
3 Improving compliance

Greater familiarity with the RIS process has improved the level of expertise in agencies and increased compliance overall. Compliance needs to be further improved at the critical decision-making stage, for measures introduced via Bills. Integration of the RIS framework into the initial stages of policy development will lead to more informed decision making and, ultimately, better regulatory outcomes.

As noted in chapter 2 and appendix B, compliance with RIS requirements in 1998-99 has been mixed. Although there has generally been a significant improvement on the previous year, compliance at the critical decision-making stage (for primary legislation) is still relatively low.

This chapter discusses some of the actions taken within agencies and by the ORR that have contributed to the improvements in compliance in 1998-99. Some suggestions are also made for how to further improve compliance. The discussion focuses on the following broad issues:

- awareness of requirements;
- compliance at the decision-making stage;
- integration of the RIS;
- consequences of non-compliance;
- gatekeeper procedures;
- quality of analysis; and
- tracking regulatory activity.

3.1 Awareness of requirements

Greater awareness and understanding, within departments, agencies and national regulation-making bodies, of the RIS requirements is likely to have been one of the more important factors explaining improved compliance. This improved familiarity stems from:

- the Government's ongoing commitment to (and promotion of) the process;

-
- agencies' experience in preparing RISs;
 - education and training provided by the ORR;
 - the wide dissemination of *A Guide to Regulation* (the Guide) and the COAG Guidelines; and
 - indirectly, the ORR's monitoring and reporting of compliance.

Feedback from agencies indicates increasing acceptance of the process and recognition of the value of the RIS as a tool for informing decision making and for public transparency. As agencies have become accustomed to the process, they are reportedly finding that it helps in crystallising ideas and in identifying options. This is likely to have contributed to improved compliance and better outcomes.

Practical 'hands-on' experience is often the most effective method of raising awareness and improving compliance. Once an official (or work area) has prepared a RIS, there appears to be an increased likelihood of compliance for future proposals. In work areas that regularly prepare RISs, there is the opportunity for colleagues who are more familiar with the nature of the impact analysis required to provide guidance to staff preparing a RIS for the first time. This is also contributing to better quality analysis, including of the wider flow-on effects of regulation.

The ORR too is benefiting from experience in implementing the processes. As its knowledge and expertise has increased, the ORR has sought to clarify its advice to agencies (see appendix A) to ensure its decisions are consistent and equitable, as well as transparent.

Despite significant advances overall in awareness and understanding of RIS requirements, an element of non compliance can be explained by agencies still having inadequate or incomplete knowledge of the RIS requirements and their obligations. Some officials and ministerial advisers are still not fully aware of the scope of the RIS requirements, particularly in relation to non-disallowable delegated legislation, quasi-regulation and treaties. Two other questions about which there have been some misunderstanding or confusion are:

- *What constitutes compliance at the decision-making stage?*
 - Where a Minister is responsible for a regulatory policy decision, the RIS must be available to *inform the decision*. Some agencies in their compliance reports have suggested that requirements are met as long as the Minister has seen the RIS — even if this occurred after the decision was taken.
 - Where Cabinet is the ultimate decision maker, the RIS must be available for its consideration along with the ORR's coordination comments. Clearance of

the RIS by the Minister submitting the proposal is not sufficient to satisfy requirements at the decision-making stage.

- *Who has authority to waive the RIS requirements?*
 - Some agencies have incorrectly assumed that the ORR has the discretion to waive the RIS requirements. The RIS process has been endorsed by the Government and the Guide states that only the Prime Minister or Cabinet can waive the requirements. The ORR does, however, advise on whether proposals meet the criteria for the limited exceptions set out in the Guide (ORR 1998, pp. A3–4).

The ORR will continue to offer training to raise awareness of the nature and scope of the requirements. In addition, the ORR will provide greater assistance to those departments and agencies that have reported poor performance, particularly those where the level of compliance at the decision-making stage is low.

The ORR will also seek to improve agencies' compliance by maintaining regular contact with them and by developing a better understanding of their regulatory activities.

