
Overview

Over the past year, the Commission's Office of Regulation Review (ORR) has endeavoured to build on the progress made by agencies in implementing the Government's best practice regulatory processes. Whereas in the previous year, the emphasis had been on explaining the processes and how they were to be undertaken, in 1998-99 there was a stronger focus on achieving the Government's objectives. This was facilitated by increasing knowledge within departments and agencies about the processes, and growing recognition of their value. As a result, even though the hurdles have been raised on the Regulation Impact Statement (RIS) requirements, overall there was an improvement in compliance in 1998-99.

Best practice regulatory processes

The Commonwealth Government's best practice requirements for regulation making and review have been put in place in recognition of the potential costs of inappropriate regulation and the benefits to the community of good regulation. Similar processes have been adopted by the Council of Australian Governments (COAG). The processes (outlined in chapter 1) include:

In recognition of the benefits to the community of good regulation, best practice processes are in place.

- RIS requirements, as set out in *A Guide to Regulation* (the Guide);
- reviews of existing regulation on the Legislation Review Schedule, as part of the Government's obligations under the *Competition Principles Agreement* (CPA) and complementary review processes;
- (the Government's August 1998 decision that) all departments and agencies with responsibility for regulating business will monitor nine regulatory performance indicators and report to the Office of Small Business; and

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- requirements set out in the *COAG Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (COAG Guidelines).

Following a 1998 initiative, all departments and agencies are now required to prepare annual regulatory plans.

They provide aids to informed decision making.

These processes are essential aids to informed decision making. They also make regulatory decisions more transparent to the Parliament and the community. Key aspects of the RIS process are summarised below.

What is a RIS?

A RIS provides a consistent, systematic and transparent process for assessing alternative policy approaches to problems. It includes assessment of the impacts of the proposed regulation, and alternatives, on different groups and the community as a whole.

When does the RIS process apply?

- *All* reviews of existing regulation, proposed new or amending regulation and proposed treaties involving regulation which will directly or indirectly affect business, or restrict competition. Limited exceptions apply (see the Guide).

To whom do the RIS requirements apply?

- *All* government departments, agencies, statutory authorities and boards that review or make regulations, including agencies or boards with administrative or statutory independence.

What are the ‘milestones’?

- A RIS should be prepared once an administrative decision is made that regulation may be necessary, but before a policy decision involving regulation is made by the Government or its delegated officials.
- A RIS should be attached to all proposals to be considered by the decision maker.
- A RIS should be tabled with explanatory statements/memoranda or (in the case of non-disallowable instruments and quasi-regulation) made public in some other way — for example, on a website.

The ORR's role in overseeing these processes includes:

- liaising with departments and agencies on the Government's requirements for regulation impact analysis and advising on how to comply with them;
- reporting annually on compliance with the RIS requirements and monitoring agency performance in relation to three of the nine regulatory performance indicators for the Office of Small Business;
- providing guidance to departments and regulatory agencies on appropriate terms of reference for reviews under the Commonwealth Legislation Review Schedule; and
- monitoring compliance with the COAG Guidelines.

Details of the ORR's role and activities are provided in chapter 1 and appendix A.

Compliance with RIS requirements

Some methodological changes have been made to the reporting framework in 1998-99, precluding precise comparisons with the previous year. Nevertheless, the aggregate data indicates an overall improvement in compliance (see chapter 2).

There has been an overall improvement in compliance, but...

Primary legislation

The first methodological change was the reporting of primary legislation by the number of proposals rather than by the number of Bills. The new measure reflects more accurately the quantum of regulation. When looking at primary legislation, one area where there is clear room for improvement is in the preparation of RISs for decision making. While compliance at the tabling ('transparency') stage for primary legislation was 89 per cent, compliance at the decision-making stage was only 61 per cent.

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Aggregate RIS compliance, 1998-99

Type of Regulation	Decision maker		Parliamentary tabling	
	RIS required	Adequate RIS prepared	RIS required	Adequate RIS prepared
Primary legislation	87	53 (61%)	117	104 (89%)
Disallowable instruments	110	94 (85%)	110	97 (88%)
Non-disallowable instruments ^a	27	26 (96%)	na	na
Quasi-regulation ^a	35	30 (86%)	na	na

^a Based entirely on self-reporting by departments and agencies. **na** Not applicable.

Delegated Legislation

Compliance is better for disallowable instruments and...

The second change made this year was to report separately on disallowable and non-disallowable delegated instruments. At 85 per cent, the compliance ratio for *disallowable* instruments at the decision-making stage was considerably higher than for primary legislation. Compliance for tabling was 88 per cent. Of some interest when looking at the disallowable instruments was the small number that required a RIS — 110 out of 1590 that were reported during 1998-99. Notwithstanding their relatively small number, many of these instruments can impose significant impacts.

also appears to have improved for non-disallowable and quasi-regulation.

For reporting on *non-disallowable* instruments and *quasi-regulations*, the Commission has relied entirely on reports to the ORR from departments and agencies. Compliance was 96 and 86 per cent, respectively. While it is not possible to ascertain whether all such regulation has been accurately reported, there was a significant increase in the number of RISs prepared and assessed as adequate compared with 1997-98.

Portfolios and agencies

Some departments are performing particularly well.

The third methodological change was the reporting of disaggregated data by portfolios, and where possible, agencies (see appendix B). The departments of

Communications, Information Technology and the Arts; and Health and Aged Care had relatively high compliance rates in both the primary legislation and disallowable instruments categories; while the Australian Taxation Office achieved good results for primary legislation. These results were notable given the relatively high numbers of proposals involved. Treasury, Environment and Heritage, and the Attorney-General's departments also performed well in the primary legislation category.

