
2 Compliance with RIS requirements

Overall, there was an improvement in compliance with the Commonwealth Government's RIS requirements in 1998-99. However, there is considerable scope for improvement at the decision-making stage for primary legislation.

In 1998-99 117 proposals introduced via primary legislation required a RIS. Of these, 98 per cent were accompanied by a RIS when tabled and 89 per cent (of those requiring a RIS) contained an adequate level of analysis. Of the 117 proposals introduced, 87 required a RIS at the decision-making (or policy approval) stage. An adequate RIS was prepared for 61 per cent of these proposals.

Of the 1590 disallowable delegated instruments made and reported to the ORR in 1998-99, RISs were required for 110. An adequate RIS was prepared for 85 per cent at the decision-making stage and for 88 per cent at the tabling stage.

For those non-disallowable instruments and quasi-regulations reported, compliance with the RIS requirements at the decision-making stage was 96 per cent and 86 per cent, respectively.

2.1 Introduction

As noted in chapter 1, 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 using a logical standardised framework. In addition, after the decision is made, the RIS can become a public and transparent account of that decision making.

In the case of regulatory proposals introduced via Bills and for disallowable delegated legislation, RISs are tabled in Parliament as part of an explanatory memorandum or explanatory statement, respectively. In the case of treaties, a RIS is prepared when approval to commence negotiations is sought. It is updated when approval is sought to sign the final text of a treaty, and is made public when the

treaty is tabled in Parliament.¹ RISs for proposals introduced via non-disallowable delegated legislation and quasi-regulations should also be publicly available.

Changes in methodology

There have been three changes to the methodology used by the ORR this year in assessing compliance.

The first involved primary legislation. Whereas in 1997-98 the ORR assessed compliance on the basis of the number of Bills introduced (requiring a RIS), for 1998-99, assessment has been made on the number of proposals of a regulatory nature that were introduced via Bills. This change was made to reflect more accurately the quantum of regulation. Many Bills include a number of regulatory proposals, which under the previous methodology would have been counted as only one. This meant that the compliance reports for some departments would provide a distorted picture of their level of regulatory activity relative to other departments.

The second change related to the reporting of compliance for delegated regulation, which this year has been disaggregated into disallowable and non-disallowable instruments. For disallowable instruments, information published by the Senate Standing Committee on Regulations and Ordinances (SSCRO) allowed the ORR to verify compliance information reported by agencies (SSCRO 1998, 1999). The absence of equivalent information on non-disallowable instruments (and quasi-regulation) has made it necessary for the ORR to rely entirely on departments' self-reporting for these forms of regulation.

The third change involved reporting compliance on a portfolio, department and (where possible) agency basis, consistent with the requirements arising out of *More Time for Business* (see chapter 1). Appendix B provides a disaggregated assessment of compliance for proposals introduced via Bills and disallowable instruments.

Due to these changes, the compliance figures for 1998-99 have not been directly compared with those for 1997-98. To the extent that data can be compared, an overall improvement in compliance is apparent.

¹ The Commonwealth Government must table proposed treaty actions in both Houses of Parliament at least 15 sitting days prior to taking binding action.

Assessing compliance

When making its assessment of compliance with the Commonwealth RIS requirements, the ORR considers whether:

- a proposal ‘triggered’ the RIS requirements;
- a RIS was prepared to inform the decision maker (the decision-making stage);
- the analysis contained in a RIS prepared for the decision maker was adequate;
- a RIS was tabled in Parliament or otherwise made public (the transparency stage); and
- the analysis contained in a RIS tabled or otherwise made public was adequate.

In order for a portfolio, department or agency to be considered fully compliant with the requirements, a RIS must be prepared for the decision maker, cleared as adequate by the ORR before policy approval is sought, and be subsequently tabled in Parliament or otherwise made public. If a RIS is inadequate at the decision-making stage, a department or agency has some scope to modify the RIS to improve the standard of analysis before tabling it or making it public.

