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# 1 Improving regulation

**The effective functioning of a modern economy and society depends of regulation. However, the volume of existing and new regulation is enormous. There are also concerns about the quality of regulation and compliance burdens on business in particular. Governments have implemented a range of strategies to improve regulation, including the widespread use of Regulation Impact Statements (RIS). The Australian Government's RIS processes are highly regarded internationally. Nevertheless, there is scope to make them more effective and transparent in improving the quality of regulation.**

Regulations are an essential component of modern society. When regulations work well, they enhance governance and promote stability, progress and prosperity. By contrast, ill conceived or poor quality regulations can create barriers to trade and commerce, impede innovation and increase business costs and consumer prices.

## 1.1 Features of Australia's regulatory system

There are approximately 60 Australian Government regulators and national standard setting bodies involved in developing and/or administering regulations. While the total budgets and number of staff of these regulators is difficult to estimate, a sample of 16 Australian Government regulators is indicative. In 2003-04, they had a combined staff of over 33,000 and annual budgets exceeding \$4.1 billion (table 1.1).

A further 40 Ministerial Councils are involved in making regulations. While the number of state and territory based regulators is unknown, a recent study by the Victorian Competition and Efficiency Commission (2005a) identified 69 regulators in that state. If the Victorian result is extrapolated to the other seven Australian states and territories, there could be up to 500 state and territory based regulators, making a total of up to 600 regulators Australia-wide.

The volume of existing and new regulation is clearly great, but is difficult to measure with precision. At the Federal Government level, there are more than 1500 Acts of Parliament. The amount of existing subordinate legislation is currently unknown, but there are around 1000 statutory rules (including Regulations) in

force.<sup>1</sup> The establishment of the Federal Register of Legislative Instruments, to meet the requirements of the *Legislative Instruments Act 2003*, will by 2008 allow the identification of all Federal Government subordinate instruments of a legislative nature/character.

In 2004-05, the Australian Government made 2552 new regulations, a significant increase over the annual average of 1441 in the previous five years (table E.1). However, a major contributor to this increase was the revoking and remaking of several hundred legislative instruments, including by the Civil Aviation Safety Authority.

In addition, each state and territory also administers a large body of legislation and regulation, with several hundred new Acts passed each year. For instance, NSW has about 1300 Acts and 650 principal statutory instruments, with a further 5500 local government planning instruments (BCA 2005, pp. viii, 8).

Table 1.1 **Resources of selected Australian Government regulatory agencies in 2003-04**

	<i>Expenses \$m</i>	<i>Staff Numbers</i>
Australian Customs Service	801	4 806
National Occupational Health and Safety Commission	15	94
Australian Communications Authority	59	444
Australian Maritime Safety Authority	64	245
Food Standards Australia New Zealand	15	132
Australian Prudential Regulation Authority	74	496
Australian Quarantine Inspection Service	290	2 800
Australian Securities and Investments Commission	196	1 531
Civil Aviation Safety Authority	107	701
National Industrial Chemicals Notification and Assessment Scheme	6	38
Australian Pesticides and Veterinary Medicines Authority	22	134
Therapeutic Goods Administration	68	457
Australian Taxation Office	2 315	21 009
Australian Consumer and Competition Commission	81	449
Australian Broadcasting Authority	17	131
Australian Fisheries Management Authority	28	131
<b>Total</b>	<b>4 158</b>	<b>33 598</b>

Note: Only includes agencies with explicit regulatory functions. Does not include government departments, Ministerial Councils and inter-governmental bodies.

Source: Various agencies' annual reports for 2003-04.

<sup>1</sup> Source: ComLaw, <http://www.frli.gov.au/comlaw/comlaw.nsf/previewlinks?OpenView&Count=9999&RestrictToCategory=LEGISLATION> (accessed 5 October 2005). Over the last 20 years, statutory rules have accounted for approximately one-third of all disallowable subordinate instruments made.

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## **How does Australia's regulatory system compare with other countries?**

The last two decades have seen unprecedented regulatory reform in Australia, including through major programs of trade liberalisation and National Competition Policy. It is generally recognised that such reforms have generated significant benefits for Australia, including in employment, productivity and income growth (Banks 2005a, b; International Monetary Fund 2005).

