
1 Improving the quality of regulation

Regulatory review has developed from a focus on ‘deregulation’ and ‘cutting red tape’ to becoming an integral and ongoing part of good governance. Australia is recognised as being one of the leaders in developing processes to underpin good regulatory policy. A range of processes, initiatives and institutions aim to ensure high quality regulation, including the Australian Government’s Regulation Impact Statement (RIS) process.

Over the last decade or so, many OECD countries have undertaken substantial regulatory reform — for example, in infrastructure related activities such as electricity, rail, shipping, airports and telecommunications. During the period, there has also been a significant increase in new regulations associated with the environment, health and safety.

In these areas and elsewhere, it is generally recognised that some degree of regulation is essential for a properly functioning society and economy. The challenge for government is to deliver effective and efficient regulation — regulation that is *effective* in addressing an identified problem and *efficient* in terms of minimising compliance and other costs imposed on the community. Poor quality regulation can impose unnecessary costs, impede innovation and create unnecessary barriers to trade, investment and economic efficiency.

Evolution in regulatory policies

The nature of regulatory management and reform has changed over the last few decades. What began as ‘deregulation’ evolved into a focus on regulatory reform — encompassing a mixture of deregulation, re-regulation and initiatives to improve the effectiveness of regulation. In more recent years, there has been growing recognition that government has an ongoing role in ensuring the quality of the regulatory system.

Today, the concept of ‘regulatory policy’ is developing into the wider notion of ‘regulatory governance’ (OECD 2002a). This development recognises that the tasks involved in exercising regulatory authority extend beyond the design and implementation of regulatory instruments, or their coordination, and embrace

governance issues such as transparency, accountability, efficiency, adaptability and coherence. Developing and implementing the concept of regulatory governance is now the focus of the regulatory policy agenda in many OECD countries.

1.1 Regulatory policy

The regulatory policy agenda is based on an integrated approach to three mutually supportive elements: regulatory policies, regulatory tools and regulatory institutions.

Explicit regulatory policies signal commitment to reform and aid transparency, as well as promoting consistency and coordination across different elements of a broader regulatory reform program. A central principle is the establishment of explicit responsibility for regulatory policy at both political and administrative levels, and the adoption of standardised appraisal systems for regulation making and regulatory review processes. Key elements of most policies also include adoption of explicit guiding objectives and the enunciation of principles of good regulation (OECD 2002a).

Regulatory Impact Analysis

Although not a new concept, Regulatory Impact Analysis (RIA)¹ has become one of the main initiatives employed by OECD countries to improve the quality of regulation and promote regulatory governance. Other tools include the systematic consideration of regulatory alternatives, wider public consultation and improved accountability arrangements (OECD 2002a, p.11).

Although only two or three OECD countries were using RIA in the early 1980s, by the end of 2000, 14 of 28 OECD members had adopted universal RIA programs and a further six were using this analytical framework for some regulatory proposals (OECD 2002a, p. 45). The use of RIA across OECD countries is illustrated in figure 1.1.

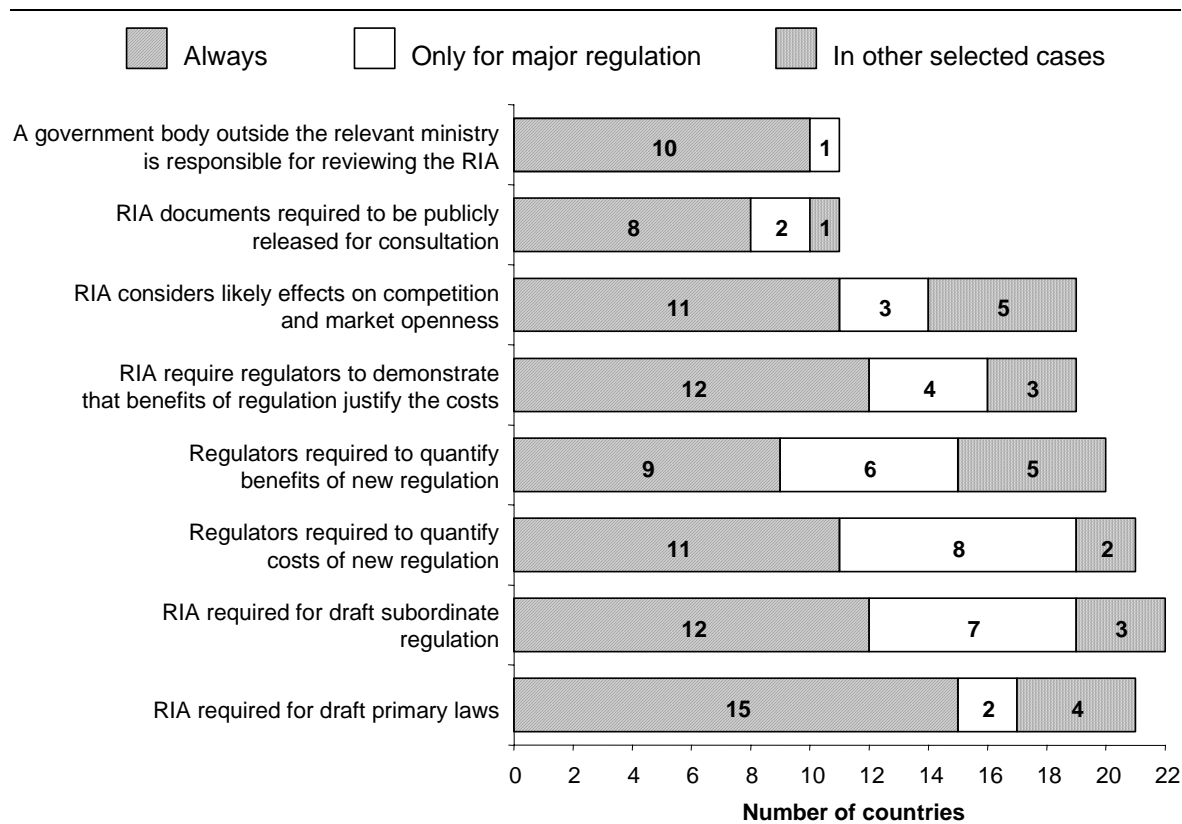
The United States and the United Kingdom are leading countries in implementing regulatory policy — including RIA.

