
4 Subordinate Legislation

Overall, departments and agencies prepared Regulation Impact Statements for less than half of the subordinate legislation which affected business or restricted competition, based on the compliance reports for legislation made in 1997–98. These reports under-state the amount of subordinate legislation made, as evidenced by the subordinate legislation that was tabled in the Senate for the same period.

4.1 What is subordinate legislation?

Subordinate legislation is that vast amount of legislation that comprises all rules or instruments which have the force of law and which have been made by an authority to which Parliament has delegated part of its legislative power. Such authorities include Ministers, agencies and officials.

Subordinate legislation may take many forms:

- statutory rules approved by the Governor-General in Council and disallowable instruments that are mainly made by Ministers or government agencies — these are tabled in Parliament and are subject to review by the Senate Standing Committee on Regulations and Ordinances (SSCRO); and
- other subordinate legislation that is not subject to parliamentary scrutiny and is not, therefore, disallowable — these instruments can be gazetted and/or tabled or neither tabled nor gazetted.

In recent years, the Commonwealth Government has focused on improving the quality of subordinate legislation. This follows concerns expressed by the Administrative Review Council about the variability of the quality of subordinate legislation in its 1992 report *Rule Making by Commonwealth Agencies*. The *Legislative Instruments Bill 1994* was introduced as a result of that report. Revisions to this Bill led to the introduction of the *Legislative Instruments Bill 1996*. Consistent with this approach, the Prime Minister, in 1997 announced new requirements for the preparation of Regulation Impact Statement (RISs) for ‘black

letter' law in his statement *More Time for Business* (p. 66):

Building on the regulation making framework set out in the Legislative Instruments Bill 1996, the Government will require a RIS for regulation (ie. primary and legislative instruments) and treaties involving regulation which directly affects business or which has a significant indirect effect on business or which restricts competition.

*A Guide to Regulation*¹ (the Guide) was prepared following the Prime Minister's Statement and was endorsed by the Government in September 1997. The Guide requires RISs to be prepared for "any law or other government rules which influence the way people behave" (p. A1), where those laws or rules have a direct or a substantial indirect effect on business or where they restrict competition. The preparation of RISs will continue under the authority of the Government, until the *Legislative Instruments Bill 1996* is passed by Parliament, after which new arrangements will apply to subordinate legislation.

One of the biggest challenges faced by the ORR in applying the RIS process to subordinate legislation is the absence of a comprehensive means to monitor all categories of the legislation, and the reluctance of some departments and agencies to accept that RIS requirements apply to all forms of subordinate legislation. Subordinate legislation includes a broad range of regulation such as determinations, directions, declarations, notices and plans. It may also include codes and guidelines where these are specifically provided for under the principal legislation. Whereas primary legislation may be identified through the legislation bid process, there is no such process that may be applied to subordinate regulation. The only monitor that exists for subordinate legislation is the Delegated Legislation Monitor that catalogues statutory rules and disallowable instruments after they have been made and tabled. While this is a helpful reference, its purpose is not to identify likely policy decisions involving regulation before they are made.

The application of the RIS process to subordinate legislation that is not disallowable is particularly difficult, due to: uncertainties in identifying and tracking this type of regulation; and uncertainties over whether the instrument is regulatory or administrative — only instruments that are of a regulatory character may be subject to the RIS requirements.²

¹ *A Guide to Regulation* sets out the Government's current regulation impact statement requirements.

² The Guide's test of regulatory character ("any law or other government 'rules' which influence the way people behave"), is generally consistent with the test of 'legislative character' set out in the *Legislative Instruments Bill 1996* to determine whether or not an instrument is a legislative instrument.

On the latter point, departments and agencies are more inclined to argue that many of these types of instruments are not ‘regulation’. Unfortunately, the class of instrument used to invoke a particular action, is not necessarily definitive in determining whether the action is regulatory or administrative in nature. Rather it must be decided whether the instrument determines the content of the law or simply applies the law.

The ORR should be consulted, where there is any doubt as to whether a RIS is required for a particular instrument including as to whether the instrument is regulatory or administrative.

4.2 Regulation Impact Statement requirements and subordinate legislation

The status of regulation — that is whether it is primary, subordinate (disallowable or non-disallowable) or quasi-regulation (see Chapter 5) — does not affect the analysis that should be undertaken in the RIS. The level of analysis contained within the RIS should be commensurate with the impact of the proposal. Subordinate legislation often prescribes the detailed operation of the more general provisions contained in an Act, and it may therefore impose significant compliance costs on business and other stakeholders.

A RIS prepared for statutory rules and disallowable instruments (after being attached to advice going to a decision maker) forms an attachment to the Explanatory Statement, which is tabled in Parliament. RISs for non-disallowable instruments that are tabled, should accompany the Explanatory Statement, where one has been prepared.³ Where an Explanatory Statement is not prepared, the ORR encourages departments and agencies to place RISs on their website and in any other medium that they consider would provide the stakeholders, interested parties and the public with information on the regulation.