Comparing the performance of Australia's regulatory systems with other countries is complex and difficult. However, international studies have generally concluded that Australia's regulatory system performs well internationally. For example, according to an OECD study of product market regulation, which measures the 'relative friendliness of regulations to market mechanisms', Australia had the second least restrictive regulatory environment in the world in 1998 and the least restrictive environment in 2003 (Conway, Janod and Nicoletti 2005).

A World Bank (2005) study *Doing Business in 2006*, considered the time and cost involved in over 155 countries in performing essential business activities, such as starting a business, hiring workers and enforcing contracts. This report rated Australia sixth best. The World Competitiveness Yearbook (IMD 2005) concludes in its latest report that Australia is the ninth most competitive country.

### **But there are concerns about the costs of regulation**

Notwithstanding this, in recent years Australian business has expressed growing concerns about the quality of regulations. In May 2005, the Business Council of Australia (BCA) released a major report on business regulation. It argued that the growth in regulation in Australia overwhelms the ability of Parliament to consider it properly. New regulation was seen as generating significant compliance burdens on business and the community, and higher administration costs for government. Furthermore, the BCA considered that many regulations have a wide range of unintended and undesirable impacts. It argued that:

Many other countries have recognised the need to reform business regulation to keep their businesses competitive. If Australia does not match these efforts, we will fall behind and economic growth will slow. If we can surpass the efforts of other countries, Australia's business regulatory environment will be a source of competitive advantage (BCA 2005, p. vi).

Other business groups, including the Australian Industry Group, Australian Chamber of Commerce and Industry, and the Housing Institute of Australia, have also expressed concerns about the volume and cost of regulations for their members.

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Specific concerns identified by business include (BCA 2005):

- regulatory over-reach, with governments over-estimating their ability to achieve better outcomes than the market;
- governments focusing on resolving past problems and issues rather than looking to the future;
- regulators being overly prescriptive when they make regulations;
- governments over reacting to “hot issues”;
- regulations not being properly enforced;
- unnecessary and costly overlap between a large number of regulators, both within and between jurisdictions; and
- poor communication between governments and businesses/individuals subject to regulation.

A major concern of business is the compliance burden of regulations. Available evidence suggests that the gross compliance burden of regulations is very large. For example, the OECD estimated that in 1998 the cost to small and medium sized businesses in Australia arising from labour market, taxation and environmental regulations was \$17 billion (OECD 2001). A range of other estimates of compliance burdens have been published in recent years, highlighting the large additional burden of regulation, unintended and unnecessary impacts and a disproportionate impact on small business (Banks 2005b).

Some compliance costs are an unavoidable consequence of regulations needed to meet important economic, social and environmental goals. Therefore, a key focus of debate about regulation is on whether the objectives of regulation can be achieved with lower compliance costs on business and the community.

## **1.2 What is being done to improve the quality of new regulations?**

Most OECD countries have adopted a range of policies to improve the quality of new regulations, including the use of regulatory impact analysis (RIA). The integration of RIA into regulatory policy development processes has been promoted by the OECD and within APEC.

The OECD also advocates the systematic consideration of regulatory alternatives, public consultation and accountability in the regulatory policy process. The Australian Government has integrated these tools into its Regulation Impact Statement (RIS) process.

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## **What is a RIS?**

A RIS formalises and documents the steps taken in developing good regulation (OECD 2002a, b). It is prepared by a regulatory department/agency and seeks to ensure that regulation achieves its objectives in the most effective and efficient way. It does this by canvassing in a systematic and transparent manner objectives and a range of feasible options to address a policy problem. It aims to ensure consideration of the social and environmental as well as economic impacts of any proposed regulation. RISs should utilise cost/benefit analysis to consider and compare the impacts, pros and cons of each option. The RIS then provides a statement about community consultation, a recommended approach and a discussion of how the preferred approach can be implemented and reviewed. A key objective of the RIS is to provide a better basis for informed decision making. RISs also enhance accountability and transparency by informing the community and stakeholders about why and how particular regulatory decisions were taken.

