an in-depth analysis during which all 'data transfers' between a business and the authority (for example, a document, a telephone call, an inspection, etc) are isolated and defined;
2. the time involved in each 'data transfer' and the function level of the person performing it (related to professional qualification and hourly wage-rate) are then determined; and
3. the data are compiled to produce direct compliance cost estimates.

The two first steps are based on a multi-stage process of intensive consultation and discussion — individually and in groups — with experts from firms, accountants, employers and enforcing authorities.

Source: OECD (1999b).

6.7 Review of existing regulations

Regulations need to be regularly reviewed and updated. Systematic review processes are a complement to rigorous *ex ante* scrutiny of new proposals using RIA. As stated earlier, over time, even well designed regulations can become less effective, or unnecessarily costly, with changes in technology and economic and social conditions.

The OECD (1997b and 2002b) has identified the following best practice principles in relation to review of regulations:

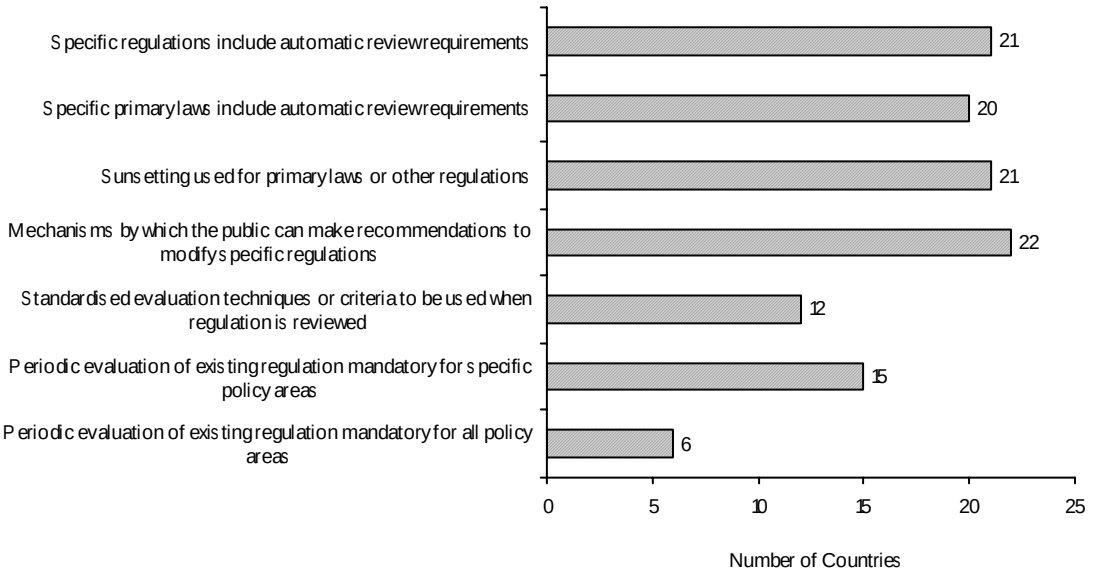
- a clear set of criteria is needed to guide review programs, including in particular competition principles;
- standardised evaluation techniques and decision criteria should apply;
- RIA should be integrated into processes for the review of regulations;
- review processes should be transparent and provide for involvement by key stakeholders and the general public;
- reviews should be targeted at regulations where change will yield the highest and most visible benefits; and
- regulations should be updated through automatic review methods, such as sun-setting.

According to the OECD, by 2000 only six of 28 member countries had in place periodic evaluation processes for all regulations, although 15 were evaluating regulations in specific policy areas. A range of different approaches to the review and updating of regulations have been employed, including:

- scrap and build;
- targeted reviews;
- staged reviews;
- generalised reviews; and
- sun-setting or automatic revocation clauses.

However, few review processes are systematic and only 12 countries had developed standardised evaluation criteria or methods (see figure 6.4).

Figure 6.4 **Review and updating of regulations in OECD countries**



Note: 28 OECD countries were surveyed.

Data source: OECD (2001d).