4.3 Regulatory activity in subordinate legislation

Subordinate legislation represents the largest sector of ‘black letter’ law. In 1995–96, there were 1 900 individual pieces of regulation that were subject to

³ The Table Offices of the House of Representatives and the Senate encourage the preparation of Explanatory Statements for non-disallowable instruments. Departments and agencies should contact the Table Offices where they are unsure of the requirement to prepare an Explanatory Statement.

Table 4.1 Subordinate legislation considered by the Senate Standing Committee on Regulations and Ordinances

<i>Year</i>	<i>Statutory rules</i>	<i>Disallowable instruments excluding statutory rules</i>	<i>Total subordinate legislation subject to Parliamentary scrutiny</i>
1990–91	484	1 161	1 645
1991–92	531	1 031	1 562
1992–93	408	1 244	1 652
1993–94	490	1 313	1 803
1994–95	419	1 668	2 087
1995–96	398	1 502	1 900
1996–97	395	1 396	1 791
1997–98	454	1 434	1 888

Source: Annual Reports of the Senate Standing Committee on Regulations and Ordinances

Parliamentary scrutiny. This decreased to 1 791 in 1996–97. In 1997–98, there were a total of 1 888 pieces of subordinate legislation tabled and considered by SSCRO. In addition to this volume of disallowable legislation, subordinate legislation includes non-disallowable instruments that are not subject to parliamentary scrutiny. As mentioned above, records are not readily available on the number of non-disallowable instruments made each year. Non-disallowable instruments may include decisions by Boards or delegates, with the type or class of instrument used to embody these decisions varying considerably.

Based on the information supplied by SSCRO, it is clear that the returns from departments and agencies (reporting that 1 230 instruments were made in 1997–98) significantly underestimated the amount of subordinate legislation actually made. Further, as SSCRO does not record non-disallowable instruments, the amount of subordinate legislation actually made would have been significantly higher than the 1 888 instruments. The ORR will be encouraging departments and agencies to report comprehensively across all categories of subordinate legislation.

4.4 Compliance for subordinate legislation

An examination of the compliance reports by departments and agencies reveals that RISs were prepared for 12 per cent (156 instruments) of all subordinate legislation made in 1997–98. Further analysis of these reports suggests that RISs should have been prepared in 28 per cent of cases (338 instruments), resulting in a compliance ratio of only 46 per cent for the subordinate legislation identified by departments and agencies as having been made in 1997–98. Box 4.1 contains examples of subordinate legislation for which RISs were prepared.

Box 4.1 **Selected subordinate legislation having an effect on business, 1997–98**

Telecommunications Numbering Plan 1997

This Numbering Plan provides a framework for ensuring that telephone and other service numbers are used so as to make the most efficient use of this limited resource. The Plan sets out certain rules and procedures for the management of numbers and provides existing and new telecommunications operators with equitable access to the quantities and types of numbers they require to offer services. The Plan allows for some industry self-regulation. The Plan was tabled in Parliament as a disallowable instrument.

Telecommunications (Service Provider — Identity Checks for Pre-Paid Mobile Services) Determination 1997

This Determination enables pre-paid digital mobile services to be offered in a manner that minimises the adverse impacts, mainly the inability to identify the caller, of anonymous mobile services on law enforcement and national security. This is achieved by requiring customer information to be provided in the case of all pre-paid mobile services and authentication of that information for a sub-set of services where payment is made by cash or cheque. The Determination was tabled in Parliament as a disallowable instrument.

Carriage of Goods by Sea Regulations 1998

These Regulations implement changes to marine cargo liability by making amendments to the application of international liability rules known as the Hague Rules. These amendments improve the protection provided to Australian shippers in the event of loss, damage or delay to their sea cargoes. The amendments are compatible with cargo liability arrangements existing in Australia's major trading partners and minimise the cost to the mostly overseas-owned shipping companies by retaining a Hague Rules basis for Australia's liability regime as envisaged in the *Carriage of Goods by Sea Amendment Act 1997*.

National Environment Protection Measure for the National Pollutant Inventory 1998

The Measure, developed by the National Environment Protection Council, provides for the collection of a broad base of information on emissions and the dissemination of this information to all sectors of the community in an accessible and understandable form, in order to assist policy formulation, inform communities and facilitate waste minimisation and cleaner production programmes for industry, government and the community. Facilities using more than a specified amount of chemicals listed in the Measure must report these emissions. The information will be collected on a uniform, comprehensive and consistent basis across Australia. The State and Territory Governments will collect these figures from industry, along with estimates from non-industry sources and facilities using less than the threshold amounts. The information will then be made widely available by the Commonwealth. The Measure, Impact Statement, Summary Response Document and RIS were tabled in the Commonwealth Parliament as a disallowable instrument and passed.

