2 Compliance with RIS requirements

In 2005-06, compliance by departments and agencies with the Australian Government's previous Regulation Impact Statement (RIS) requirements was lower at the decision-making and tabling stages than in earlier years. Compliance with COAG's RIS requirements was also lower than in the previous reporting period.

Both the Australian Government and COAG have now agreed to strengthen and reorientate their respective RIS processes in 2005-06, through the use of cost-benefit analysis and better measurement of compliance costs.

2.1 Compliance with the Australian Government's previous requirements

When assessing and reporting on compliance with the Australian Government's RIS requirements applying in 2005-06, the ORR has considered whether:

- a RIS was prepared to inform the decision maker at the policy approval stage and the analysis contained in the RIS meets the Government's adequacy criteria (see Box 2.1) and
- the RIS prepared at the decision-making stage was tabled in the Parliament or otherwise made public[1] and the analysis meets adequacy standards.

[1] In accordance with the Government's RIS guidelines, RISs for proposals introduced via bills, legislative instruments or treaties must be tabled in Parliament with the enabling instrument. While there is no formal requirement for RISs prepared for proposals introduced by other forms of instruments/quasi-regulation to be made public, the ORR encourages departments and agencies to do so.

Box 2.1 **Adequacy criteria for RISs applying in 2005-06**

In 1998, the Government endorsed the following criteria for the ORR to assess whether each RIS met the Government's regulatory best practice requirements.

1. Is it clearly stated in the RIS what is the fundamental **problem** being addressed? Is a case made for why government action is needed?
2. Is there a clear articulation of the **objectives**, outcomes, goals or targets sought by government action?
3. Is a range of viable **options** assessed including, as appropriate, non-regulatory options?
4. Are the groups in the community likely to be affected identified, and the **impacts** on them specified? There must be explicit assessment of the impact on small businesses, where appropriate. Both costs and benefits for each viable option must be set out, making use of quantitative information where possible.
5. What was the form of **consultation**? Have the views of those consulted been articulated, including substantial disagreements? If no consultation was undertaken, why not?
6. Is there a clear statement as to which is the **preferred option** and why?
7. Is information provided on how the preferred option would be **implemented**, and on the **review** arrangements after it has been in place for some time?

Relevant to all seven criteria (which correspond to the seven sections of a RIS) has been an 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.

For proposals which maintain or establish restrictions on competition (such as barriers to entry for new businesses or restrictions on the quality of goods and services available), it must be established that:

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

both of which are requirements under the *Competition Principles Agreement* (COAG 1995).

The ORR has also taken into account Government requirements for RISs to include an assessment of ecologically sustainable development (ESD), small business and international trade impacts and, where appropriate, cost recovery issues.

Source: ORR 1998, p. D 19.

If a department or agency has met these conditions, it has been considered fully compliant with the Government's requirements.

RIS compliance is only reported in *Regulation and its Review* when the instrument implementing a regulatory proposal is tabled in Parliament (in the case of bills, legislative instruments and treaties), or is made (in the case of other forms of instruments and quasi-regulations) into law. Hence, the data reported here do not include regulatory proposals which were decided by the Government in 2005-06, but not introduced into the Parliament or made into law during that period.

Aggregate compliance in 2005-06

In 2005-06, 96 RISs were required at the *decision-making* stage. Of these, 79 were prepared and 68 were assessed as adequate by the ORR — a compliance rate of 71 per cent. This compares with compliance rates of 80 per cent in 2004-05 and 92 per cent in 2003-04.

As in previous years, the failure to prepare a RIS accounted for a significant proportion of non-compliance (61 per cent of cases of non-compliance in 2005-06 compared to 82 per cent in 2004-05 and 56 per cent in 2003-04).

With respect to the tabling stage (for proposals introduced via bills, legislative instruments and treaties), compliance was 86 per cent, compared to 89 per cent in 2004-05 and 95 per cent in 2003-04.