Where systematic evaluation programs are not used, reviews have tended to be *ad hoc* and unstructured. There has often been a focus on reducing the volume of regulation — page numbers or numbers of regulations — without adequate consideration of cost-benefit criteria and the efficiency of regulatory regimes. As a result, a lot of reviews have produced only marginal benefits, in terms of the effectiveness and efficiency of regulations. Nevertheless, there have also been notable successes with a variety of different regulation review models in such countries as Canada, Mexico, Korea and the Netherlands (see OECD 2002b).

Australia's COAG CPA Legislation Review Program has been recognised by the OECD as an example of a good systematic review program with clear criteria based on efficiency and net benefit to the community (that is, the public interest test). The Commonwealth Government's program is broader than required under the CPA, covering legislation that impacts on business as well as that which restricts competition. The schedule of reviews was drawn up based on an assessment of the stock of legislation in the mid 1990s.

For all legislation included on the schedule, the CPA includes an automatic review requirement. Once reviewed, legislation must be systematically reviewed at least every ten years. Also, Commonwealth RISs — for proposed new legislation/regulations or amendments to existing legislation/regulation — must address the issue of ongoing monitoring and future review. Officials are encouraged to include a commitment to a systematic review at an agreed time.

The Senate Small Business Employment Report (CoA 2003) considered that there are inadequate ongoing review processes. The Committee recommended a continuing program of systematic review of regulations affecting business. (see box 6.5).

Box 6.5 **Senate Committee recommendations on review of regulations**

The Committee recommended that the Commonwealth and State and Territory governments and local councils each undertake an ongoing program of systematic review of regulations affecting business.

The reviews would assess whether regulations are still necessary and whether they are achieving their objectives as simply and efficiently as possible, and identify the need for any changes to regulations or administrative requirements.

> Particular attention could be given to areas where regulatory requirements, including administrative arrangements, unnecessarily burden business, for example through poor drafting, duplication, unnecessarily rigid requirements or the interaction with other regulatory requirements. Reviews could also consider whether the regulations are being administered in [a] way that minimises the compliance burden. (p. 117)

The Committee also considered there is a need for a standing cross-jurisdictional regulation review and reform body that would focus on reducing regulatory burden. The Committee favoured a ministerial level body, backed by appropriate resources.

Source: CoA (2003).

A feature of the Netherlands MDW targeted review program[7] is the opportunity for interest groups to have input into the selection of priority areas for review.

[7] Reviews of specific areas of regulation focused on a particular regulatory theme, or an industry, activity or profession.

Similarly, in the United States, the Office of Management and Budget (OMB) in its *Draft Report to Congress on Costs and Benefits of Federal Regulations* (2002) calls for public nominations of specific existing rules that should be rescinded or reformed. OMB requests that agencies consider all nominations, but especially those that OMB's preliminary evaluation suggests merit a high priority.

Mechanisms for regular updating of regulations

Some of the more important tools used to ensure the regular review and reform of the stock of regulations are sun-setting, staged repeal and automatic review provisions.

Sun-setting involves new regulations being given an automatic expiry date upon adoption. Under staged repeal, existing regulations are given expiry dates determined by subsequent policy action. In both cases, the regulations can only continue beyond the sun-set date if remade. These measures are not currently widely used in Commonwealth legislation, but sun-setting of delegated legislation is a feature of the Legislative Instruments Bill, tabled in the Commonwealth Parliament in June 2003. Both sun-setting and staged repeal have been used more extensively in Australian States and Territories (with review cycles from five to ten years).

Sun-setting is also used in most OECD countries in certain regulatory areas. For example, the United States mandates a three year sun-setting period on all government formalities and paperwork requirements and periodic reviews every ten years for small business impacts, and Mexico uses five year sun-setting for technical standards (after an initial 12 month review to check they are operating as intended). Korea uses an interesting variant, described as 'soft sun-setting'. Where regulations 'have no clear reason to continuously exist', their duration is not, in principle, to exceed five years, but if agencies believe an extension is warranted, they may — at least one year prior to the expiry date — prepare an RIA and ask the Regulatory Reform Committee to review the matter.

If sun-setting is to be used, a balance must be struck between, on the one hand, the need for regular updating and, on the other, the uncertainty and possibly unnecessary effort and expense (and the risk of overwhelming review resources) associated with too frequent reviews. The OECD suggests, based partly on reviews of the NSW experience, that a five year cycle may be too short (OECD 2000b, p. 156).