Figure 4.1 shows that Departments and agencies regarded subordinate legislation as either having no impact on business or not restricting competition in 22 per cent of cases (276 instruments) and that 57 per cent of subordinate legislation (685 instruments) was excepted under the Guide. The most common reason for excepting regulation from RIS requirements was that the matters were minor or machinery in nature. Departments and agencies also cited reasons for not preparing RISs which are not included as grounds for exception under the Guide. As shown in figure 4.1, invalid reasons for not preparing RISs accounted for 9 per cent (113 instruments) of the total subordinate legislation reported to have been made.

The ORR takes an economy-wide perspective when considering the likely impacts of regulation, and consequently its assessment may differ to that made by departments and agencies. As shown in figure 4.2, the ORR considered that a higher proportion of the reported subordinate legislation was likely to affect business or restrict competition (28 per cent — 338 instruments), than departments and agencies which assessed the amount as 12 per cent (156 instruments) as shown in Figure 4.1. Conversely, the ORR assessed only 18 per cent of regulation (216 instruments) as not affecting business or restricting competition — this compared to assessments made by departments and agencies of 22 per cent (276 instruments). It is significant that the ORR considered that eight per cent of the reported regulation (93 instruments) restricted competition, whereas departments and agencies believed that only two per cent of regulation (28 instruments) had this effect.

Figure 4.1 Application by departments and agencies of RIS requirements to reported subordinate legislation, 1997–98

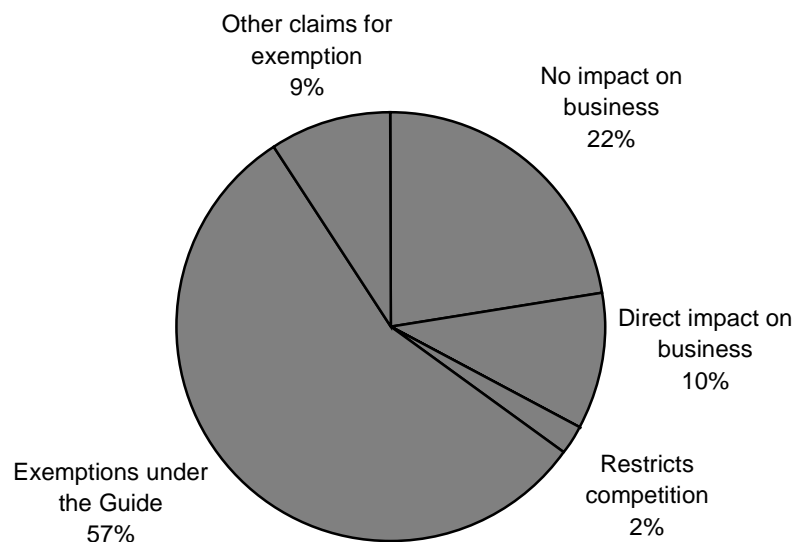
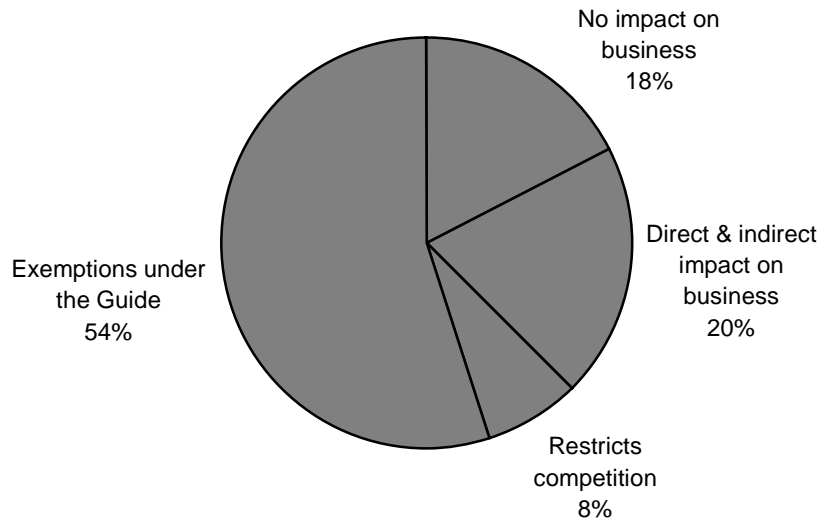


Figure 4.2 **Examination by the ORR of RIS requirements for reported subordinate legislation, 1997–98**



Further, in the ORR’s assessment, only 54 per cent (676 instruments) of the subordinate legislation met the exception criteria, whereas departments and agencies excepted a total of 66 per cent (798 instruments) of their subordinate legislation from the requirement to prepare RISs. The compliance reports also show that certain departments and agencies consistently failed to consult on the requirement to prepare a RIS for proposed subordinate legislation. Box 4.2 provides examples of some reasons, authority for which is not included within the Guide, given by departments and agencies for not preparing RISs.