RISs are required for new and significant changes to existing regulatory proposals which impact on business. They are not required for proposals that do not impact on business or have only minor impacts on business. Nor are RISs required for government spending initiatives or specific government purchases. In 2004-05, the ORR received 851 new queries about regulatory reviews potentially impacting on business and advised that RISs were required in 167 (20 per cent of) cases. This is consistent with previous years, where the average number of RISs required was around 22 per cent of queries received.

## **Growing use of RIS processes**

While Australian Government RIS processes date back to 1984, it is only since 1997 that they have been widely used by regulators. The Council of Australian Governments (COAG) has similar RIS processes which have applied since 1995 to all Ministerial Councils and national standard-setting bodies. With the exception of Western Australia, all Australian states and territories also employ RIS processes (appendix F).

New Zealand and some Australian jurisdictions, such as Victoria, have broadly modelled their RIS processes on those used by the Australian Government. Other countries, such as Indonesia, are also considering establishing RIS systems based on the Australian Government approach. Indeed, the Australian Government RIS processes have been seen by organisations such as the OECD, APEC and the National Competition Council, as constituting best practice. For example, the OECD review of Canada's regulatory quality control systems recommended that the Canadian Government adopt key elements of the Australian approach to RISs (OECD 2002b; PC 2003, pp. 84-85; PC 2004, p. 77).

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### Box 1.1     **The Australian Government’s RIS requirements**

RISs are mandatory for significant regulations, including international treaties, that have the potential to affect business or restrict competition.

RISs should address a number of key elements. These include an assessment of the problem or issue being addressed and a clear statement of the objective of government action. The problem should be carefully defined, with evidence of its nature, magnitude and impacts. The objective should be explicit in addressing the problem, but not pre-justify a certain course of action. The RIS then assesses feasible options, includes a cost-benefit, impact and risk analysis of each option, and provides justification for the preferred option. It also summarises the consultation process and views of stakeholders on the issues being addressed. In addition, the RIS should address how the regulation will be implemented and when it will be reviewed.

The primary role of a RIS is to ensure that all relevant information is presented to the decision maker. After a decision is made, the RIS may be tabled in Parliament or otherwise made public, promoting transparency about the basis for a decision.

The ORR is required by the Australian Government to advise agencies developing regulatory proposals whether a RIS is necessary and to assess the adequacy of all RISs prepared by agencies.

Agencies are required to consult the ORR at the earliest practicable stage in the policy development process as to whether a RIS is required. Failure to consult with the ORR, prepare a RIS where one is required, or prepare a RIS of an adequate standard can trigger a number of responses, including the ORR providing an adverse report to the decision maker and non-compliance being reported in *Regulation and its Review*.

*Source:* Derived from *A Guide to Regulation* (ORR 1998).

The Australian Government and COAG RIS requirements are broadly comparable to those used in other OECD countries, including the UK and US. RIS systems applied in Australia are integrated with — and reinforce — other regulatory quality control systems, such as regulatory plans and regulatory performance indicators, which are administered by the Office of Small Business, within the Department of Industry, Tourism and Resources.

### **The role of the ORR in RIS processes**

The role of the ORR, which is part of the Productivity Commission and shares its statutory independence, is outlined in its Charter (appendix E). The ORR is not subject to Ministerial direction and provides impartial and independent advice to the Australian Government and COAG regulators about whether a RIS is required for each regulatory proposal and, if so, whether the analysis contained within each RIS meets ‘adequacy’ standards established by the Australian Government and COAG.

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The ORR assessments are based on information provided by departments and agencies as well as that included in each RIS. In undertaking this role, the ORR is generally not in a position to verify the underlying data or methodology. Nor does the ORR endorse or support particular regulatory options or outcomes. It is the department or agency preparing the RIS which is ultimately responsible for the content of RISs.

The ORR reports to decision makers on the adequacy of RISs as regulatory proposals are considered. It also reports annually to government and the broader community — through *Regulation and its Review* — on the adequacy of analysis about regulatory issues within Australian Government RISs (see box 1.1 for further information).

The ORR provides training and guidance to officials who consider regulatory issues. In 2004-05, 74 per cent of officials who received RIS training responded to an ORR survey about the quality of such training. Some 94 per cent rated ORR training as either ‘excellent’ or ‘good’ (table E.2).