Table 2.1 **RIS compliance, 2000-01 to 2005-06**

	2000-01	*2001-02*	*2002-03*	*2003-04*	*2004-05*	*2005-06*
Decision-making stage [a]	129/157	128/145	113/139	105/114	68/85	68/96
	(82%)	*(88%)*	*(81%)*	*(92%)*	*(80%)*	*(71%)*
Tabling stage [a, b]	118/133	116/123	113/119	82/86	59/66	73/85
	(89%)	*(94%)*	*(95%)*	*(95%)*	*(89%)*	*(86%)*

a The first figure records adequate RISs; the second figure records RISs required. **b** Compliance for regulatory proposals introduced via bills, legislative instruments and treaties (which are subject to formal assessment by the ORR). The number of RISs required at tabling is usually lower because RISs are not required at this stage for quasi-regulations, they may be required at more than one decision-making stage for significant regulatory proposals and they are required at two decision-making stages for treaties.

Source: ORR estimates.

Significance of regulatory proposals

The ORR has classified the significance of each regulatory proposal according to:

- the nature and magnitude of the problem and proposal; and

- the scope (broad or narrow) and scale (level or degree) of impacts on affected parties and the community.

While facilitating interpretation of compliance data, categorising regulatory proposals according to the significance of their likely impact also provides a better basis on which to apply the 'proportionality rule' — that the extent of RIS analysis needs to be commensurate with the magnitude of the problem and with the size of the potential impacts of the proposal.

The approach used by the ORR to classify regulatory proposals is outlined in box 2.2.

Box 2.2 **Classifying the significance of regulatory proposals**

A simple approach to classifying the significance of a regulatory proposal is to consider, first, the nature and magnitude of the proposal (and the problem) and second, its impacts on affected parties. The following examples illustrate this approach.

In terms of the nature and magnitude of proposals, a ban on, say, popular or widespread activities or some other significantly anti-competitive proposal would generally be regarded as 'large'. Placing conditions on activities, such as requiring licences or specific standards typically could be regarded as intervention of a 'medium' nature. Examples of less significant 'small' interventions might be changes to clarify periodic reporting requirements for businesses.

Impacts can be viewed from an economy-wide perspective, having regard to both their scope and intensity. The ORR classification involves just two categories — broad and narrow.

An increase in the rate of excise on petrol, for example, would be considered to be broad in its impact. On the other hand, a late night curfew on flights into, say, Coolangatta airport would be relatively narrow in terms of its impacts. A third example might be deregulation of the dairy industry. On the supply side, there might be a relatively narrow industry based impact but, on the demand side, there might be a widely dispersed impact on consumers, which could result in the proposal being classified as 'broad'.

In 2005-06, eight RISs were required at the decision-making stage for regulatory proposals that the ORR identified as having a more significant impact on business and/or the community. In seven cases, RISs were prepared. In each case, the RIS prepared was assessed against the Government's criteria as inadequate (table 2.2).

Table 2.2 **Compliance by significance, 2005-06**

Significance rating	*Required*	*Prepared*	*Adequate*	*Compliance*
	No.	*No.*	*No.*	*%*
More significant	8	7	0	0.0
Less significant	88	72	68	77.0
Total	**96**	**79**	**68**	**70.8**

Source: ORR estimates.

While comparisons of RIS compliance for more significant and less significant proposals over time should be treated with caution, due to the relatively small number of more significant proposals in some years, in only one of the past five years (2003-04), has compliance for more significant proposals exceeded that for less significant ones.

Table 2.3 **Compliance at the decision-making stage by significance, 2001-02 to 2005-06**

Significance rating	*2001-02*	*2002-03*	*2003-04*	*2004-05*	*2005-06*
More significant	7/10 *(70%)*	6/13 *(46%)*	17/18 (94%)	2/3 (67%)	0/8 (0%)
Less significant	121/135 *(90%)*	107/126 *(85%)*	88/96 *(92%)*	66/82 (80%)	68/88 (77%)
Total	**128/145** ***(88%)***	**113/139** ***(81%)***	**105/114** **(92%)**	**68/85** **(80%)**	**68/96** **(71%)**

Source: ORR estimates.

Multiple decision stages

In accordance with the Government's RIS requirements, RISs are required at the decision-making stage for proposals that impact on business. In some (generally significant) cases, there may be more than one decision-making stage. In 2005-06, apart from treaties where RISs are always required at more than one decision-making stage, there were two cases of multiple decision-making stages. In one case, RISs were required at three decision-making stages. Two RISs were prepared, and were assessed as inadequate by the ORR. In the other case, two RISs were required, of which only one was prepared. It was assessed as adequate.