Automatic review clauses are a weaker form of sun-setting — a review is required after a certain period, but the regulation continues unless specific action is taken.

Review clauses are increasingly being used in Commonwealth legislation. Advantages include savings from not having to remake regulations that are found to be still required. However, because certain steps are required to terminate a regulation, there is a risk of inaction by regulators either because of competing priorities or because of pressure from parties that benefit from the regulation.

In the United Kingdom, recent proposals, if implemented, would require *ex post* reviews of the impact of major pieces of regulation within three years of their introduction.

In Ireland, as part of a 'Regulatory Quality Checklist', regulators are required to specifically address whether new regulations should incorporate sun-setting or automatic review mechanisms, including mandatory substitution (adding a rule only when there is a corresponding reduction or repeal).

Italy is implementing a new mechanism recommended by the OECD — the 'guillotine system' — whereby regulations that are not centrally registered are annulled. In the Italian case, specific sectors are identified where existing regulations are in need of consolidation. A Simplification Bill lists all the rules that are to govern a particular sector and establishes that, from the commencement of the new consolidated text, all other rules are automatically repealed.

Finally, a new tool adopted in some OECD countries is the use of subordinate regulations to reform primary legislation. This mechanism, which is a feature of the United Kingdom's Regulatory Reform Act of 2001 (see box 6.6), allows the government to implement reforms more quickly by avoiding the normal delays associated with legislative processes for amendments to Acts of Parliament. At the same time, these new procedures ensure that opportunities for Parliamentary scrutiny and disallowance are retained.

Box 6.6 **United Kingdom Regulatory Reform Act**

The Regulatory Reform Act enables ministers to reform existing laws by ministerial orders. The Act seeks to address the lack of legislative capacity in the British Parliament which was seen as a barrier to responding to identified problems with existing legislation.

Regulatory Reform Orders made under the Act can be used to remove or reduce burdens, correct inconsistencies and anomalies, and, in certain strictly defined circumstances, apply new burdens. The Orders are subject to extensive public consultation and a detailed scrutiny process by the Deregulation Committee of the House of Commons and the Delegated Powers and Deregulation Committee in the House of Lords.

Source: OECD (2002e).

6.8 Compliance and enforcement

Achieving a high level of compliance is essential if regulations are to effectively meet their objectives. This has implications for the design of regulation and implementation and enforcement strategies.

Monitoring of actual compliance is also important. The OECD recommends that governments develop databases and methodologies for measuring compliance rates and trends. Ideally, information would be collected not only on compliance rates, but also data on achievement of ultimate policy objectives. The results of such monitoring can then feed back into policy development and refinements to existing regulations and implementation strategies. Surprisingly, the OECD has found that there is very little experience with such *ex post* compliance monitoring.

As discussed in the previous chapter, Commonwealth RISs should address compliance and enforcement issues, but regulators are given only limited practical guidance on the factors to consider. Some OECD member countries have introduced initiatives that could better integrate compliance considerations into policy development processes.

Perhaps the most comprehensive and systematic approach to addressing compliance and enforcement issues has been adopted in the Netherlands. The *Directives on Legislation* require regulators to ensure, before adopting a regulation, that they will be able to 'adequately' enforce it. Guidance is provided on various factors that should be considered and on legislative drafting principles for improving enforcement. The *Inspectorate of Law Assessment*, within the Ministry of Justice, acts as a consultant to ministries on compliance and enforcement issues, identifying key risk factors for new proposals. This enables policy makers to address these issues before regulations are made.

In conducting its review, the Inspectorate applies a standard checklist called the 'table of eleven' (T11) key determinants of compliance to analyse the strengths and weaknesses of a proposed regulation (see box 6.7). These were developed jointly by the Ministry of Justice and Erasmus University and derive from the academic literature and practical experience. A score from one to five is assigned for each element of the T11, with a lower score indicating potential compliance problems. The T11 checklist is also used for reviews of existing regulation.

