
E Regulatory reform in States and Territories

In this appendix, State and Territory Regulation Impact Statement (RIS) requirements and compliance results are presented. The information in this appendix is based on the answers provided by the States and Territories to an ORR questionnaire. The questionnaire is included in box E.1.

The Commonwealth's RIS requirements differ from the various State and Territory requirements. It should also be noted that most States and Territories have specific legislation which imposes the RIS requirements, whereas the Commonwealth does not. The States and Territories mainly concentrate on subordinate legislation, whereas the Commonwealth's RIS requirements apply to both primary and subordinate legislation, quasi-regulation (for example, codes of practice) and treaties. Another substantial difference is the number of RISs reviewed each year. In 1999-2000, the ORR reviewed 180 RISs, decreasing to 133 in 2000-01. The regulatory review units in the States and Territories examined significantly fewer RISs. Another major distinction is the requirement in many States and Territories for the preparation of a RIS at the consultation stage, during the policy development process.

To obtain a more comprehensive picture of the requirements and processes in the various States and Territories, this appendix should be read in conjunction with appendix C in *Regulation and its Review 1999-2000*.

As identified in previous editions of *Regulation and its Review*, States and Territories can be categorised into two broad groups — those with formal RIS requirements and those without. This appendix discusses both groups.

Formal RIS requirements exist in New South Wales, Victoria, Queensland, Tasmania and the Australian Capital Territory (ACT). The ACT and Tasmania require RISs to be produced for both primary and subordinate legislation. RISs are required only for subordinate legislation in New South Wales, Victoria and Queensland.

While Western Australia, South Australia and the Northern Territory do not have formal RIS requirements, processes exist to ensure that legislation does not unduly

impact on any part of the community without good reason. The ORR questionnaire requested information about formal RIS requirements. Consequently, South Australia and the Northern Territory were unable to respond to these specific questions. Western Australia provided information on the role of the Small Business Development Corporation in reviewing legislation and on future regulatory review plans.

Box E.1 Questionnaire for *Regulation and its Review 2000-01*

1. Does an independent body assess the adequacy of a Regulation Impact Statement (RIS) (or equivalent)?
 - (a) Is there an independent body within Government, or do individual departments have the responsibility?
2. What is (are) the trigger(s) for the RIS requirements?
 - (a) States and Territories should explain further how they interpret and apply the RIS requirements. For example, what is meant by 'appreciable economic burden'?
3. Are alternatives to regulations sought as part of the regulatory review process?
4. How is the adequacy of the analysis of the costs and benefits assessed? Are there any formal adequacy requirements?
 - (a) For example, COAG requires that the level of analysis to be commensurate with the level of impacts, whereas other jurisdictions require a highly quantitative approach.
5. Is consultation mandatory?
 - (a) What level of consultation is judged as adequate?
 - (b) Is an effort made to consult with small business?
6. Are RISs made public? At what stage(s)?
 - (a) For example, are RISs made public at the decision making stage and/or at the completion of the regulation making process?
7. Approximately how many RISs are completed annually? How well did departments and agencies comply with the RIS requirements?
 - (a) Percentage figures should be included where available, but qualitative assessments will suffice, ie excellent, satisfactory or poor.
 - (b) What strategies (past, present and proposed) are in place to integrate the RIS process with the policy development process of departments and agencies? For example, training, regulatory plans.
8. Is publication of the figures in (7) mandatory?

Source: ORR.

New South Wales

Regulation Impact Statement Requirements

The *Subordinate Legislation Act 1989* requires the preparation of a RIS for all new principal statutory rules. Individual departments have the responsibility for preparing a RIS for their Minister. The Minister is required to ensure that, as far as is reasonably practicable, a RIS is prepared in connection with the substantive matters to be dealt with by the proposed regulation. An initial RIS must be prepared before consultation is sought.

A RIS is not required when a regulation is directly amended; for matters of a machinery, savings or transitional nature; for matters arising under legislation that is uniform with legislation of the Commonwealth or another State or Territory; for matters involving the adoption of international or Australian standards or codes of practice; where an assessment of the costs and benefits has already been made; or for matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

The Parliament of New South Wales established, under the *Regulation Review Act 1987*, the Regulation Review Committee. This Joint Committee examines all regulations in accordance with various grounds, including whether the regulation adversely impacts on business and whether there are better alternatives. It reports to Parliament on these grounds and whether there has been compliance with the requirements under the *Subordinate Legislation Act 1989*.