Generally speaking, a RIS that is considered adequate at the decision-making stage will be adequate for public release. On a few occasions, departments and agencies have removed information from a RIS between the decision-making and tabling stages, and the analysis in the tabled RIS was inadequate. Very occasionally, material will be removed from the RIS being tabled due to its sensitivity (for example, it might be commercial-in-confidence). The ORR considers each RIS altered under these circumstances on a case-by-case basis.

The ORR’s more limited role in assessing and advising on the adequacy of COAG RISs prepared by or on behalf of Ministerial Councils and national standard-setting bodies is described in chapter 1. When assessing compliance with COAG RIS requirements, the ORR considers whether:

- a decision made by a Ministerial Council or national standard-setting body ‘triggered’ the COAG RIS requirements;
- a COAG RIS was prepared; and
- the COAG RIS was assessed by the ORR before it was made available for public comment.

In the following sections, the ORR reports on the level of regulatory activity in 1998-99 and the extent to which departments and agencies complied with the Commonwealth RIS requirements for regulatory decisions introduced via Bills, delegated instruments, quasi-regulations and treaties, respectively. The chapter

concludes with an assessment of compliance by Ministerial Councils and national standard-setting bodies with the COAG RIS requirements.

2.2 Primary legislation

Regulatory activity in Bills

The Commonwealth Government introduced 263 Bills into Parliament in 1998-99. Of these, 261 Bills were assessed and included 360 policy proposals (regulatory and non-regulatory in nature). Of these:

- 140 proposals were exempt from the RIS process, having no impact on business; and
- 103 proposals impacted on business, but proposed changes that satisfied one of the several minor exceptions to the RIS process (see ORR 1998, pp. A3–4).

This left 117 proposals that required a RIS (see figure 2.1), of which 93 had a direct impact on business, eight had a significant indirect impact on business and 16 restricted competition (see figure 2.2).

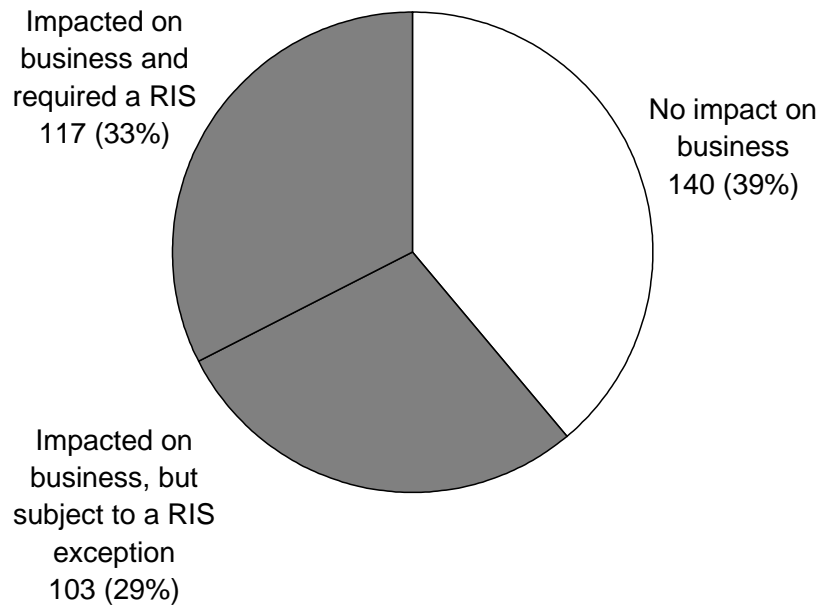
Assessing compliance

In 1998-99, out of the 117 proposals, the RIS requirements were waived for the decision-making stage for 30, leaving 87 proposals that required a RIS. RISs were prepared for 62 proposals (71 per cent), of which 53 contained an adequate level of analysis (that is 61 per cent of proposals requiring a RIS) (see figure 2.3).

The departments of Communications, Information Technology and the Arts; Environment and Heritage; Health and Aged Care; the Treasury; and the Attorney-General's Department all achieved high levels of compliance for proposals introduced via Bills (see appendix B for more details).

