
3 Better integration of the RIS process

While some departments and agencies have incorporated the RIS process into their policy development, some appear to still treat it as an ‘add-on’. This chapter discusses the benefits to agencies of better integrating the RIS process into decision-making. Initiatives introduced by some agencies are used to highlight ‘best practice’.

While much regulation is necessary and beneficial, this is not always the case. In some circumstances, regulation may not be the most efficient means for achieving relevant policy objectives. And, in many cases where regulation is needed, there will be a number of options with different features and effects from which to choose. The Regulation Impact Statement (RIS) process seeks to assist departments and agencies to move towards ‘best practice’ in policy design and implementation.

Preparation of a RIS formalises and provides evidence of the steps that should be taken in policy formulation. It helps to ensure that options to address a perceived policy problem are canvassed in a systematic, objective and transparent manner, with options ranked according to their net economic and social benefits.

The Prime Minister’s statement (*More Time for Business*) highlighted the importance of the RIS process and not just the RIS document itself.

The purpose of the [regulation impact] statement is to ensure that departments and agencies fully consider the costs and benefits of all viable alternatives, with a view to choosing the alternative with the maximum positive impact (CoA 1997, p. 66).

The Prime Minister also stated that ‘Departments and agencies are required to consult with the Office of Regulation Review (ORR) *at an early stage* in the policy development process’.

While there has been an improvement over recent years in aggregate compliance with the Government’s RIS requirements, there are still some deficiencies, including: a wide variation in compliance performance across agencies, relatively low compliance for significant regulatory proposals and a lack of timeliness in preparing RISs. These deficiencies suggest a lack of commitment to integrate the RIS process (Banks 2001). The following sections discuss a range of factors relating to the integration of the Government’s RIS process into the policy development process.

3.1 Agency management

The ORR's primary role is to advise and assist departments and agencies to meet the Government's RIS requirements. Commitment to the RIS process should therefore come from the department or agency. If best practice regulatory processes are already in place, little extra work is involved in formally complying with the Government's RIS requirements.

Agencies that have integrated the preparation of RISs into their existing processes typically incorporate some of the elements of a RIS into their 'discussion' or 'issues' papers. This might include, for example, information on the problem being addressed (and the need for government action), objectives, options (regulatory and non-regulatory) and identification of the main groups affected by the proposed regulation. Undertaking these elements before public consultation occurs is important to effective policy formulation. It is also an effective means of integrating the RIS process into policy development.

Some agencies have introduced 'gate-keeper' roles by adopting a centralised or coordinated approach to manage the preparation of RISs. A check list, managed by the Cabinet liaison area within the agency, is one simple way to implement the arrangement. The check list might include questions such as: 'Has the ORR been consulted about the proposal?'; 'Is a RIS required?'; 'What is the ORR's RIS identification number for this matter?'.

An example: RIS management in AQIS

Since the Government's RIS requirements became mandatory in 1997, the Australian Quarantine and Inspection Service (AQIS) has had a good record on RIS compliance. AQIS cites two reasons why the RIS process is becoming part of their culture.

The first stems from the importance AQIS places on the consultative process. All regulatory proposals in relation to operational matters are developed in consultation with industry through a series of consultative committees. In other words, an important part of the RIS process — developing options in relation to an identified problem — begins a long time before policy approval is sought from the Minister.

The second reason is that AQIS has a unit tasked with managing the legislative process; this includes ensuring compliance with the Government's RIS requirements. The unit manages the legislative process from the development of the RIS right through to the making of the legislation and subsequent implementation.

Members of the unit explain the RIS process to AQIS officers, assist in the preparation of RISs, conduct training and liaise with the ORR as required.