Box 6.7 **The Netherlands table of eleven (T11) key determinants of compliance**

The T11 factors:

Spontaneous compliance dimensions **(factors that affect the incidence of voluntary compliance — that is, compliance that would occur in the absence of enforcement):**

T1. *Knowledge of rules*: Target group familiarity with laws and regulations, clarity (quality) of laws and regulations.

T2. *Cost-benefit considerations*: Material and non-material advantages and disadvantages resulting from violating or observing regulation.

T3. *Level of acceptance*: The extent to which the target group (generally) accepts policy, laws, and regulations.

T4. *Normative commitment*: Innate willingness or habit of target group to comply with laws and regulations.

T5. *Informal control*: Possibility that non-compliant behaviour of the target group will be detected and disapproved of by third parties (that is, non-government authorities), and the possibility and severity of sanctions that might be imposed by third parties (for example, loss of customers/contractors, loss of reputation).

Control dimensions **(the influence of enforcement on compliance**):

T6. *Informal report probability*: The possibility that an offence may come to light other than during an official investigation and may be officially reported (whistle blowing).

T7. *Control probability*: Likelihood of being subject to an administrative (paper) or substantive (physical) audit/inspection by official authorities.

T8. *Detection probability*: Possibility of detection of an offence during an administrative audit or substantive investigation by official authorities. (The probability of uncovering non-compliance behaviour when some kind of control is applied.)

T9. *Selectivity*: The (increased) chance of control and detection as a result of risk analysis and targeting firms, persons or areas (that is, extent to which inspectors succeed in checking offenders more often than those who abide by the law).

Sanctions dimensions **(the influence of sanctions on compliance):**

T10. *Sanction probability*: Possibility of a sanction being imposed if an offence has been detected through controls and criminal investigation.

T11. *Sanction severity*: Severity and type of sanction and associated adverse effects caused by imposing sanctions eg loss of respect and reputation.

Source: OECD (2002b, p. 79).

Canada has adopted a detailed compliance strategy to guide regulators. It has integrated its compliance efforts with the RIA and consultation processes by requiring compliance to be one of the issues that must be addressed in every RIA. Substantial guidance is available to regulators covering a wide range of program design, monitoring and enforcement issues, including:

- advice on factors that affect compliance;
- role of stakeholder groups; and
- the appropriateness of alternative approaches to a range of regulatory situations and legislative precedents for each option.[8]

Mexico has explicit requirements that regulations must be backed by sufficient budgetary and administrative resources to ensure effective implementation and enforcement.

In the United States, agencies are obliged to publish compliance guides for all rules with a significant small business impact.

6.9 Evaluation of results of regulatory programs

A generally recognised weakness in the regulatory quality policies of most OECD countries is the inadequate focus on monitoring and evaluation of results of regulation review and reform.

Objective and transparent reporting of the results of different processes and policy tools can lead to a better understanding of successes and failures and, eventually, to improved targeting of regulatory reform efforts. However, establishing the nexus between regulatory quality programs and improvements in the quality of regulation (and ultimately better economic and social outcomes) is very difficult. Because governments have implemented a range of regulatory quality policies and strategies, it is especially challenging to develop methodologies for separately identifying their individual contribution and impact.

Some partial indicators of the success of RIA were discussed in chapter 3. In relation to performance evaluation more generally, while the overseas experience reviewed by the ORR highlights that several countries have introduced worthwhile initiatives, it appears that a systematic and comprehensive assessment framework has not been implemented in any jurisdiction.

[8] RAOICS (1992), *A Strategic Approach to Developing Compliance Policies*.

As highlighted in chapter 4 the main elements of the Commonwealth Government's system for the *ex post* evaluation of regulatory programs are:

- internal monitoring and evaluation systems within responsible departments and agencies;
- annual reporting by the Productivity Commission, including detailed RIS compliance information in *Regulation and its Review*;
- ongoing monitoring and evaluation of the implementation of National Competition Policy and related regulatory reforms by the National Competition Council;
- performance audits by the Australian National Audit Office; and
- annual compilation and reporting by departments and agencies of Regulatory Performance Indicators.