Proposals that restrict competition

Restrictions on competition can impose substantial costs on business and the community by raising prices, reducing choice and impeding innovation. Reflecting these costs — and to meet the requirements of the National Competition Policy *Competition Principles Agreement* — RISs for proposals that affect business by restricting competition should demonstrate that the benefits of restricting competition outweigh the costs, and that the benefits can only be achieved by restricting competition (ORR 1998, p. B6).

In 2005-06, three of the more significant proposals were judged to restrict competition, whereas, among those proposals of less significance, eight restricted competition. RISs were prepared for each of the more significant proposals and for four of the less significant ones (table 2.4). None of the RISs prepared for the more significant proposals were assessed as adequate. Each of the RISs prepared for the less significant proposals was assessed as adequate.

Table 2.4 **Compliance at the decision-making stage for proposals that restrict competition, 2000-2001 to 2005-06**

Significance rating	*2000-01*	*2001-02*	*2002-03*	*2003-04*	*2004-05*	*2005-06*
More significant	2/7 *(29%)*	1/3 *(33%)*	0/2 *(0%)*	n/a	n/a	0/3 (0%)
Less significant	n/a	7/9 *(78%)*	18/20 *(90%)*	6/6 *(100%)*	4/7 (57%)	4/8 (50%)
Total	**2/7 *(29%)***	**8/12 *(67%)***	**18/22 *(82%)***	**6/6 *(100%)***	**4/7 *(57%)***	**4/11 (36%)**

n/a - Not applicable.

Source: ORR estimates.

2.2 Compliance by type of regulation

The extent of compliance with the RIS requirements, at both the decision-making and tabling stages, for the various types of regulation is shown below (table 2.5).

Table 2.5 **RIS compliance, by type of regulation, 2005-06**

Type of regulation	*Decision-making*			*Tabling* [a]		
	prepared	*adequate*		*prepared*	*adequate*	
	ratio	*ratio*	*%*	*ratio*	*ratio*	*%*
Primary legislation (bills)	28/32	19/32	59	28/29	23/29	79
Delegated legislation	45/51	44/51	86	47/51	46/51	90
Quasi-regulation [b]	2/4	2/4	50			
Treaties	4/9	3/9	33	5/5	4/5	80
Total	**79/96**	**68/96**	**71**	**80/85**	**73/85**	**86**

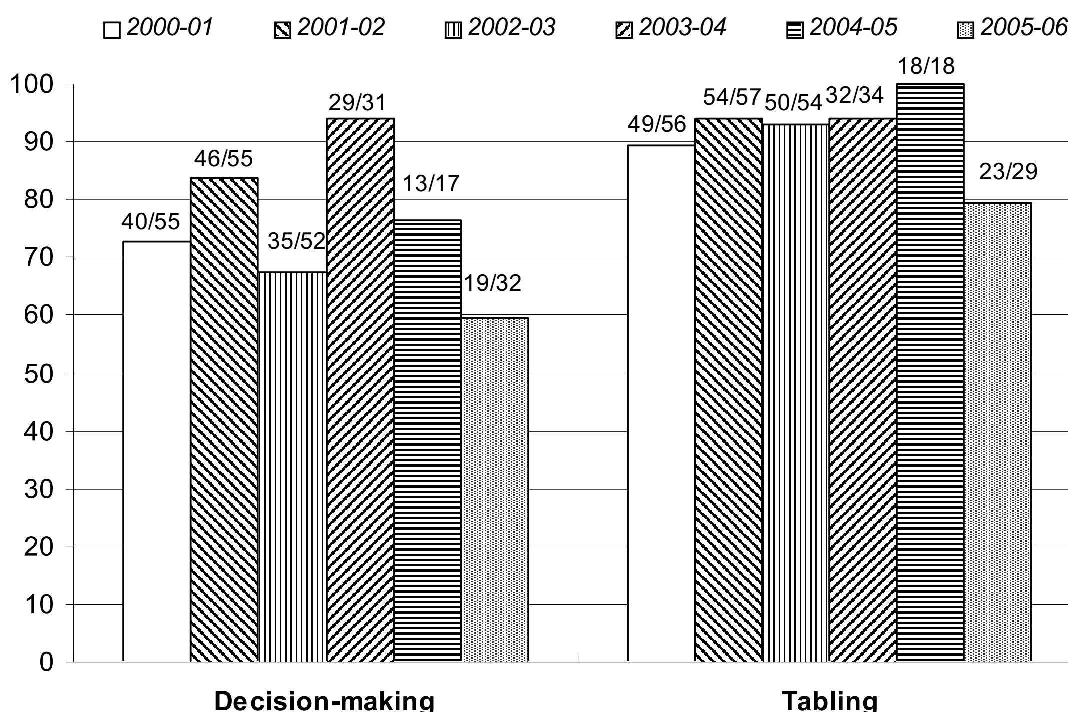
n/a - Not applicable. Tabling is not a formal requirement. [a] RIS compliance for the tabling of bills, legislative instruments and treaties is subject to formal assessment by the ORR. [b] As reported by departments and agencies to the ORR.