An example: Management Plans for Commonwealth Marine Reserves

Under previous legislation (the *National Parks and Wildlife Conservation Act 1975*), the use of a Commonwealth marine reserve was regulated under a Plan of Management. Under the Plan, International Union for the Conservation of Nature (IUCN) Classifications were usually assigned, although this was not a statutory requirement. These plans were disallowable instruments and ran for finite terms — usually five years. Two years before their expiry, work commenced on drafting a new Plan of Management. At this point, the ORR would be consulted on the need for a RIS. As Plans were disallowable instruments with finite lives and had the potential to affect businesses (for example, fishing and tourism), the position taken by the ORR was that each new Plan required a RIS, because the default option was not to regulate use.

The introduction of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (EPBC Act) led to a change in the process for regulating the use of Commonwealth reserves. Now, when an area is declared a Commonwealth reserve, it is always assigned an IUCN Classification. That classification determines the type of activities that can and cannot be conducted within the reserve. The IUCN categories range from Strict Nature Reserve (IUCN category Ia), where the management focus is to preserve the natural conditions of the ecosystems and dependent species, to Managed Resource Protected Area (IUCN category VI), where consideration is given to balancing the long-term protection and maintenance of biological diversity and the sustainable use of the reserve's natural products and services.

After discussing the issue, the Marine Protected Areas section of Environment Australia and the ORR found a way to better integrate the RIS process. Under the new arrangements, it is intended that a RIS will be prepared for the decision to make the declaration and assign the IUCN category. (At the tabling stage, Environment Australia will make the RIS available to the public through its website.) A Management Plan is also prepared for the reserve, but a RIS is not required as the Plan is largely determined by the assignment of the IUCN classification and, as a result, will be 'machinery of government' in nature.

When a Management Plan (under the EPBC Act) ceases to take effect after seven years, a RIS is required only if the new Management Plan proposes amending the IUCN category for all or part of the Commonwealth Reserve.

These mutually agreed arrangements provide greater certainty for the Department and the ORR as to when a RIS will be required, leading to a more consistent application of the Government's regulatory best practice requirements and administrative savings for both agencies.

Agency-specific RIS guidelines

The Government's RIS requirements can be integrated into existing policy development processes by developing agency-specific guidelines. The Australian Taxation Office adopted this approach in 1998 with its *Guidelines for the preparation of Regulation Impact Statements* (ATO 1998).

Similarly, COAG RIS requirements can be integrated into existing policy development processes. In 2000-01, the National Road Transport Commission released *Guidelines for the Preparation of Regulatory Impact Statements* which were endorsed by the Australian Transport Council (ATC) (NRTC 2001). The guidelines set out the requirements and procedures that must be followed in developing and finalising RISs in relation to proposals for regulatory change submitted to the ATC. The guidelines, developed in consultation with the ORR, place the COAG RIS requirements in the context of the NRTC's own regulatory development process. They aim to ensure that the NRTC's development of regulatory reforms conforms fully with the COAG *Principles and Guidelines* (COAG 1997) and the requirements for impact analysis in the NRTC's own legislation. As far as practicable, the guidelines also seek to harmonize the NRTC's RIS standards and policy development processes with those of the Commonwealth, States and Territories to avoid unnecessary delay or duplication of effort.

A feature of the NRTC guidelines is the emphasis on addressing the RIS requirements as early as possible in the policy development process. The guidelines recommend that the ORR be consulted at the policy options stage and that, as far as possible, issues papers and other documents that guide initial public consultation incorporate the key elements of a RIS. The process is described as an 'incremental one' in which the final RIS document (for submission to the ATC) develops progressively as additional elements are added and the level of analytical sophistication increases.

3.2 Compliance reporting

A key function of the ORR is to monitor compliance with the Government's RIS guidelines. Compliance assessment is undertaken by the ORR in conjunction with departments and agencies on a six monthly basis, and involves information collection, appraisal and feedback. As explained below, the monitoring process can assist agencies to better integrate the RIS process into their policy development framework.

For departments and agencies that exhibit poor compliance over the six months, the ORR provides direct feedback to the relevant department or agency head. The purpose of this feedback is threefold. First, to check that compliance information is correct. Second, senior management can use the information to send a signal to their staff that the Government's RIS requirements need to be met. Third, some feedback is provided as a matter of courtesy to ensure that there are 'no surprises' when the Commission reports on compliance in *Regulation and its Review*.