A RIS must consider alternative options for achieving the desired objectives — either wholly or substantially — and the option of not proceeding with any action must be considered. An evaluation must be made of the costs and benefits expected to arise from each option compared with the costs and benefits that are expected to arise from proceeding with the regulation.

The analysis of the costs and benefits must consider the costs and benefits relating to resource allocation, administration and compliance. Costs and benefits should be quantified where possible. If this is not possible, the anticipated impacts of each of the options should be stated and presented in a way that permits a comparison of the costs and benefits.

Consultation

A RIS must include a statement of the consultation program to be undertaken. The extent of the consultation must be commensurate with the impact likely to arise for

consumers, the public and any sector of industry. Comments and submissions on a proposed new regulation must be invited for a period not less than 21 days. The responsible Minister is required to ensure that the notice — and information on where a copy of the RIS can be obtained — is published in the Gazette, a daily newspaper in New South Wales and, where relevant, in professional magazines.

Ministers are required to table a copy of the RIS in the same sitting week as Parliament is given notice of the making of a new regulation, or as soon as possible thereafter.

Compliance

While exact data are not available, it is estimated that approximately 25 to 30 RISs are completed each year. Compliance with the RIS requirements has been variable. The New South Wales Government strongly encourages the integration of the RIS process at an early stage in the policy development process.

Victoria

Regulation Impact Statement Requirements

Under the *Subordinate Legislation Act 1994* (the Act), a RIS must be prepared wherever a proposed statutory rule imposes an appreciable economic or social burden on a sector of the public. In considering whether a proposed statutory rule imposes an appreciable burden, departments and agencies must consider whether it imposes significant penalties for non compliance; whether it impacts on individual rights and liberties; and whether it will impact on business. If a statutory rule does not impose appreciable burdens, under s9 of the Act, Ministers must certify, with reasons, that this is the case.

Under s10(3) of the Act, 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 (VORR), 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. RISs are made public prior to the making of the statutory rule.

The VORR has produced the *Regulation Impact Statement Handbook*, with which agencies need to comply. The assessment of costs and benefits must include an assessment of economic, environmental and social impacts and the likely

administration and compliance costs. A fundamental requirement is to ensure that no significant impact of the proposal is overlooked.

Consultation

Generally, consultation occurs with all identified stakeholders twice, prior to preparation and again upon publication of the RIS. Consultation is mandatory if the proposed statutory rule is likely to impose an appreciable burden on any sector of the public. A RIS must be included in the consultation process. The responsible Minister is required, under s11 of the Act, to ensure that a notice is published — in the Gazette and daily newspaper — inviting submissions or public comment within a time frame of not less than 28 days.

Compliance

In 2000-01, 40 RISs were prepared by Government Departments. Of this 40, the VORR assessed 21. The VORR noted that compliance with the RIS requirements was excellent and, generally speaking, the quality was very good. The number of RISs reviewed by the VORR is published in the Annual Budget Statements and is one of the performance indicators relating to the VORR.

The VORR releases the *Victorian Regulation Alert* on an annual basis to allow business and the general public the opportunity to know of sunseting regulations and new regulations in advance. The publication is intended to complement the consultation requirements of the Act. In order to encourage compliance, the VORR has also published the *Regulatory Impact Statement Handbook* to assist agencies in interpreting the Act.

Queensland

Regulation Impact Statement Requirements

Under the *Statutory Instruments Act 1992* (the Act), RISs are required if proposed subordinate legislation is likely to impose ‘appreciable costs’ on the community or part of the community. Individual departments have the responsibility to produce RISs. Departments can seek advice from the Queensland Business Regulation Reform Unit (BRRU) on the necessity for a RIS and the content and level of analysis contained in a RIS. Consultation with the BRRU is not mandatory. A RIS must be prepared before, and included in, the consultation process.

The term ‘cost’ is defined as including burdens and disadvantages, and direct and indirect economic, environmental and social costs. The question of whether the impacts are ‘appreciable’ remains a matter of judgement and departments may have regard to the following:

- 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;
- the legislation 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;
- the legislation affects a sensitive policy area; and
- the legislation is likely to have a significant impact on the legal rights of any particular part of the community.