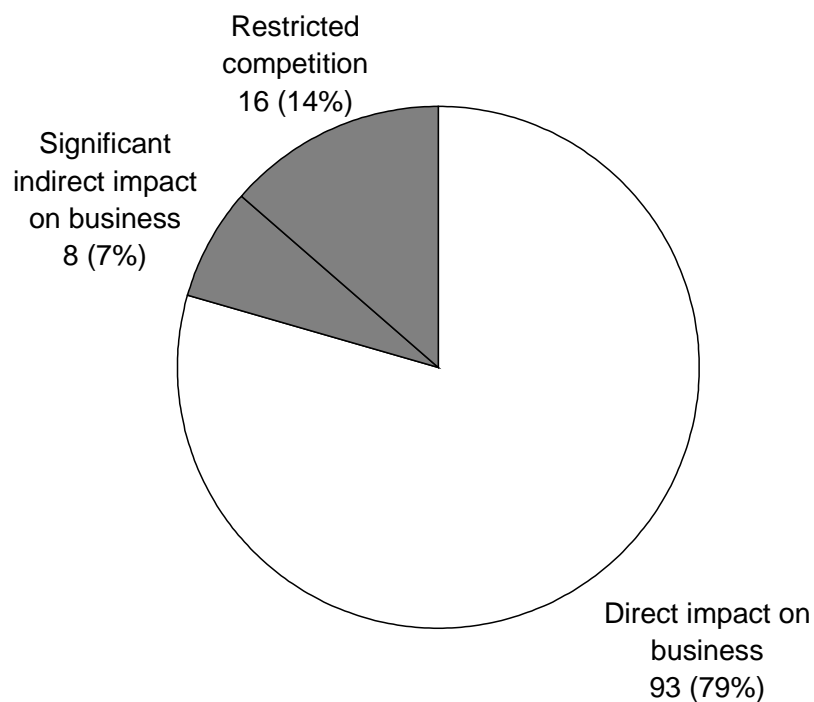
A secondary purpose of the RIS process is to provide Parliament and the community with greater information about the reasons underlying the Government's proposed actions. Compliance with the RIS requirements at the tabling (transparency) stage during 1998-99 was significantly better than at the decision-making stage. Of the 117 proposals that triggered the RIS requirements, 115 (98 per cent) were accompanied by a RIS when tabled in Parliament. In 104 cases (89 per cent of total proposals requiring a RIS), the ORR was satisfied with the level of analysis.

Figure 2.1 **Policy proposals introduced into Parliament via Bills, 1998-99**



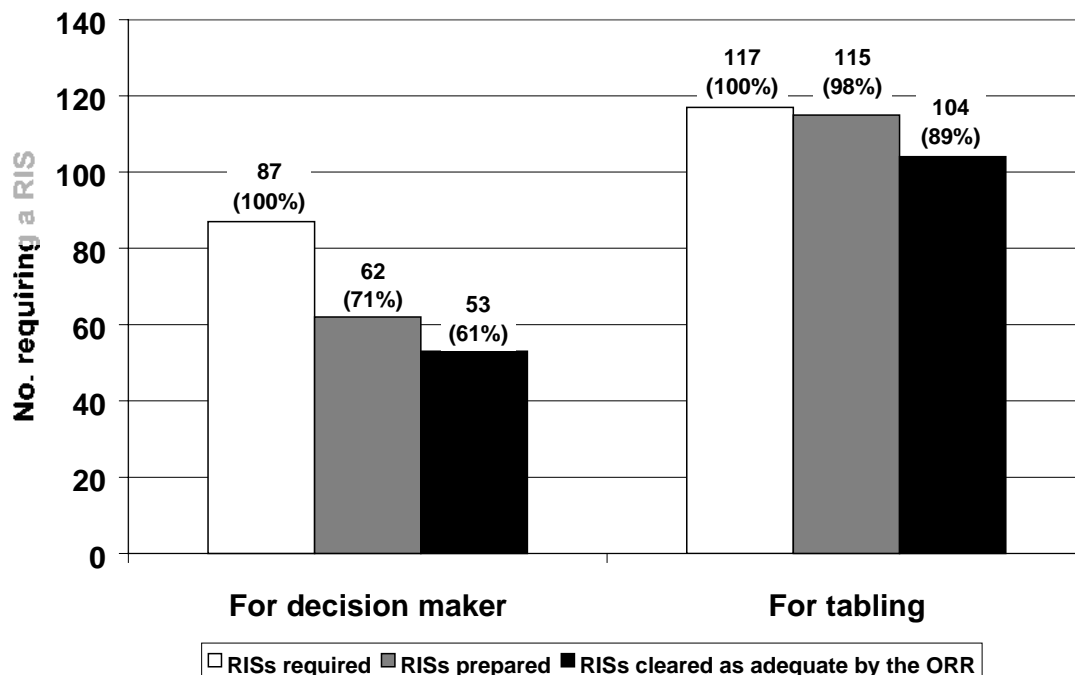
Source: ORR estimates.