The ORR has sought over time to develop more refined indicators of compliance to promote the Government's objective of effective and efficient legislation and regulation, while giving agencies time to become accustomed to the RIS process. In *Regulation and its Review 1997-98*, aggregate Commonwealth results were presented, with no portfolio information (PC 1998). In 1998-99, the Commission recorded compliance results by portfolio, but only in broad terms (PC 1999b). In 1999-2000, compliance results were presented by department and agency for individual instruments (PC 2000). This year, indicators of significance and timeliness are included at an aggregate level. Next year the intention is to report on these indicators by department and agency. The provision of greater detail in compliance reporting should increase the incentive for departments and agencies to satisfy the Government's RIS requirements by better integrating the RIS process into policy development.

3.3 Legislation reviews

The Commonwealth Legislation Review program is part of a national program of review of existing legislation agreed to in 1995 by COAG as part of the *Competition Principles Agreement* (CPA). Under the CPA, all Australian governments made a commitment to review and reform legislation that restricts competition.

The Commonwealth Legislation Review program began in 1996-97. Unlike the programs of other jurisdictions, the Commonwealth's program includes not only

legislation that potentially restricts competition, but also legislation that may otherwise impose costs or confer benefits on business.

To date, around 64 Commonwealth reviews across 14 departments have been completed and 11 reviews across 5 departments are in progress. The review of the stock of legislation has helped to build a critical mass of 'RIS aware' policy officers across departments and agencies sooner than would have been the case had only the flow of new and amended regulation that triggered the Government's RIS requirements been examined. In turn, this has helped to integrate the RIS process into policy development.

The ORR's role in relation to the Commonwealth Legislation Review Schedule is to provide guidance to departments and agencies on appropriate terms of reference and the composition of review bodies. More detail is provided in appendix C.

3.4 Training policy officers

Ongoing training and guidance to policy officers is fundamental if departments and agencies are to meet the Government's RIS requirements. Best practice policy development processes can only be achieved if there is a sound framework in place and capable staff to apply it. Given staff turnover, training in RIS requirements will continue to be a priority for the ORR. Appendix D provides more detail.

Training takes many forms, from providing advice over the phone, by email or at meetings, to formal training sessions. Manuals on RIS requirements are on the Commission's website (www.pc.gov.au/orr) and are available in hard copy from the ORR. *A Guide to Regulation* is the manual applying to Commonwealth RIS requirements and *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (COAG 1997) covers the COAG RIS requirements.

In preparing a RIS, officials often find it helpful to examine past examples that the ORR has assessed as being of an adequate standard. Examples have been published on the Commission's

website for that purpose. They have been chosen to illustrate RISs for different types of regulatory proposals, as well as different forms of analysis.

3.5 Regulatory plans

The Government's 1998 small business election policy *A Small Business Agenda for the New Millennium* included a commitment that departments and agencies would publish annual regulatory plans.

The plans focus on regulation and reviews of legislation which potentially require a RIS. Each regulatory plan contains information on recent regulatory changes for the year just ended, and activities that could lead to regulatory change in the year ahead. For proposed regulatory activities, the plan includes a description of the issue, information about consultation opportunities and an expected timetable. In relation to the expected timetable, major stages and milestones are identified in the development of the regulation, including the preparation of RISs.

The Office of Small Business (in the Department of Employment, Workplace Relations and Small Business), in consultation with regulatory departments and agencies, has developed a strategy to implement the Government's commitment. Each department and agency responsible for business regulation was required to publish a regulatory plan on their website by August 2001. However, some agencies have yet to publish their plans. The Department of Employment, Workplace Relations and Small Business proposes to provide a central entry point at www.dewrsb.gov.au.