National regulation making

Reporting on the performance of Ministerial Councils and national standard-setting bodies in meeting the requirements of the COAG Guidelines revealed considerable overlap (see chapter 2). More specifically, RISs prepared for national standard-setting bodies were nearly always also considered by Ministerial Councils. Out of 24 RISs considered by Ministerial Councils, the ORR commented on 19 — a significant increase on the previous year — and all were assessed as adequate. It appears that there were an additional 12 matters considered by Ministerial Councils that may have required a RIS. As some of these bodies become more aware of the COAG Guidelines, compliance should continue to improve.

The ORR is seeing more RISs from Ministerial Councils and national standard-setting bodies.

Improving compliance

Improved compliance reflects a number of factors (see chapter 3). For example, greater familiarity with the RIS process has improved the level of expertise in agencies. The Government's ongoing commitment and promotion of the process is another key element, along with the 'hands on' experience gained by agencies in undertaking the process.

Awareness and expertise are increasing.

Feedback from a number of agencies suggests that they value the RIS process as a tool for developing proposals and informing decision making. This recognition is important — it means that agencies are likely to have a greater

commitment to the process than if it were seen simply as a procedural requirement.

But there is more to do in explaining requirements at the decision-making stage.

There is still work to be done. In some areas regulation makers are not fully aware of, or have misunderstandings about, the requirements. For instance, some agencies still appear unaware of the need to start preparing a RIS *early* in the policy development process. This is critical to its value in informing the decision maker. Last minute proposals can rarely address fully all of the requirements.

In some cases, proposals going to Cabinet have not been accompanied by RISs, in the mistaken belief that, as long as the responsible Minister has seen a RIS, the requirements have been met. In such instances, where the Cabinet is the decision maker and a waiver has not previously been granted, failure to attach a RIS has resulted in non-compliance being reported.

A RIS should be made public.

A RIS should be included with explanatory memoranda and explanatory statements for primary legislation and disallowable instruments. For non-disallowable instruments and quasi-regulation, it is desirable that RISs also be made public by, for example, inclusion with the gazettal notice or placement on a website.

The ORR will be targeting compliance at the decision-making stage for primary legislation.

The ORR will continue to provide training to agencies to increase awareness and knowledge of the process. Special attention will be paid to improving compliance at the decision-making stage for primary legislation, so that it accords with the high level of compliance that has been achieved at the tabling stage.

This report also examines some of the mechanisms for achieving greater integration of the RIS process within agencies. In particular, regulatory plans are seen as playing a useful role, including by improving contact between agencies and the ORR in the early stages of policy development.

In addition, there are a number of bodies which play key ‘gatekeeping’ roles in reminding agencies of the RIS requirements. They include: the Cabinet Secretariat and the International Division in the Department of Prime Minister

and Cabinet; the Treaties Secretariat in the Department of Foreign Affairs and Trade; the Office of Legislative Drafting in the Attorney-General's Department; and the Federal Executive Council Secretariat. Gatekeeper procedures should be further enhanced when the new Cabinet Handbook incorporating the revised RIS requirements is completed.

The level and quality of analysis in a RIS needs to be commensurate with the impact of the proposal. This applies irrespective of the type of regulation — primary, delegated (disallowable or non-disallowable) or quasi-regulation. It has proved difficult, however, for the ORR to monitor non-disallowable and quasi-regulation (see chapter 3). This problem could be alleviated by the establishment of more formal systems within agencies to track the full range of regulation for which they are responsible. Passage of the Legislative Instruments Bill would also go some way toward addressing this problem.

Analysis should be commensurate with impacts.

Commonwealth legislation reviews

After revisions to the Legislation Review Schedule, 16 reviews were to have commenced by 30 June 1999 (see chapter 4 and appendix C). Of these, eight reviews commenced as scheduled. The terms of reference for each review were cleared by the ORR.

While not all scheduled reviews commenced as scheduled...

For clearance, terms of reference must:

- recognise the guiding principle under the CPA; and
- have an analytical framework centred around cost-benefit analysis, such as those provided by the RIS guidelines or clause 5(9) of the CPA.

Although not a requirement, the terms of reference for all eight reviews specified reporting dates. Most also included processes for a response by Government.

the ORR cleared all terms of reference for those that did.

The ORR does not have a formal role in approving the composition of review bodies, though it is often asked for advice. For the most part, reviews undertaken in 1998-99 were consistent with the eight modalities identified in the

Legislation Review Schedule. Some agencies have experienced difficulties in setting up independent review bodies as required, particularly given the scope of the reviews and the number being undertaken.

Review bodies need to be seen to be independent.

One issue which has arisen is the appropriateness of industry and other stakeholder groups being represented on review bodies. While this may offer some advantages, it can also affect perceptions about the impartiality of such reviews and the validity of their findings. In general, if direct representation by industry or other groups is considered desirable, a preferable approach would be to include them on a reference group.

In conclusion ...

The focus on good regulatory outcomes needs to be maintained.

The past two years have been a learning experience for all concerned — Ministers and their advisers, Government departments and agencies, and the ORR itself. During 1998-99, some solid gains were made, but there are still areas where improvements can be made. By maintaining the focus on achieving good regulatory outcomes through informed decision making and transparency it is expected that compliance will continue to improve.

For the ORR's part, it will be making a greater effort through training and the dissemination of information, to achieve earlier consultation during the policy development process, improved compliance at the decision-making stage for primary legislation, and better reporting mechanisms for non-disallowable instruments and quasi-regulation.