Source: ORR estimates.

Primary legislation

There were 32 RISs required at the decision-making stage for proposals introduced by bills in 2005-06 (34 per cent of all RISs required). Twenty-eight were prepared, of which 19 were assessed as adequate (a compliance rate of 59 per cent). This compares to compliance rates of 76 per cent in 2004-05 and 80 per cent in 2003-04. Compliance at the tabling stage was 79 per cent (figure 2.1).

Figure 2.1 **RIS compliance, bills, 2000-01 to 2005-06**
Per cent



Source: ORR estimates.

Delegated legislation

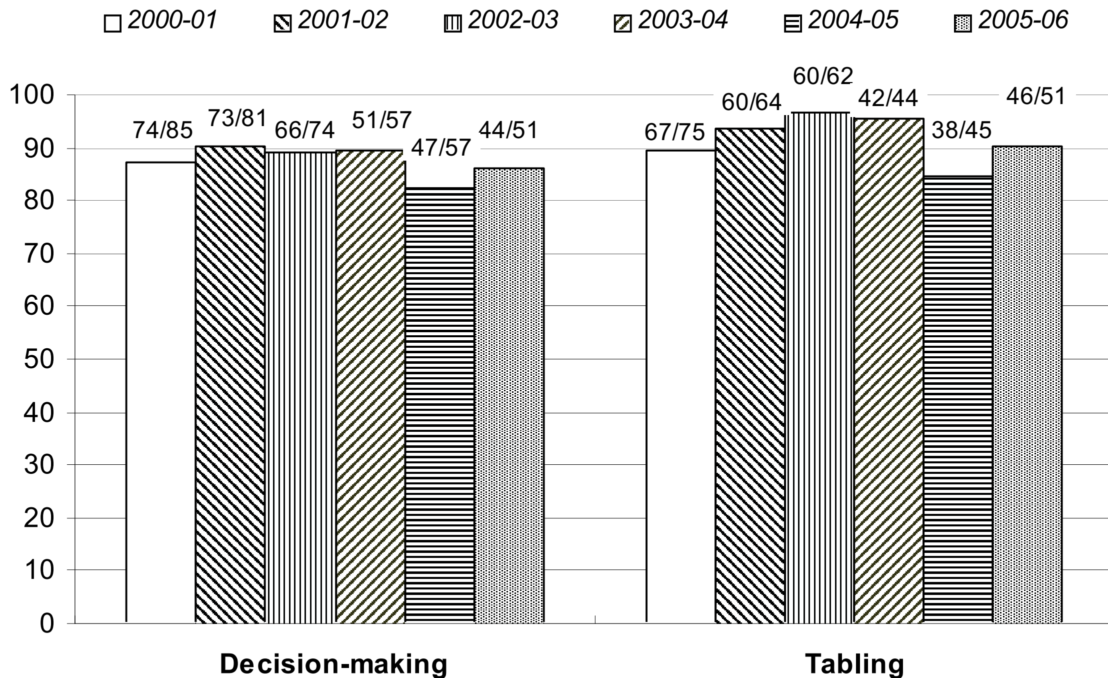
Delegated legislation comprises all rules or instruments that have the force of law and have been made by an authority to which Parliament has delegated part of its legislative power. These instruments may be legislative or non-legislative in nature.[2] An instrument is taken to be legislative if it determines or alters the law, rather than applying it in a particular case, and has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

In 2005-06, 51 RISs were required at the decision-making stage for proposals introduced by legislative instruments (53 per cent of all RISs required). Of these, 45

[2] RISs are generally not required for non-legislative instruments. In the first year of operation of the *Legislative Instruments Act 2003* (2004-05), four instruments were reported to the ORR as being 'non-legislative' instruments.