Figure 2.2 **Proposals requiring a RIS, introduced into Parliament via Bills, 1998-99**



Source: ORR estimates.

Figure 2.3 RIS compliance for proposals introduced via Bills, 1998-99



Source: ORR estimates.

2.3 Delegated legislation

Delegated legislation comprises all rules or instruments that have the force of law and that have been made by an authority to which Parliament has delegated part of its legislative power. It may take the form of:

- statutory rules approved by the Governor-General in Federal Executive Council and disallowable instruments that are mainly made by Ministers or government agencies — these are tabled in Parliament and are subject to review by the SSCRO; and
- other delegated legislation that is not subject to parliamentary scrutiny and is therefore not disallowable — these instruments may or may not be gazetted and/or tabled.

The former are referred to in this report as ‘disallowable instruments’, while the latter are referred to as ‘non-disallowable instruments’.

Delegated instruments made in 1998-99

Disallowable instruments

According to the *Delegated Legislation Monitor*, 1620 disallowable instruments were made and tabled in 1998-99 (SSCRO 1998, 1999). Departments and agencies reported 1590 instruments. The ORR has not assessed compliance for the 30 instruments not reported. Of the instruments reported:

- 683 had no impact on business; and
- 797 impacted on business but were subject to a RIS exception.²

This left only 110 that required a RIS — of which 94 had a direct impact on business and 16 restricted competition.

Non-disallowable instruments

Departments and agencies reported 143 non-disallowable instruments made during the reporting period. These included decisions by boards or delegates, with the type or class of instrument used varying considerably. Of these instruments 27 triggered the RIS requirements, with 12 having had a direct impact on business and 15 restricting competition.

Assessing compliance

Disallowable instruments

Compliance with the Commonwealth RIS requirements for proposals introduced via disallowable instruments in 1998-99 was good. As shown in figure 2.4, a RIS was prepared for the decision maker in 98 cases (89 per cent) where one was needed. The ORR assessed 94 RISs (85 per cent) as containing an adequate level of analysis.

Compliance at the tabling stage was also good, with RISs being prepared for 102 proposals (93 per cent). In 97 cases (88 per cent), the ORR was satisfied with the level of analysis in the tabled RIS. Three agencies and two departments were fully compliant with the Commonwealth RIS requirements for disallowable instruments — the Civil Aviation Safety Authority, the Australian Broadcasting

² The most common exceptions for disallowable instruments included certain airworthiness directives, which are excluded from consultation under the Legislative Instruments Bill 1996 (491 instruments) and those instruments that were minor or machinery in nature and did not substantially alter existing arrangements (290 instruments).