The Act requires that RISs include an assessment of the costs and benefits of the proposed legislation that, if practical and appropriate, quantifies the benefits and costs and includes a comparison with the benefits and costs of any reasonable alternative. The inclusion of an alternative is recommended and, as a minimum requirement, the RIS should include an assessment of the proposed subordinate legislation against the existing arrangements. BRRU recommends that a qualitative assessment be undertaken for all proposals. The BRRU has developed both a qualitative and quantitative cost–benefit methodology that can be used for all types of legislation.

Consultation

Under the *Statutory Instruments Act 1992*, RISs must be notified in the Gazette and in a newspaper likely to be read by people particularly affected by the proposed legislation. A period of 28 days is allowed from the publication of the notice for the making of comments. If the proposed legislation is likely to have a significant impact on a particular group of people, the notice must be published so as to ensure members of that group understand the content and purpose of the notice. The *Queensland Cabinet Handbook* dictates that RISs must be submitted to Cabinet prior to gazettal.

Compliance

In 2000-01, BRRU provided advice on approximately 120 regulatory proposals. Around 15 RISs are completed annually, with the majority provided to the Unit for comment prior to release. BRRU was able to comment on, and thus improve, the

level of analysis so that the standard of RISs satisfactorily met the provisions of the Act.

BRRU runs a structured training program on the RIS process and encourages the examination and adoption of alternatives to prescriptive regulation. In 2000-01, it trained approximately 185 policy officers from various departments.

BRRU is currently in the process of developing a regulatory communication plan. This will be in both electronic and hard copy forms. It is also proposing the development of a telephone referral service to assist small business with their compliance obligations.

Tasmania

Regulation Impact Statement Requirements

Under the *Subordinate Legislation Act 1992* (the Act), a RIS is required for proposed subordinate legislation imposing a significant cost, burden or disadvantage on any sector of the public. Under the Tasmanian Legislation Review Program (LRP), a RIS is required for reviews of existing primary legislation that has at least one major restriction on competition and for new primary legislation that has at least one major restriction on competition or will impose a significant negative impact on business. RISs are prepared by agencies early in the policy development process and are assessed by the Tasmanian Regulation Review Unit (RRU) within the Department of Treasury and Finance. A RIS and the public consultation program need to be approved by the RRU before consultation is sought.

In considering the need for new legislation, agencies are required to take into account whether there are alternative methods of achieving the proposed objectives.

For all legislation requiring a RIS, the costs and benefits should be quantified where possible. When this is not possible, the anticipated impacts of the alternative approaches must be presented and stated in a way that permits a comparison of the costs and benefits.

Where required, RISs for both primary and subordinate legislation should clearly identify whether the benefits of a proposal outweigh the costs. This requires an assessment of the direct and indirect social, environmental and economic impacts. Under the LRP, this includes an examination of the effect that the restriction on competition has, or will have, on the market overall. The Act also requires that a RIS assesses the impact of a proposal on competition. The RRU recommends that it

be consulted prior to commencing this process so it can provide guidance on the various analytical techniques available.

Consultation

Consultation is mandatory for both primary and subordinate legislation where a RIS is considered necessary. Once the RIS and the overall public consultation program has been approved by the RRU, advertisements need to be placed in relevant local newspapers or other publications inviting submissions on the RIS within a minimum of 21 days. Small business is specifically consulted where it is considered appropriate. In most instances, particular interest groups are directly provided with a copy of the RIS. All submissions made on the RIS need to be fully considered and documented.

Compliance

The RRU assesses on average less than five RISs for primary legislation a year. The number of RISs required for subordinate legislation is relatively small — only two or three are prepared a year.

All agencies have complied satisfactorily with the RIS process. After the RRU was established in 1995, it embarked on a comprehensive training and educational program to inform the agencies of their obligations under the Legislation Review Program and the *Subordinate Legislation Act 1992*. This has been supplemented in subsequent years by additional explanations and presentations.

Australian Capital Territory

Regulation Impact Statement Requirements

The *ACT Cabinet Handbook* requires a RIS to be included as an attachment to Cabinet submissions for all proposals of a legislative nature with some minor exceptions, such as matters of an administrative nature. The *Subordinate Laws Amendment Act 2000* added RIS requirements to all subordinate laws that impose an ‘appreciable burden on business’.

The Department of Treasury assesses the adequacy of RISs, but other departments are able to seek further analysis as part of the coordination process. Treasury follows the COAG approach, requiring the level of analysis to be commensurate with the likely impacts of the proposal. RISs must assess the cost and benefits of non-regulatory options.