RISs were prepared and 44 were assessed as adequate (a compliance rate of 86 per cent). Three RISs were prepared after the decision-making stage and tabled.[3]

Figure 2.2 **RIS compliance, delegated legislation, 2000-01 to 2005-06[a]**
Per cent



[a] Comprises disallowable and non-disallowable instruments made before 1 January 2005 and legislative and non-legislative instruments tabled or made after 1 January 2005 (the date the *Legislative Instruments Act 2003* came into force).

Source: ORR estimates.

Quasi-regulations

Quasi-regulation refers to the range of rules, instruments and standards whereby government influences business to comply, but which do not form part of explicit government regulation. Examples of quasi-regulation include industry codes of practice, guidance notes, standards, industry-government agreements and accreditation schemes.

Four quasi-regulations made in 2005-06 were reported by departments and agencies to the ORR. RISs were prepared, and assessed as adequate by the ORR, in two cases (a compliance rate of 50 per cent).

[3] One RIS prepared at the decision-making stage was not tabled.

Treaties

Under the Australian Government's RIS requirements, a RIS should be prepared at three stages of the treaty-making process — before the formal policy decision to pursue treaty negotiations, prior to Australia signing a treaty and, finally, when the treaty is tabled in Parliament before ratification. Where Australia is considering acceding to an existing treaty, RISs are required prior to accession and when the treaty is tabled in Parliament. (Other countries require a similar analysis of the domestic impacts of treaties.)

Five treaties tabled in Parliament before ratification in 2005-06 triggered the Government's RIS requirements. Four RISs were required at entry into negotiations and five RISs at the signing stage.[4] Of these, one was prepared at entry into negotiations and three were prepared at signing. Three RISs were assessed as adequate (a compliance rate of 25 per cent at entry and 40 per cent at signing). At the ratification stage, five RISs were required. Five RISs were prepared and four were assessed as adequate by the ORR (a compliance rate of 80 per cent).

2.3 National regulation making

Regulation making also occurs at a national or inter-jurisdictional level among some 40 Ministerial Councils and several standard-setting bodies involving the Commonwealth, State and Territory governments. In 1995, the Council of Australian Governments (COAG) agreed on a set of *Principles and Guidelines* for such activities. The major element of the Guidelines is the preparation of a regulatory impact statement (RIS) for those national regulatory decisions that:

> … would encourage or force businesses or individuals to pursue their interests in ways they would not otherwise have done. (COAG 2004b, p.2)

At the direction of COAG, the ORR has had a role in monitoring and reporting on compliance by Ministerial Councils and national standard-setting bodies with these Guidelines. A RIS, assessed by the ORR, is required at two stages: the first for community consultation with parties affected by the regulatory proposal; and the second or final RIS, reflecting feedback from the community, for the decision-making body. At each stage, the ORR is required by COAG to assess:

- whether the COAG *Principles and Guidelines* have been followed;
- whether the type and level of analysis in the RIS is adequate and commensurate with the potential economic and social impacts of the proposal; and

[4] In one case, entry into negotiations occurred before the Government's RIS requirements became mandatory.

- whether alternatives to regulation have been adequately considered.

The ORR has been required to advise the relevant Ministerial Council or national standard-setting body of its assessment.

Between 1 April 2005 and 31 March 2006, 34 regulatory decisions made by Ministerial Councils and national standard-setting bodies required the preparation of a COAG RIS (table 2.6). Of these, 30 adequate RISs were prepared at the consultation stage (a compliance rate of 88 per cent) and 26 adequate RISs were prepared at the decision-making stage (a compliance rate of 76 per cent).

Table 2.6 **Compliance with COAG RIS requirements by Ministerial Councils and national standard-setting bodies, 2003-04 to 2005-06** [a]

	2003-04	*2004-05*	*2005-06*
Consultation stage			
More significant	4/7 (57%)	5/6 (83%)	4/4 (100%)
Less significant	24/27 *(89%)*	15/18 (83%)	26/30 (87%)
Total	**28/34 (82%)**	**20/24 (83%)**	**30/34 (88%)**
Decision-making stage			
More significant	4/7 (57%)	6/6 (100%)	2/4 (50%)
Less significant	26/27 *(96%)*	15/19 (79%)	24/30 (80%)
Total	**30/34 (88%)**	**21/25 (84%)**	**26/34 (76%)**

[a] Compliance with the COAG *Principles and Guidelines* is published on a 1 April to 31 March basis.