- In the United States, reform of the regulatory process was introduced under an Executive Order of the President in September 1993. RIAs are required for all

¹ The OECD describes Regulatory Impact Analysis (RIA) as a decision tool, a method of systematically and consistently examining selected potential impacts arising from government action and a way of communicating the information to the decision maker (OECD 2002a, p. 45).

significant rules, regardless of the extent to which an agency is permitted by law to consider risks, costs or benefits when issuing regulations. Agencies are required to identify and assess alternatives to direct regulation and are encouraged to allow 60 days for the public to comment on proposed regulations. An independent agency — the Office of Information and Regulatory Affairs — is responsible for oversight of the Government’s regulatory quality assurance system.

Figure 1.1 **Key aspects of regulatory impact assessments in 28 OECD countries, 1998**



Source: OECD (2002a, p. 46).

- In the United Kingdom, regulatory impact assessment for proposals that affected businesses, charities or voluntary bodies was introduced in 1998. A central unit — the Regulatory Impact Unit, located within the UK Cabinet Office — works with departments, agencies and regulators to: ensure departments prepare robust RIAs at three stages in the policy development process; consider alternatives to regulation; include RISs² for ministerial correspondence seeking collective agreement for ‘significant proposals’; provide early and effective consultation

² A RIS includes RIA, the systematic consideration of regulatory alternatives and the documentation of public consultation.

with those affected; and actively manage the efficient and fair transposition of EC regulatory law to British statute (Cabinet Office (UK) 2003).

While the use of RIA is growing throughout the OECD, its impact is difficult to gauge. Hahn (1998) concludes that RIA appears to have helped yield more sensible regulations in some cases and also to have reduced the number of unnecessary burdensome regulations in others. While most OECD countries now use RIA, some are strengthening their requirements (discussed in appendix E).

Benefits of regulatory impact analysis

The main benefit of RIA is that it provides a systematic and consistent framework to assess the potential impacts arising from government action (OECD 2002a, p. 45). RIA attempts to clarify relevant factors for decision-making and make trade-offs explicit.

The RIA process also contributes to greater transparency of government decision-making. Improved transparency is regarded by the OECD as the most pressing area for change in many countries which have regulatory impact analysis requirements (OECD 2002a, p. 65). The OECD considers that increased transparency can address many regulatory failures such as regulatory capture, bias toward concentrated benefits/costs for particular groups, decisions based on inadequate information and lack of accountability. Transparency increases the incentives for policy makers to approach the policy making process in a best practice manner.

Some concerns about regulatory impact analysis

The institution of RIA is sometimes criticised for replacing political accountability with a mechanistic tool. However, as the OECD (2002a) has shown, this criticism is misplaced. In OECD countries, RIA is intended to complement good decision-making, not substitute for political accountability.

The OECD also notes that some interest groups and regulators continue to oppose RIA as contrary to their ethos. A key issue appears to be the role of RIA in making explicit the trade-offs implicit in all policy action, as well as the limits to government's power to act (OECD 2002a, p. 49). Such notions are sometimes perceived as challenging the ideals and objectives of some interest groups and regulators.

The OECD highlights the issue of conflicting incentives for regulators (OECD 2002a, p. 51). Regulators are under constant pressure to make decisions quickly,

particularly where political imperatives intervene. Analysis and consultation can slow down the process. However, it is precisely in such situations, where governments are under great pressure to ‘do something’ and do it quickly that good process is needed to ensure that all of the potential impacts of proposed regulation — costs, as well as the benefits— are given adequate consideration. Speed of action should not preclude good process.

Further, where best practice processes are in place, with RIA integrated into policy development processes, little additional work — and, hence, time — should be involved in complying with RIA requirements. Notwithstanding this, and the growing use of RIA in OECD countries, the need to ensure that RIA is integrated into decision-making is seen as a continuing challenge.