Regulatory plans can provide business and the community with ready access to information about past and planned changes to Commonwealth regulation and make it easier for business to participate in the development of regulation that affects them. In principle, the plans should: help to improve the way in which regulators approach the task of developing and administering regulation; encourage strategic planning of regulatory activity; and make it easier for agencies to monitor relevant developments in other areas of government.

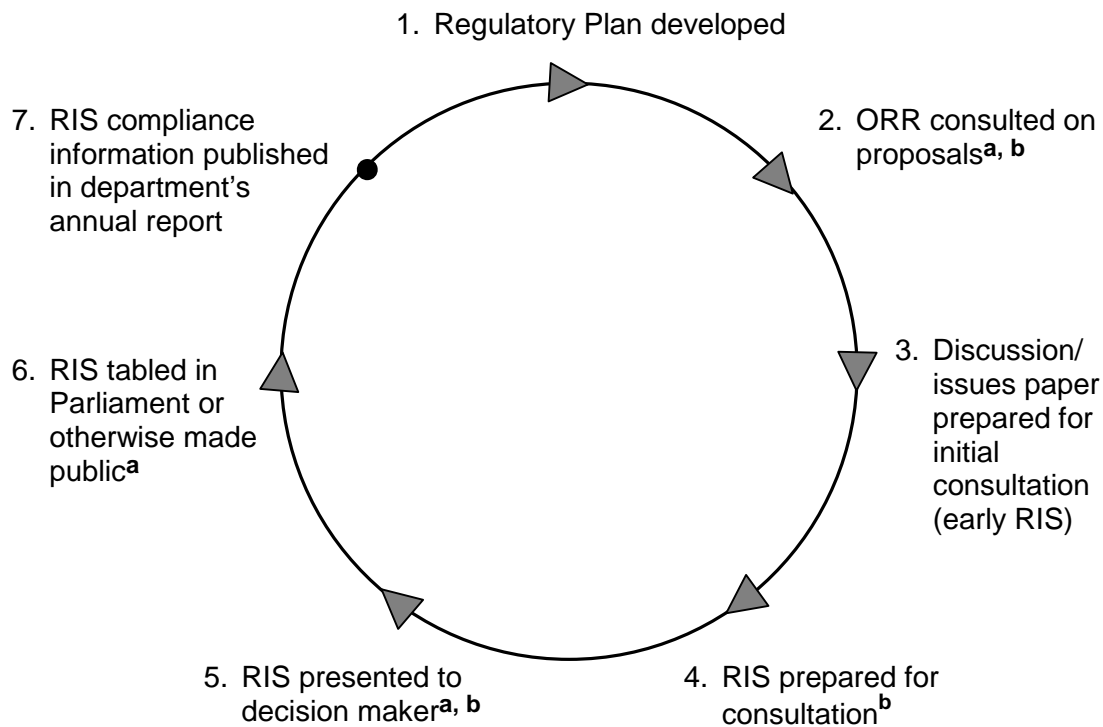
Developing regulatory plans should also help agencies to achieve best practice in their policy formulation processes. More specifically, identifying at a very early stage of the development of regulation whether proposed regulatory activity will require a RIS should prompt agencies to plan how to integrate the RIS process into their policy development process. In addition, the development of regulatory plans should improve contact between agencies and the ORR in the early stages of policy development.

3.6 Agency commitment

Another way to integrate the RIS process better would be for departments and agencies to publish RIS compliance information as part of a set of performance indicators in their annual reports. This would demonstrate their commitment to the Government's RIS requirements, and so complete the 'commitment cycle'. Figure 3.1 presents a stylised representation of what is involved.

The main phases of the RIS commitment cycle (shown in figure 3.1) are outlined in box 3.1. *A Guide to Regulation* provides more detail.

Figure 3.1 **Commitment cycle for the Government's RIS requirements**



a Minimum Commonwealth RIS requirement. **b** Minimum COAG RIS requirement.

Source: ORR.