The RIS process generally works best where there is high level political and bureaucratic support for the process, and where regulators consult with the ORR early in the policy development process and before decisions about regulatory issues are made. In such cases, the RIS provides high quality information about regulatory issues and impacts to decision makers and can shape the policy making process. When published, RISs also help communicate the evidence and rationale behind regulatory proposals. In such cases, the preparation of a RIS is merely the codification of good regulation review and reform processes undertaken by regulators.

By contrast, poor quality regulation making processes are often associated with decisions being made routinely in haste, with incomplete information being provided about options and their impacts. Inadequate consultation with stakeholders and the broader community can also be a feature of poor quality processes. Where RISs are prepared very late in the policy making process, they may not achieve the primary objective of assisting the deliberations of decision makers about important regulatory problems and issues. Nevertheless, such RISs can sometimes still provide insightful information and be a useful communication tool.

Since the mid-1990s, the ORR has progressively raised the minimum information requirements of RISs, with the objective of improving the quality of RISs and their usefulness to decision makers. For example, for regulatory proposals that generate additional compliance costs on business, since 1 July 2004, the ORR has advised regulators that quantitative data about such costs must be included in RISs (or, alternatively, a clear statement be made that the regulator is unable to estimate such

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costs). In 2004-05, the ORR also commenced using a checklist to measure the features and characteristics of each RIS. This also allows changes in the quality of RISs over time to be documented and measured.

Surveys of regulators preparing RISs have generally given positive feedback about the service provided by the ORR. For example, in 2004-05, 78 per cent of survey respondents preparing RISs rated the quality of the ORR's written and oral advice as 'excellent' or 'good' (Appendix E).

### **Assessing the effects of the RIS process**

As noted above, international perceptions about the quality of regulation in Australia are positive and, in some cases, have improved in recent years. Furthermore, the OECD rates Australia's RIS processes highly. However, many factors can influence government decisions about regulation, so that the influence of the RIS process in improving the quality of regulation is difficult to ascertain.

In recent years the ORR has monitored the extent to which preferred regulatory options change during the policy development process. In 2004-05, the preferred option within a RIS changed in 10 of the 71 RISs which were prepared and considered by decision makers. (Chapter Two provides a more detailed commentary on the contribution of the RIS process to achieving better quality regulations.)

Business groups in Australia have typically been supportive of the RIS process. But some groups consider that it could make a greater contribution to improving the quality of regulation if it was strengthened.<sup>2</sup> For example, the Australian Chamber of Commerce and Industry (ACCI 2005, p. 37) stated in its 2005 pre-budget submission that:

ACCI proposes a number of recommendations to address the issue of poor RIS compliance and policy design. Firstly, greater education, skill development, resources and priority within agencies is needed. Secondly, the ORR, in conjunction with agency heads, needs to address the mentality within certain departments and agencies that RISs can be used as a means to justify regulation, as opposed to the original intention of validating the need for regulation. And thirdly, State counterparts of the ORR must be made more independent. The Commonwealth ORR, through its operation as an independent body, has formal independence from other Commonwealth departments and agencies. State ORR equivalents are currently co-located within policy departments such as the Premier's Department, State Development or Treasury. The Chamber considers that in order for these bodies to operate impartially and effectively, there must be clear lines of separation.

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<sup>2</sup> See appendix E for further information.

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The ACCI also stated that it supported recommendations in the 2003 Senate Employment, Workplace Relations and Education Committee's Small Business Employment Report, two of which related to the Productivity Commission and the RIS process:

- that the Productivity Commission be asked to report to COAG on the most appropriate body to monitor and manage a continuing program of cross-jurisdictional regulatory review and coordinate the rolling programs of regulatory review to be undertaken by all tiers of government; and
- that the RIS guidelines be amended so that agencies have to provide quantitative estimates of compliance costs, based on detailed proposals for implementation and administration, and that regular reviews be commissioned of the accuracy of compliance estimates in RISs for regulations with a major impact on business.