The COAG Guidelines have their fullest impact when they are included in procedures and protocols for Ministerial Councils. The Ministerial Council on Drug Strategy has already moved in this direction, as has the Health and Community Services Ministerial Council. Another way of instituting change is for impact assessment using the COAG framework to be included in legislative requirements for Councils or their advising bodies.

The COAG Guidelines can have a further effect by acting as the basis for more customised guidelines. This is beginning to occur, for example, Guidelines for the Review of Professional Regulation have been developed to complement and support the COAG Guidelines.

3.2 Compliance at the decision-making stage

The primary purpose of a RIS is to better inform decision makers of the benefits and costs of proposed regulation and why it is favoured over alternative options. Despite significant progress, there is clear room for improvement in the performance of some departments and agencies in preparing RISs (for primary legislation) in time for Cabinet or ministerial decision making.

Some agencies did not realise that a RIS should be prepared early in the policy development process or, as noted above, misunderstood the requirement to provide

it to the decision maker. Other agencies cited resource constraints and tight deadlines as a reason for non-compliance. More often the explanation lay in too low a priority being assigned to the preparation of a RIS. While agencies sometimes underestimated the scale of analysis required, in other cases, they perceived the scale of the task and the extent of analysis to be greater than actually required.

Departments and agencies should not, however, be held wholly responsible for poor compliance. In some cases they were not involved in the development of the proposal and became aware of it only after a decision had effectively been made. This made it difficult to prepare a RIS for the tabling stage, as agencies may not have known whether other options were considered, what consultation (if any) took place, and what level of cost benefit analysis was undertaken.

It is important that compliance be improved at the decision-making stage. The ORR will continue to encourage regulators to integrate impact analysis into their decision-making processes. Integrating the RIS approach from the time problems are identified and proposals are first being formulated, instead of late in the process, would promote earlier consideration of a greater variety of solutions, whether regulatory or non-regulatory.

Departmental and agency heads could also take greater responsibility for ensuring that RISs are prepared before policy approval is sought. Ultimately, however, it is up to Cabinet and Ministers to ensure that they see an adequate RIS when approached for policy approval.

3.3 Better integration of the RIS

Adoption of a more centralised and coordinated approach within departments and agencies is an important mechanism for achieving greater integration of the RIS process. Many departments and agencies now have a central contact or functional area with specific responsibility for providing information on RIS compliance and liaison with the ORR on compliance matters. Some have expanded the role of the central contact to include coordination of RIS training and advising on when the ORR needs to be consulted. The roles of the individuals or functional areas could in most cases be expanded to encompass other aspects of RIS compliance and the coordination of regulatory activity more generally. Box 3.1 highlights features of the centralised internal RIS compliance processes used by the Australian Taxation Office and the Civil Aviation Safety Authority.

Box 3.1 **RIS compliance — a coordinated approach**

Australian Taxation Office (ATO)

The ATO has integrated the tax RIS requirements into its existing processes and has systematically promoted awareness of the RIS requirements. Corporate responsibility for RIS compliance is coordinated through the 'central' legislation area. This is particularly important in the context of tax policy where the Treasury is involved in its development, but the ATO usually has prime responsibility for its implementation.

After the Government's announcement of the mandatory RIS requirements, the ATO, in consultation with the ORR, developed its own guidelines to assist staff in the preparation of a RIS. These guidelines have been widely distributed through the ATO. The RIS requirements, including consultation with the ORR, have been incorporated into the ATO 'checklist' of procedures which officers need to follow when involved in development of legislation. Guidance material and pro-forma are also available to staff in electronic form. The ATO incorporates training modules on the RIS requirements into its suite of training sessions.

The ATO's compliance record is good and the adequacy of their tax RISs has shown steady improvement since 1997.

Civil Aviation Safety Authority (CASA)

CASA is a statutory authority responsible for the safety regulation of civil aviation. CASA is currently undertaking a comprehensive internal review of its safety regulations to improve the delivery of CASA's safety functions through development and adoption of aviation 'world best practice' safety standards.

CASA's regulatory review program has incorporated the Commonwealth's RIS requirements into its formal consultation processes. The review program is centrally managed and coordinated. As soon as each regulatory review project is initiated, the central coordinator briefs the project staff on the RIS requirements and provides them with copies of the official Guide and CASA's summary guide, as well as other useful reference material. Practical assistance and training is provided as required. The coordinator also facilitates consultation between the ORR and CASA staff and is responsible for administrative matters, such as maintaining records and preparing RIS compliance reports in conjunction with the CASA Office of Legal Counsel.