Box 3.1 Phases of the commitment cycle

All the phases in the cycle may not be appropriate for every regulation. For example, more complex proposals, where regulation evolves over time, may require greater consultation and feedback between phases 2, 3 and 4. However, figure 3.1 indicates the important milestones in the RIS process. It also highlights the need to consult the ORR early in policy development and the iterative nature (between the ORR and the agency developing the policy) of the process to achieve regulatory best practice.

1. The Regulatory Plan for each Commonwealth department or agency is developed — it is suggested that agencies seek advice from the ORR at this phase. The Regulatory Plan is published on the agency's website.
2. Departments and agencies confer with the ORR at an early stage in the policy development process. (Some matters may arise that were not anticipated in the Regulatory Plan.) *A Guide to Regulation* (p. A4) states that:

If there are any doubts as to whether or not a regulatory review or proposed regulation qualifies for an exemption/exception from RIS requirements, the matter should be referred at the earliest opportunity to the ORR. It is important to note that it is the ORR — not individual departments, agencies, statutory authorities or boards — that decides whether a RIS should be prepared.

If a RIS is not required for a regulation, notification from the ORR confirming such advice should be obtained.
3. It is suggested that a discussion/issues paper (an 'early RIS') be prepared for initial consultation. Ideally, the paper would include some elements of a RIS (box 1.2). For example, it might include information on the problem, objectives, some options (regulatory and non-regulatory) and identify the main groups affected by the regulation. It is suggested that the ORR be consulted in the preparation of the paper.
4. A RIS is prepared for consultation. It contains most of the elements of a RIS, including a preliminary impact analysis. For COAG matters, it is a requirement that the RIS be cleared by the ORR. For Commonwealth matters, it is suggested that agencies seek advice from the ORR.
5. The RIS is presented to the decision maker, which may be Cabinet, the Prime Minister, Minister(s), Ministerial Council, board or agency head. For both COAG and Commonwealth matters, it is a requirement that the RIS be assessed by the ORR for adequacy. Adequacy criteria for Commonwealth RISs are presented in box 1.2.
6. After a decision is made, the RIS (cleared by the ORR) is tabled in Parliament or otherwise made public.
7. It is suggested that Commonwealth RIS compliance information be published (after seeking advice from the ORR) in the department's or agency's annual report.

Source: ORR.

3.7 Ecologically Sustainable Development

To progress the National Strategy for Ecologically Sustainable Development (NSESD), in June 2001 the Government decided to amend *A Guide to Regulation* to specifically refer to the need for RISs to include an assessment of ESD impacts.

The Strategy, which was endorsed by all Australian governments in 1992, states that ecologically sustainable development (ESD) ‘... aims to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations’ (CoA 1992, p. 6).

An inquiry into the implementation of ESD by Commonwealth Government agencies (PC 1999b) noted the broad scope of the policy agenda associated with ESD implementation. There is a wide variation in both the significance for policy and the complexity of the problem for policy makers. For some departments and agencies, ESD is a core policy concern, and decision-making is relatively complex. Decisions may involve scientific uncertainty and difficulties in balancing objectives in the short and long term. However, as noted in the Commission’s report, ESD implementation is not always complex (PC 1999b). In general, the degree of detail and depth of analysis should be commensurate with the magnitude of the problem and with the size of the potential impact of the proposals. Better integration of the RIS process into policy development should lead to a more thorough consideration of ESD impacts.

3.8 Cost recovery

Over time, government agencies have turned increasingly to cost recovery arrangements to recoup some or all of the costs of certain activities: for example, the provision of some statistical information by the Australian Bureau of Statistics, the assessment of new drugs by the Therapeutic Goods Administration and the provision of aviation safety services by the Civil Aviation Safety Authority.

In a recent draft report on the inquiry into cost recovery arrangements by the Commonwealth Government, the Commission recommended that cost recovery matters be covered specifically in the RIS process (PC 2001). The Commission stated that, notwithstanding the increased significance of cost recovery, present practice lacks the attributes of good policy — clear rationale, accountability, transparency, performance assessment and review.