1.2 Regulatory policy in Australia

Among OECD countries, Australia is recognised as one of the leaders in regulatory policy. In Australia, regulations are required to be pro-competitive, with a focus on outcomes. An important objective is to avoid creating unnecessary burdens on business or the community. There is also a general agreement about the need to periodically review and reform regulatory arrangements to ensure that they remain appropriate. Further, the Australian Government’s RIS process encompasses the main tools (RIA, the systematic consideration of regulatory alternatives, public consultation and accountability) that the OECD has identified as needed to improve the effectiveness and efficiency of regulation. New Zealand and a number of Australian jurisdictions have recently implemented RIS systems modelled on the approach taken by the Australian Government.

The Government’s commitment

The Prime Minister’s 1997 statement (*More Time for Business*) highlighted the Government’s commitment to reforming regulation making.

In order to minimise the burden of regulation on business, the Government is firmly committed to reforming regulation making. Improving the regulatory environment starts at the policy development level. (CoA 1997, p. 65)

The Government noted that a cultural change in regulation making was required.

Minimising the regulatory burden on small business requires a change in the regulation making culture. Regulation should not only be effective, but also the most efficient way of achieving the objectives at hand. To foster this culture change, the Government will introduce reforms to the way regulation is made by requiring a cost-benefit analysis for regulation that is likely to affect business or restrict competition. (CoA 1997, p. 66)

To promote its objective to improve the quality of regulation, the Government announced at that time that RISs would be mandatory for legislation and regulation that has the potential to affect business. As part of this initiative, the Productivity Commission was asked to report on compliance with the Government's RIS requirements. The Office of Regulation Review (ORR), a separate unit within the Productivity Commission, advises on whether the Government's RIS requirements have been met — including the adequacy of RISs.

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 policy problem are canvassed in a systematic, objective and transparent manner, with options ranked according to the net economic, social and environmental benefits.

The primary role of a RIS is to improve government decision-making processes by ensuring that all relevant information is presented to the decision maker. In addition (after a decision is made) the RIS may be tabled in Parliament or otherwise made public, providing an open and transparent account of that decision.

The Prime Minister's 1997 statement 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)

In 2001, the Government reaffirmed support for the RIS process in the form of a pre-election statement (*The Howard Government: Putting Australia's Interests First, Getting on with Business*).

The Coalition will maintain its commitment that each Cabinet Submission is examined for its potential regulatory impact on small business. A formal Regulatory Impact Statement will be prepared for each relevant Cabinet Submission. This will ensure that Cabinet is fully briefed on likely regulatory impacts of Cabinet decisions on small business.

Also in 2001, the Government decided that, where relevant, RISs should include an assessment of ecologically sustainable development (ESD) impacts. And, in 2003, the Government decided that, where appropriate, the RIS should also include a cost recovery statement.

While the Australian Government's RIS process has a high degree of consistency with OECD regulatory best practice principles there is scope to strengthen the RIS process (see appendix E).

Complementary processes, initiatives and institutions

The Australian Government's RIS process complements similar requirements introduced by the Council of Australian Governments (COAG) and by State and Territory governments. The COAG RIS process which applies to national regulatory proposals is discussed in appendix A. The RIS requirements adopted by the States and Territories are discussed in appendix D.

The *Competition Principles Agreement* is another initiative that aims to improve the quality of regulation (NCC 1997). Amongst other things, it obliges the Australian, State and Territory governments to review and, where appropriate, reform legislation that restricts competition. (The Australian Government's legislation review program is discussed in appendix B.) Further, all new legislation that restricts competition must be accompanied by evidence that the benefits of the restriction to the community as a whole outweigh the costs, and that the objectives can only be achieved by restricting competition.

Regulatory plans also form part of the Government's strategy to improve regulation. These are required to be prepared by each department or agency and contain information on recent regulatory changes for the year just ended, as well as activities that could lead to regulatory review and change in the year ahead. (Regulatory plans are discussed in chapter 4.)

Regulatory performance indicators also seek to enhance the quality of regulation. Indicators for a range of regulation are prepared by the Office of Small Business (within the Department of Industry, Tourism and Resources) to facilitate an assessment, over time, of the effectiveness of regulation, including an assessment of administrative aspects, such as compliance costs. (Regulatory performance indicators are discussed in chapter 5.)

In 2003, it was announced that an Implementation Unit was to be established in the Department of The Prime Minister and Cabinet. The Unit is to have two main roles: to monitor and report on the effectiveness with which key programs and services are being delivered; and to ensure departments have carefully considered implementation issues in Cabinet submissions. There is also scope for this Unit to be involved in assessments of the effectiveness of the implementation of regulation.

Effective and accessible appeal provisions complement other measures to improve regulation and strengthen regulatory governance. In Australia, some decisions of regulators are subject to administrative review. A smaller number of decisions are subject to judicial review — seen by the OECD as 'the ultimate guarantor of transparency and accountability' (OECD 2002a, p. 75). Other avenues of review include the Commonwealth Ombudsman and the Inspector-General of Taxation.

These processes of government and similar implementation issues relating to regulation are discussed in more detail in chapter 5.