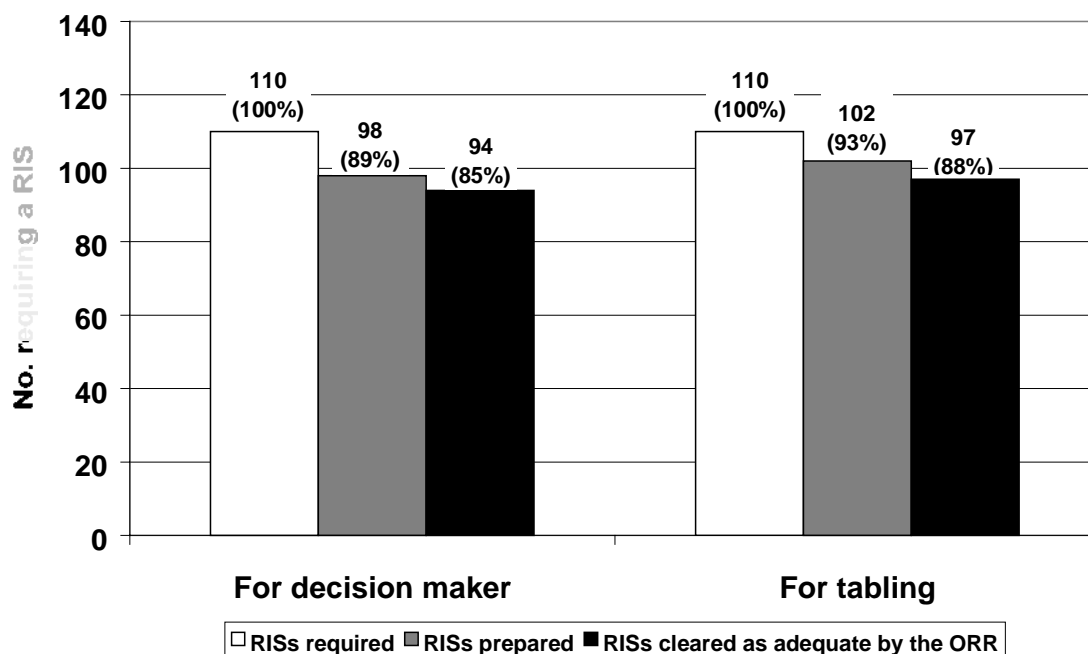
Authority, the Australian Communications Authority, the Department of Health and Aged Care and the Department of Immigration and Multicultural Affairs (see appendix B).

Non-disallowable instruments

Compliance with the Government's RIS requirements for proposals introduced via non-disallowable instruments also appears to be good. Based on the number of non-disallowable instruments reported by departments and agencies to the ORR in 1998-99, departments and agencies prepared adequate RISs for 26 (out of 27) proposals that triggered the RIS requirements. However, as noted in section 2.1, the ORR is unable to verify the total number of non-disallowable instruments made, and whether, in all cases, a RIS was seen by the decision maker.

While there is no obligation on departments and agencies to publicise RISs for non-disallowable instruments, the ORR encourages them to do so, consistent with the objectives of the Government's best practice processes. The ORR notes that some agencies now place RISs on their web-sites. Others use monthly activity bulletins to advise their clients when RISs have been prepared, and how to obtain copies.

Figure 2.4 RIS compliance for disallowable instruments, 1998-99



Source: ORR estimates.

2.4 Quasi-regulation

Table 2.1 summarises the number of quasi-regulations reported to the ORR for 1998-99 by departments and agencies and the RIS compliance results. A comparison with 1997-98 is included.

There has been a significant increase in the number of quasi-regulations reported to the ORR, from 30 in 1997-98 to 79 in 1998-99. Most of the increase relates to policy statements reported by the Australian Securities and Investments Commission.

Table 2.1 **RIS compliance for quasi-regulation**

	1997-98	1998-99
Number of quasi-regulations reported	30	79
Number requiring a RIS ^a	22	35
RISs prepared for decision maker	2	30
RISs published	2	29
RISs which contained an adequate level of analysis	2	30

^a After exceptions to the RIS requirements have been taken into account.

Source: ORR estimates.

Compliance with the RIS requirements improved markedly — from 9 per cent in 1997-98 (when only two RISs were prepared) to 86 per cent in 1998-99 (when 30 RISs were prepared, 29 being published). Importantly, all RISs prepared in 1998-99 were considered to contain an adequate level of analysis.