Canada is one of the more advanced countries in this area, with important innovations in reporting to the Parliament on reform results. Departmental Performance Reports are tabled annually, the intention being to demonstrate the links between policies and programs (including regulatory initiatives) and their actual outcomes. The specific processes of performance reporting are continuing to be refined, with the Treasury Board Secretariat working with departments to improve the process and the relevance of what is reported.

In the United States, the *Government Performance and Results Act of 1993*, requires government departments to prepare and submit to Congress strategic plans (see discussion of forward planning above) that identify, among other issues, evaluation strategies and performance measures. The strategic plans are supplemented by government-wide and agency-specific annual performance plans. Also, under the Regulatory Right-to-Know Act, OMB is required to submit an annual Report to Congress on the Costs and Benefits of Federal Regulations and paperwork requirements, together with recommendations for reform (see box 6.8).

In Denmark, the Ministry of Business and Industry reports annually to Parliament on the impact on business of legislation adopted in the previous year. Impacts are reported in four categories: impacts on business costs, impacts on administrative costs, impacts on market opportunities and long-term impacts on structural competitiveness. Quantification is generally limited to the first two types of impact. Because of the timing of the report, the impacts tend to be those estimated prior to proposals being adopted, rather than the actual effects observed after implementation. A panel of business representatives is consulted on the contents of the report on a biannual basis. The main value of these reports is that they allow some focus on the expected cumulative impacts of the legislation passed during a

parliamentary year — something that is often given little consideration in individual impact assessments.

Box 6.8 **United States Annual Report to Congress on the costs and benefits of regulations**

Estimates of the costs and benefits of regulations (including quantifiable and non-quantifiable effects) are presented:

- in the aggregate;
- by agency and agency program; and
- by major rule.

An analysis of impacts of Federal regulation on State, local, and tribal government, small business, wages and economic growth must also be provided in the report. The Regulatory Right-to-Know Act states that the report itself should go through notice and comment and peer review. OMB revises estimates and discussion of estimates based on studies and data that have become available since the last report was written.

Source: OMB (2002).

In the Netherlands, a program of rolling audits of the legislation-making processes of all ministries has been implemented, with follow up reviews planned. An independent review committee (three academics, three Ministry staff and three members from 'government/society at large') oversees the reviews and reports to the responsible Minister. The Committee bases its findings on a self-assessment by the relevant ministry, supplemented by an external review by independent experts. A report detailing overall progress is made to Parliament every two years.

The Queensland Business Regulation Review Unit produces an annual Red-Tape Reduction Stocktake on behalf of the Red-Tape Reduction Task Force.[9] It records progress made by Queensland Government agencies in reducing the burden of red-tape on business. It also satisfies a requirement of the Government's Charter of Social and Fiscal Responsibility to annually publish and report on reductions in the regulatory burden.

Performance evaluations can take the form of benchmarking exercises. In Mexico, for example, there have been efforts to directly measure and benchmark the regulatory environment in different Mexican states. In 1996, a private university published a comparative analysis of the 'friendliness' to business investment of the states. The study took into account differences in the regulatory environment in each state. A second benchmarking exercise published in March 1999 by the

9 BRRU (2002) is the latest edition of the Stocktake.

Mexican Business Council compared the actual performance of regulatory environments across the states. Based on surveys of officials and businesses, the study included an assessment of the quality of regulatory reform programs and the efficiency of processing licences and permits in each state.

Other initiatives include:

- in Korea, regular reviews are made of progress in regulatory reform and a Reform White Paper is published annually; and
- in Italy, quarterly reports on the regulatory system are prepared by a research team at the University of Rome.

Finally, even where performance can be measured, outcomes attributed to regulatory quality policies and tools will vary depending on how effectively they have been implemented. That is, results will be a function both of the quality of the design of the processes and of the way they are put into practice. As noted, in the OECD's review of RIA in New South Wales (OECD 1999d, p. 35):

… sound processes will not necessarily yield good quality outcomes, as there is room for considerable variation in their implementation as a result of the quality and quantity of resources brought to bear, formal and informal messages as to the importance attached to these areas of Government policy and legislation and the impact of the external environment, including community attitudes and expectations.