The centrally managed and coordinated approach to regulation review and reform is an important contributor to CASA's improved compliance performance.

Sources: ATO 1998; information provided by CASA.

The introduction of regulatory plans across portfolios next financial year should enable departments to better integrate the preparation of RISs into the policy development process (regulatory plans were discussed in chapter 1). The pilot plan prepared by the Department of Employment, Workplace Relations and Small Business provided the ORR with a comprehensive picture of the portfolio's proposed regulatory activity and assisted the Department with its compliance

reporting. The introduction of regulatory plans is especially important in improving contact between agencies and the ORR in the early stages of policy development and has the potential to significantly improve compliance in future years. The publication of plans of proposed Commonwealth departmental regulatory activity will also provide stakeholders with a greater opportunity to have an input into policy formulation.

Departments and agencies are also becoming more pro-active in relation to RIS training for their staff. In 1998-99, some departments and agencies began integrating RIS training into their forward work plans. Closer liaison with the ORR has enabled training to be better targeted to the agency's particular needs. In certain agencies, a critical mass of expertise now exists and basic training in the RIS requirements forms part of in-house training in policy-making processes.

3.4 Consequences of non-compliance

This year's *Regulation and its Review* reports disaggregated compliance information for the first time. Departments and agencies were informed prior to publication of last year's report that their individual performance in complying with the RIS requirements would be reported from 1998-99 onwards. While agencies have put varying degrees of effort into demonstrating their commitment to the Government's process, they have generally been determined to improve their compliance record.

The publication annually, from 1998-99, of regulatory performance indicators by the Office of Small Business (see chapter 1) will also bring greater transparency to compliance reporting.

The Assistant Treasurer has also played an important role in promoting compliance, intervening where issues of particular significance have arisen. This intervention has ranged from encouraging the relevant Minister to direct his/her department to prepare a RIS (or to improve the analysis in a RIS) to recommending to the Prime Minister or Cabinet that a proposal be withdrawn.

With respect to proposals being considered by Cabinet, departments that do not comply fully with best practice requirements can attract a negative coordination comment from the ORR. For more important issues, negative coordination comments are specifically drawn to the attention of the Assistant Treasurer's office.

3.5 Gatekeeper procedures

The ‘gatekeeper’ role played by central policy departments can contribute to improved compliance by alerting departments and agencies to the RIS requirements either when policy approval is sought or at the tabling stage.

In relation to submissions and memoranda for Cabinet consideration, the Cabinet Secretariat of the Department of the Prime Minister and Cabinet performs a minor gatekeeper role. The Secretariat advises agencies of the requirement to contact the ORR and prepare a RIS if necessary.

The *Cabinet Handbook* also refers to the RIS requirements, but has not been updated since 1994. It is in the process of being redrafted to reflect the latest procedures and conditions applying to RISs — in particular, that the RIS requirements apply to all legislation and regulation having an *impact* on business or restricting competition, not just business regulation; and that only Cabinet or the Prime Minister, not the ORR, can waive the RIS requirements. One consequence of the Handbook not being up-to-date has been that some Cabinet Liaison Officers have failed to circulate relevant draft Cabinet submissions to the ORR. In a number of these cases this has resulted in non-compliance with the RIS requirements at the decision-making stage (although a RIS was generally prepared for tabling). The consequence is that Cabinet would not have benefited from being informed by the information and analysis contained in a RIS.

For primary legislation, the processes required for the tabling of Bills and explanatory memoranda in Parliament, specifically incorporate the RIS requirements. When departments submit legislation bids to the Department of the Prime Minister and Cabinet, they must indicate for each proposed Bill whether a RIS will be required and whether the ORR was consulted. The ORR is provided with a copy of these legislation bids and is able to contact agencies, where necessary, to remind them of the need to comply with the RIS requirements. These processes have been a major factor contributing to the good compliance result for primary legislation at the tabling stage (see chapter 2 and appendix B).