Consultation

Under the *Subordinate Laws Amendment Act 2000*, RISs for subordinate laws will be tabled in the Legislative Assembly along with the Explanatory Memoranda. RISs for primary legislation are attachments to Cabinet submissions and are not tabled in the Legislative Assembly.

Agencies preparing legislative and regulatory proposals are required to consult with relevant stakeholders. The consultation report is often contained in a Cabinet Submission rather than a RIS. Community consultation processes in the ACT have recently been revised — in most cases a higher level of consultation will be required. Small business is usually consulted through the Business and Regulation Review Taskforce.

Compliance

There are no figures on the number of RISs completed in the ACT. The Department of Treasury has implemented training programs resulting in higher quality RISs.

Western Australia

While Western Australia has no formal RIS requirements, each Minister and government agency is responsible for ensuring that proposed legislation, and the review of existing legislation, is conducted in an open and transparent manner and allows for appropriate public consultation.

Departments submitting legislative proposals to Cabinet must indicate whether the proposal will impact on small business and, if so, provide an indication of the likely impacts.

The Small Business Development Corporation (SBDC) has a significant role in reviewing regulations affecting small business. Where appropriate, the SBDC makes comments or recommendations to Ministers and their departments through its independent Board of small business operators or the Minister for Small Business.

The SBDC also supports the activities of the State's Regulation Review Panel which is made up of seven private sector small business representatives. The Panel, which is convened by the SBDC, was established as a vehicle to obtain small business input on government regulations and restrictions which may unnecessarily impede business operations. The Panel seeks feedback from small business by

working with small business organisations, conducting Red Tape Forums for individual industry sectors or regions and via its Internet address.

The Department of Premier and Cabinet coordinates and oversees regulatory reforms on a whole-of-government basis, while the Competition Policy Unit of the Department of the Treasury and Finance provides support to agencies undertaking reviews of existing and proposed legislation that potentially restricts competition.

As part of its Small Business Policy, the Western Australian Government has made a commitment to establish stricter small business impact analysis provisions and enhance Cabinet reporting requirements during its first term of government.

South Australia

While South Australia (SA) does not have formal RIS requirements, regulatory reform is the primary responsibility of the Cabinet Office of the Department of Premier and Cabinet. Regulatory reform which focuses on small business is the primary responsibility of the Department of Industry and Trade.

Regulatory review mechanisms which operate in SA include the following.

- *A ten year Sunset Program.* In 1987 SA introduced sunset clauses in existing and in all new regulations (Part 3A of the *Subordinate Legislation Act 1978*). Since then agencies have reviewed all their existing regulations, updating those for which a need remains and allowing others to lapse. All updated and new regulations now have a ten year sunset clause. In addition all by-laws made under the *Local Government Act 1934* sunset after 7 years.
- *Parliamentary scrutiny.* Regulations made by the SA Government and by-laws made under the *Local Government Act 1934* are subject to scrutiny and possible disallowance by the Legislative Review Committee.
- *Cabinet Requirements for Proposed Legislation.* The *SA Cabinet Handbook* gives effect to Treasurer's Instruction number 17 which requires that all Cabinet Submissions justify the use of legislation as the most appropriate means of implementing the proposal, including consideration of whether the policy can be implemented by non-legislative means. Where the proposal may have a major impact, submissions are required to identify the costs and benefits for both the Government and the community. The formal requirements are similar to the cost-benefit assessments required by COAG in the Competition Principles Agreement.
- *Consultation Requirements.* The *SA Cabinet Handbook* requires that for all Cabinet Submissions, relevant Ministers ensure their agencies consult with those

who are likely to be affected. Although consultation is not mandatory, it is usual for consultation to be undertaken.

Northern Territory

The Northern Territory Department of Industries and Business provides a regulatory review role within the Northern Territory.

The mechanisms for regulatory review include the Department of Industries and Business scrutinising any proposed regulation and its accompanying explanatory memorandum. Regulations which are complex or those which have wide ranging impacts on government and non-government agencies are referred to the Co-ordination Committee, which includes the Chief Executive Officers of all departments and government agencies.

The Department of Industries and Business continues to work in partnership with the Chief Minister's Cabinet Office to ensure that when prospective regulations are being sponsored by an agency there is wide consultation with business and the relevant industry bodies. This aims to ensure that the impact of the proposed regulation on business is, where possible, minimal.