Source: ORR estimates.

For more significant proposals, compliance was 100 per cent at consultation, but only 50 per cent at the decision-making stage (reflecting, in part, the higher level of analysis required for COAG RISs at the decision-making stage).

In February 2006, COAG agreed to improve the quality of regulatory impact analysis through the use of cost-benefit analysis and better measurement of compliance costs (including use of the Business Cost Calculator). More detailed compliance information about regulation making by COAG forums, including RIS compliance, is provided in appendix C.

2.4 Reasons for non-compliance in 2005-06

The compliance of departments and agencies with the Australian Government's RIS requirements was lower in 2005-06 compared to previous years, at both the decision-making and tabling stages. Compliance for a small number of significant regulatory issues was significantly lower.

RISs were not prepared at the decision-making stage in 17 cases. In five cases the ORR was not consulted and in seven cases the ORR was not consulted until after the decision was made. In five cases, the ORR was consulted before the decision was made, but the ORR did not receive RISs for assessment.

There can be legitimate reasons for not preparing a RIS before a decision is taken to regulate - for example, the need to respond to a genuine emergency. However, such cases are rare and the RIS requirements are sufficiently flexible to respond to them (PC 2004, pp. 8-9).

Timeliness

The analytical framework underpinning a RIS should be used throughout the policy development process. Departments and agencies have been encouraged to integrate the RIS process into their internal policy development processes and consult with the ORR at an early stage. Where departments and agencies consult with the ORR and commence preparation of a RIS early, in most cases the RIS meets adequacy standards.

Where departments and agencies do not consult with the ORR early in the policy development process, there is often insufficient time to address major weaknesses in a RIS before seeking the ORR's final assessment of the RIS for the decision-making stage. In addition, where departments and agencies consult with the ORR and prepare RISs late in the policy development process, the RIS is less likely to make an effective contribution to policy development.

Inadequate impact analysis

Where RISs were prepared but failed the Government's adequacy test, there was typically a lack of adequate and robust cost-benefit data and analysis.

In 2005-06, there were eleven cases where RISs were prepared but assessed by the ORR as being inadequate. In two cases, timeliness may have been a factor, as the RISs were revised and assessed as adequate at the tabling stage. In the other nine cases, RISs were assessed as inadequate because they failed to demonstrate that

there was a net benefit to the community from the preferred option, failed to adequately quantify the impacts (costs and benefits) of proposals (commensurate with the significance of those impacts), did not provide a rigorous analysis of risk, or failed to quantify compliance costs. More details are provided in appendix A.

The cost of preparing RISs is usually quite small compared to the total budgets of regulatory departments and agencies. For example, in 2005-06 the ORR asked Australian Government regulators preparing a RIS to provide estimates of the number of person days taken to prepare each RIS. On average, each RIS took 14.9 person days to prepare (compared to 13.6 person days in 2004-05). Based on an average wage cost of $46.50 per hour, the cost of preparing a RIS, on average, was around $5200. This implies that the total wage cost of preparing 79 Australian Government RISs in 2005-06 was about $410 500.[5]

This is a rough estimate of the gross cost. Where regulators routinely define policy objectives, consider feasible options and their impacts etc, the additional or incremental cost of preparing a RIS is small, because the RIS simply documents an existing high quality regulatory policy development process. By contrast, the RIS process could generate additional net costs on departments and agencies where there are deficiencies in their regulatory policy making processes.

Some departments and agencies performed well in preparing RISs. Of the twenty-one departments and agencies which were required to prepare RISs for their regulatory proposals in 2005-06, ten complied fully with the RIS requirements and eleven did not. The following complied fully with the RIS requirements:

- Auditing and Assurance Standards Board;
- Australian Accounting Standards Board;
- Australian Competition and Consumer Commission;
- Australian Fisheries Management Authority;
- Australian Radiation Protection and Nuclear Safety Agency;
- Australian Prudential Regulation Authority;
- Australian Securities and Investments Commission;
- Civil Aviation Safety Authority;
- Department of Immigration and Multicultural Affairs; and
- Office of Indigenous Policy Co-ordination.

[5] These estimates include labour costs within departments and agencies, based on a working day of 7.35 hours, and do not include other costs such as on-costs, capital costs and consultants' fees.

Elsewhere, there remains room for significant improvement, especially within departments and agencies with systemic poor RIS compliance.