Notwithstanding the significant improvement in 1998-99, the likelihood of under-reporting of quasi-regulatory activity remains. *Regulation and its Review 1997-98* noted that some regulatory agencies issued policy statements, notices and protocols on a regular basis, some of which are likely to be of a quasi-regulatory nature. While there may continue to be some underreporting, it is clear that awareness and compliance with the RIS requirements for quasi-regulation is increasing.

2.5 Treaties

Based on the information provided by departments and agencies, 16 treaties were tabled in the Commonwealth Parliament during 1998-99. Of these, only one required a RIS. A RIS was prepared, and cleared by the ORR as containing an adequate level of analysis.

There are a number of other international agreements that have less than ‘treaty’ status. These agreements (for example, memoranda of understanding) are not tabled in Parliament, and hence are not reported to the ORR for inclusion in its annual compliance report.

2.6 National regulation making

Ministerial Councils and national standard-setting bodies have been required since 1995 to undertake regulatory impact assessment in cases where their decisions could affect the activities of businesses or individuals. In November 1997, the COAG Guidelines were amended to require Ministerial Councils and national standard-setting bodies to provide draft RISs to the ORR for comment, before undertaking public consultation.

Since 1995, compliance with the COAG RIS requirements has generally been highest for bodies with statutory roles in regulation making. These bodies include the Australian New Zealand Food Standards Council, the Australian Transport Council and the National Environment Protection Council. The legislation establishing these bodies requires formal impact assessment to be undertaken prior to the implementation of regulation.

Assessing compliance

In 1998-99, 24 RISs were prepared for decisions by Ministerial Councils. Two of these were prepared after the decision was made — in one case this followed an emergency decision. However, based on the information reported to the ORR, at least four other decisions would have required a RIS and eight other matters may have required a RIS (potentially a total of 36). Actual compliance by Ministerial Councils would therefore lie between 67 and 86 per cent, depending on whether the consideration of these other eight matters should have been informed by a RIS.

Of the 24 RISs prepared for Ministerial Councils, the ORR commented on 19 and assessed each as containing an adequate level of analysis (see table 2.2).

National standard-setting bodies reported to the ORR that they prepared 23 RISs in 1998-99. Of these, 22 were prepared for decisions made by Ministerial Councils and are included in table 2.2. In the remaining case, a RIS was prepared and commented on by the ORR, in full compliance with COAG Guidelines.

Table 2.2 Performance of Ministerial Councils, 1997-98 and 1998-99

	1997-98 ^a	1998-99
Decisions which potentially required a RIS	na	36
RISs prepared	29	24 ^b
RISs commented on by the ORR	11	19

^a Data are from *Regulation and its Review 1997-98*. ^b At least four other decisions would have required a RIS and eight other matters may have required a RIS. **na** Data not available.

Source: ORR estimates.

The question remains as to whether compliance for national regulators is improving over time. Comparative data for 1997-98 are limited, as table 2.2 indicates. What is clear is that, for Ministerial Councils, the ORR commented on a significantly higher proportion of RISs in 1998-99 than in 1997-98 (79 per cent compared to 38 per cent). This appears to have been due, in part, to COAG's decision of November 1997 to strengthen the ORR's role.

Regulation and its Review 1997-98 noted that almost half of the RISs prepared for Ministerial Councils were for councils with a statutory requirement for impact assessment. This is true to an even greater extent in 1998-99, with 22 of the 24 RISs prepared over the year being required for decisions by the Australian New Zealand Food Standards Council and the Australian Transport Council.

Two other Councils and one standard-setting body with no statutory requirements for impact assessment also prepared RISs during the year — these were the Australian and New Zealand Minerals and Energy Council, the Agriculture and Resource Management Council of Australia and New Zealand and the Australian Building Codes Board.

Simple comparisons between one year and the next of the total number of RISs prepared do not necessarily reflect the overall trend in compliance by Ministerial Councils and national standard-setting bodies. In 1998-99, some 'good performers' made more decisions than usual, and others made less than usual. A further aspect is the nature of the decision — some have a greater impact than others do. Importantly, there was a high level of compliance for a number of matters that had substantial impacts and/or dealt with contentious issues for which there was a high degree of public interest.