The Business Council of Australia (BCA 2005, p. viii) also considers that the RIS process and the role of the ORR should be strengthened, including:

- Creating a champion for better business regulation within Government through enhancing the role and powers of the Office of Regulation Review to challenge the need for new regulation affecting business and oversee the cost-benefit analysis of regulatory proposals.
- Legislating the requirement that all regulatory proposals likely to have a significant impact on business must undergo a detailed regulatory impact assessment to ensure that the benefits of regulation clearly outweigh the costs.
- Requiring the Minister proposing new business regulation to personally certify that the benefits of regulation clearly outweigh the costs.
- Introducing a two-stage impact assessment process, with all regulations likely to affect business subject to a preliminary assessment, and all regulations likely to have a significant impact on business subject to full assessment.
- Requiring the release of draft regulatory impact statements for public comment and allowing sufficient time for consultation to make that consultation meaningful.

The National Competition Council (NCC) has also supported the role and contribution of the RIS process. In its 2004 National Competition Policy Assessment of the regulatory gatekeeping mechanisms of governments, the NCC commented that:

... the Australian Government's gatekeeping arrangements comply with NCP obligations for effective gatekeeping. In particular, the ORR makes a significant contribution to improving regulatory quality and transparency by monitoring the compliance of departments with the government's regulatory requirements (NCC 2004, p. 46).

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The NCC was critical of the lack of a clear independent mechanism for advising the NSW Government on the likely impact of proposed regulations before introduction to Parliament. While the NSW Cabinet Office advises agencies on regulatory best practice, the NCC had reservations about its separation from the policy development process and the transparency of review mechanisms noting:

This is in contrast to the federal ORR which is located within the Productivity Commission — an independent statutory authority. Consideration should therefore be given to relocating the regulatory review function outside of the Cabinet Office (NCC 2004, pp. 4.7–4.8).

### **1.3 Recent developments**

In 2004-05 there were two significant reviews of Australia's regulatory systems and also changes to the way Commonwealth subordinate legislation is made.

#### **Changes to Australian Government regulation making processes**

In 2005, the Australian Government reviewed its regulation review and reform processes, including the RIS processes. The objectives included improving and strengthening these processes, enhancing consultation regarding regulatory issues and reducing red tape and the regulatory burden on business and the broader community.

The results of this review were not finalised at the time this report was prepared.

#### **Review of National Competition Policy**

In 2004, the Government asked the Productivity Commission to review the National Competition Policy (NCP) arrangements and report on future competition-related reform priorities. The Commission reported to the Government in early 2005 (PC 2005). In June, the Council of Australian Governments (COAG 2005) considered the future of NCP and agreed:

- that continuing reform is needed to sustain and enhance Australian living standards in light of an ageing population and there are significant potential gains from further reform;
- to proceed immediately with a review of NCP with the review to report to COAG by the end of 2005;
- to COAG Senior Officials undertaking the review and producing its report;

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- that the review assess the effectiveness of the existing NCP arrangements, but focus on a possible new national reform agenda;
  - that the review identify practical options for the implementation, monitoring and assessment of any new reform agenda;
  - that the review draw from, but not be limited by, the recommendations of the Productivity Commission report on the *Review of National Competition Policy Reforms*; and
  - that the Australian Local Government Association participate in relevant elements of the Review.

### **Legislative Instruments Act**

The *Legislative Instruments Act 2003* came into effect on 1 January 2005. The Act requires all Australian Government legislative instruments, made in the exercise of a power delegated by the Parliament, to be recorded on a Federal Register of Legislative Instruments (FRLI). It allows all Australians to access these regulations in one place via an internet database, <http://www.comlaw.gov.au/>.

The Act has procedures for the progressive registration of all existing regulations. For example, all legislative instruments made since 2000 must be lodged on the FRLI by 1 January 2006 while all other legislative instruments made before 2000 must be registered before 1 January 2008. Instruments that have not been registered by these dates will no longer be in force.

Under the Act, legislative instruments will typically sunset after 10 years of operation. In most cases there is a requirement to consult with the community before a legislative instrument is made. Where a RIS is required at the decision-making stage, it should be published with the explanatory statement, thus meeting the Act's consultation requirements. These provisions aim, in part, to strengthen and promote regulatory best practice in concert with the RIS requirements.