7 Concluding comments

The task of improving regulatory decision making and, ultimately, of improving the effectiveness and efficiency of new and existing regulations involves the systematic implementation of a range of complementary regulatory quality policies, tools and institutional arrangements. While RIA is one of the most important and is being more widely used, a number of other strategies can also contribute significantly.

Regulation impact analysis

More than two decades of experience indicates that implementation of an effective and efficient RIA system is a long-term process that requires ongoing refinement of systems. Most OECD member countries and Australian jurisdictions that have implemented RIA processes have reviewed them, or are in the process of reviewing them. For example, the United Kingdom, Canada, New Zealand, New South Wales, Victoria, Queensland and the ACT have recently reviewed their RIA systems. Where reviews have been conducted, they have resulted in refinements that have typically widened the scope and improved the analytical rigour required in RIAs.

No formal review of the Commonwealth Government's RIS requirements has yet been conducted. The Senate Small Business Employment Report recommended that the Commonwealth Government:

> … review their current regulation impact assessment arrangements to ensure that they meet best practice standards with regards to minimising the compliance burden on small business. (CoA 2003, p. 141)

While a number of aspects of the design and implementation of the Commonwealth RIS requirements are clearly consistent with international best practice, some features of systems in operation overseas and in other Australian jurisdictions would appear to merit further consideration. These include, but are not limited to:

- integration of RISs into consultation processes — Canada and the United States for example, have fully integrated regulation impact analysis into public consultation;
- better targeting and clearer guidance on threshold tests — use of preliminary screening and a staged RIS process (for example, the United Kingdom, United States, Canada and Italy), and clearer guidance on threshold triggers for RISs,

including monetary thresholds (for example, Korea, United States and Queensland);

- more formalised coordination of regulation review and RIS preparation within regulatory departments and agencies (possibly modelled on the United Kingdom Departmental Regulation Impact Units);
- increased ministerial involvement and accountability. Many jurisdictions require ministers to certify that RISs comply with requirements (for example, United Kingdom, Canada and Victoria). In the United Kingdom, ministers for regulatory reform appointed in key regulatory departments must report to the 'Panel for Regulatory Accountability'; and
- more effective sanctions for non-compliance — in some jurisdictions (for example, Korea, United States and Canada) independent oversight bodies have the power to reject or delay consideration of regulatory proposals not supported by the appropriate standard of analysis.

Other regulatory quality policies

Overall, the Commonwealth is also quite advanced in its implementation of other strategies for improving regulatory quality. However, there are a number of practices that have been adopted in other Australian jurisdictions and in OECD countries that could potentially be good models and warrant further consideration.

Some of these strategies include:

- minimum standards for public consultation (for example, United Kingdom, United States and several Australian States and Territories) and further government-wide guidance for officials on different approaches to consultation about regulatory issues (for example, United Kingdom, Western Australia and the Australian Capital Territory);
- integrating preliminary impact assessments into regulatory plans (for example, Canada and the United States);
- a strong independent regulatory reform advocacy body — like the Business Regulation Task Force in the United Kingdom — with substantial authority to determine its own work program and priorities;
- improved guidance materials and training on alternatives to prescriptive regulation (for example, Canada and Queensland), and improved evaluation and sharing of experiences with their use (for example, Denmark, United Kingdom and United States);

- improved measurement of compliance costs (for example, the Netherlands, Canada, United Kingdom and New Zealand are amongst the most advanced in this area); and
- regular and systematic monitoring and evaluation of the outcomes of regulation review and reform strategies (an area the OECD has identified as a weakness in most jurisdictions, but some initiatives have been introduced, for example, in Canada, United States, the Netherlands, Denmark and Queensland).

Next steps

These and other practices could be examined more closely, with a view to assessing their applicability and likely value in refining or supplementing the existing Commonwealth policy and institutional framework for regulation review and reform.

As a starting point, the ORR is conducting further research on — and developing methodologies for — better measuring the performance of existing systems. The longer-term objective of this research is to provide information on the relative strengths and weaknesses of current strategies employed internationally and in Australia. At the same time, the ORR will continue to monitor and report on developments in other jurisdictions and participate in national and international forums where lessons from different systems and approaches are identified and discussed.

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