The inquiry found that the absence of cost recovery guidelines has led agencies to rely on outdated publications, ad hoc reviews and consultants' advice (PC 2001, p. xviii). The inquiry also found that, while the RIS is a valuable tool for assessing proposed regulation, it has not dealt directly with many cost recovery proposals.

The Commission proposed that the RIS process be clarified to make it explicit that, where a regulation under review includes a cost recovery element, the RIS should address cost recovery by applying the guidelines proposed by the inquiry. The inclusion of cost recovery policy would broaden the scope of RISs and help to integrate the RIS process further into policy development processes.

3.9 Examples from States/Territories and OECD

The Commonwealth Government's RIS requirements differ from those in Australian states and territories. One of the major differences is the requirement in some states and territories for the preparation of a RIS at the consultation stage of the policy development process. A discussion of when a RIS should be prepared and other aspects of RIS requirements in states and territories is included in appendix E.

Arrangements to ensure the RIS is commenced early in the policy development process are in place in a number of OECD countries, most notably in the United Kingdom, Canada and the United States. Appendix F contains a discussion of RIS requirements in these countries.

An independent review of New Zealand's RIS regime found a number of areas for potential improvement (Tasman Economics 2001). Of most interest to Australian regulators is the finding that the overall effectiveness of the New Zealand RIS regime is being reduced significantly by the lack of incentive for officials to work on the development of the RIS throughout the process of policy development.

The New Zealand Government is considering ways to improve the design of its RIS regime. This encompasses a requirement that a RIS be developed throughout the process of policy formulation. The changes — which go further than the Commonwealth Government's current RIS requirements — would require officials to prepare:

- an *initial* RIS at a very early stage, when officials first consider a regulatory proposal, unless a specified exemption applies; and
- a *partial* RIS, which would accompany reports to Ministers and Cabinet seeking approval to commence work on the development of regulatory proposals and would be released with any public discussion paper.

These RISs would complement the current requirement for a *full* RIS at the decision-making stage and a *final* RIS at the tabling stage.

The ORR encourages agencies to consider setting ‘milestones’ for the development of the RIS throughout the policy development process as it is regarded as a highly effective means of integrating the RIS process, particularly for more significant regulatory proposals.

3.10 Agency self-assessment trial

Better integration of the Government’s RIS requirements might also be achieved through some form of self-assessment of the RIS process.

Self-assessment could involve an agency or area (section or branch) within an agency determining whether it met the Government’s RIS requirements. The responsible area would still notify the ORR at an early stage of the policy development process that the RIS requirements were triggered. It would also provide a copy of the final RIS to the ORR at the decision and tabling stages, but would not seek the ORR’s explicit assessment. Submitting the RIS would provide a means for the ORR to monitor how well self-assessment is working.

For an area or agency to qualify for RIS self-assessment, it would need to demonstrate a commitment to the Government’s RIS process. Initially, self-assessment could be limited to areas that typically deal with regulation of lower levels of significance.

The Marine Protected Areas section of the Marine Conservation branch in Environment Australia meets these criteria to trial RIS self-assessment. The section has agreed to begin a self-assessment trial for the declaration or variations to IUCN Classifications involving marine reserves from the end of 2001.

While certain regulatory areas would benefit from greater responsibility and recognition of their effort to comply with the Government’s RIS requirements, there would be a wider benefit in the ORR being able to devote more effort to areas of poor RIS compliance, as well as to the more significant regulatory proposals.

3.11 Conclusion

Integrating the RIS process more closely into policy development, rather than treating it as an ‘add-on’, will lead to better regulation. The examples and suggestions made in this chapter illustrate how agencies can better achieve this.

Ultimately, understanding and commitment from within departments and agencies are the key ingredients needed to ensure the adoption of a best practice regulatory process.

Departments and agencies are encouraged to consult with the ORR and explore specific options to better integrate the Government's RIS process into their policy development.