To identify upcoming treaty action, the ORR liaises with both the Treaties Secretariat in the Department of Foreign Affairs and Trade and the International Division of the Department of the Prime Minister and Cabinet. The Treaties Secretariat advises departments of the need to consult with the ORR about RIS requirements which may arise throughout the treaty-making process and particularly as they may relate to tabling of treaty action in Parliament. Such information is also included in documentation the Department of Foreign Affairs and Trade provides for the treaty-making process.

The Department of the Prime Minister and Cabinet has initiated measures that are likely to further improve compliance for delegated legislation. It has agreed, with the Office of Legislative Drafting in the Attorney-General's Department and with its own Executive Secretariat, on ways to ensure that two key stages in the development and making of regulation are linked to the RIS process.

As part of the arrangements, when the Office of Legislative Drafting receives drafting instructions it reminds departments and agencies of the requirement to prepare a RIS for delegated legislation affecting business or restricting competition. While this check in procedures will not directly improve compliance at the decision-making stage, it will allow for the preparation of a RIS for the tabling stage, and perhaps for discussions on draft legislation preceding its formal making and tabling.

The Federal Executive Council Secretariat also reminds departments and agencies that RISs are required when it receives documentation, related to proposals for delegated legislation, for presentation to the Governor-General. Again, this is at the concluding stage of the decision-making and drafting process, and is designed to ensure that RISs are available for tabling and parliamentary scrutiny for statutory rules and disallowable instruments. Nevertheless, it may assist in improving awareness of RIS requirements for these categories of delegated legislation and, over the longer term, should have a positive impact on compliance at the decision-making stage.

In addition to reminding departments and agencies of the RIS requirements in relation to individual legislation and regulations, the Office of Legislative Drafting and the Federal Executive Council Secretariat are moving to update their handbooks to include the RIS requirements.

3.6 Quality of analysis

In order to comply with the RIS requirements, a RIS must not only be prepared, it must contain an adequate standard of analysis. Improvements in the quality of RISs can be attributed to greater experience within agencies and a better understanding of requirements, which in turn stems partly from interaction with the ORR.

Growing familiarity with the RIS requirements has enabled the ORR to gradually raise the hurdle in terms of the minimum acceptable standard of analysis. While a relatively lenient approach was appropriate when the requirements were new, it has been necessary to raise the standard over time to ensure the Government's objectives for the RIS process are more fully met. The ORR will continue to advise agencies on how to improve the quality of their analysis, with particular focus on

progressively achieving greater quantification of costs and benefits and adoption of best practice regulatory design principles (see appendix A).

RISs that failed the adequacy test for tabling often did so because of the level of analysis or because there was a failure to consider feasible options. If the main elements of a RIS are reflected in the early drafts of documents prepared for decision making, compliance at the tabling stage becomes relatively straightforward.

3.7 Tracking regulatory activity

The ORR's charter requires it to concentrate its efforts where they will have most effect. In 1998-99, the ORR continued to assign highest priority to ensuring departments and agencies adhered to regulatory best practice in relation to primary legislation. Compliance is pursued in relation to other regulation subject to resource constraints. The ORR has not been able to monitor comprehensively all regulatory activity, particularly non-disallowable delegated legislation and quasi-regulation.

The type of regulation — whether it is primary, delegated or quasi-regulation — does not in itself affect the level of analysis that should be undertaken. The level of analysis in the RIS should be commensurate with the impact of the proposal. Delegated legislation, for example, often prescribes the detailed operation of the more general provisions contained in an Act, and it may have a significant impact on business and other stakeholders.

The absence of a comprehensive means of monitoring non-disallowable delegated legislation and quasi-regulation is one of the biggest challenges for the ORR in applying the RIS process. These types of regulation are not subject to parliamentary scrutiny. With no external benchmark against which to measure the level of this type of regulatory activity, the ORR has not been able to gauge the extent of any underreporting by agencies. The establishment within agencies of more formal systems for the centralised tracking of the full range of regulation for which they are responsible, would enable a much clearer picture to be drawn of total regulatory activity and the level of compliance with RIS requirements. This, in turn, should lead to greater transparency and public involvement in the regulation development process.