These observations highlight the importance of consultation between the ORR and departments and agencies in determining whether a RIS is required. Clearly, there have been many instances where a department or agency has not contacted the ORR because it considered a regulatory matter to be excepted, for example considering it to be ‘minor or machinery’ in nature. However, the Government has stipulated that it is the role of the ORR to determine whether a regulation is excepted and, on this basis, departments and agencies should contact the ORR to ascertain whether a RIS is required on proposed regulation.

Box 4.2 Reasons given for not preparing RISs for subordinate legislation

Some reasons given by departments and agencies for excepting their own subordinate legislation from the RIS requirements include:

- enabling Bill did not require a RIS, therefore a RIS is unnecessary for subordinate legislation made under it;
- a National Interest Analysis (for treaties) was prepared;
- consultation had already been undertaken on proposed regulatory action;
- obligations under an international agreement had been met, a RIS was consequently not prepared;
- a RIS was not prepared on regulation which imposed levies, because the Government's levies principles had been satisfied;
- a RIS on regulation setting fees was not prepared because the cost recovery policy was in accordance with Government policy;
- the regulation was implemented at the request of industry; and
- the regulation imposes a benefit on industry.

None of these reasons is sufficient to except the regulation from the preparation of a RIS.

The ORR has sought the cooperation of departments and agencies in developing regulatory best practices for subordinate legislation. Some departments and agencies already have processes in place that involve the dissemination of comprehensive discussion papers to interested parties and which are often publicly available. To minimise duplication of effort and to maximise effect, the ORR reached agreement with certain departments and agencies on the application of the RIS framework.

The Australian Broadcasting Authority (ABA) and the ORR have agreed that the pre-RIS practice of releasing formal discussion papers for Licence Area Plans should continue, with the discussion paper being formulated to address the seven sections of the RIS. Following consultation and formal analysis by the ABA of the responses elicited from that consultation, the ABA prepares a RIS for its Board, which draws heavily on the discussion paper and subsequent consultation. This arrangement enables the RIS requirements to be met whilst minimising changes to processes that already follow best practice policy making. Likewise, the Civil Aviation Safety Authority (CASA) has adapted its Notice of Proposed Rule Making (NPRM), prepared for consultation on proposed regulation, to address the RIS requirements. As with the ABA, CASA undertakes a formal analysis of the responses to the NPRM, and a RIS is subsequently prepared. Consistent with this approach, the Impact Statements prepared by the National Environment Protection

Council essentially contain the same seven elements as required in a RIS — albeit using slightly different terminology and structure.

The Department of Transport and Regional Development also used a RIS as a consultation document for its Aviation Security Identification Card Scheme. The consultation document containing the RIS included other relevant information, such as the bodies proposed to issue aviation security identification cards, details of the administrative rules on the operation of the scheme and legislation relevant to the scheme.

In determining when and how far to pursue regulatory best practices for subordinate legislation, the ORR had regard to its charter. The ORR's charter, amongst other things, requires it to advise the Government, Commonwealth departments and agencies on appropriate quality control mechanisms for the development of regulatory proposals and to examine RISs and advise on their adequacy. The ORR's charter also requires it to concentrate its efforts where they will have the most effect. Consequently, the ORR found that in this first year, it was of greater importance to ensure departments and agencies adhered to regulatory best practices in relation to primary legislation and to pursue subordinate legislation as appropriate.

Compliance by departments and agencies with the requirement to prepare RISs has been affected by the vast amount of subordinate legislation made (and therefore potentially subject to the RIS process), difficulties in discerning whether a proposal is regulatory (subject to the RIS requirements) or administrative (not subject) and the ability of departments and agencies to apply the RIS process to the full range of legislation. The ORR will continue to seek the support of departments and agencies in ensuring that regulatory best practices are met for subordinate legislation. In particular, it will promote the importance of departments and agencies identifying all subordinate legislation for which they are responsible and consulting on new regulatory proposals to be made under this legislation.

In summary, during 1997–98, the ORR has sought to apply the RIS processes to subordinate legislation in a manner commensurate with the impact of the regulation. It has encouraged departments and agencies to prepare RISs for regulation that directly or indirectly affects business or restricts competition, limiting exemptions to those recognised under the Guide. However, the response from departments and agencies indicates that the RIS requirements have not been fully integrated into the policy and legislation processes for subordinate legislation. Further, the response to the ORR's requests for compliance information suggests that some departments and agencies need to establish more formal systems for the central tracking of their own subordinate legislation. The establishment of these systems will assist departments

and agencies to identify more easily and accurately the subordinate legislation, to report on compliance and monitor the amount of legislation made and its likely effect.