
9 Improving regulatory impact analysis

9.1 Regulatory impact analysis requirements

The Australian Government and COAG endeavour to improve the quality of regulation through the undertaking of regulatory impact analysis. The Australian Government requires a Regulation Impact Statement (RIS) for Commonwealth regulatory proposals ‘that are likely to have a significant impact on business and individuals or the economy’ (Australian Government 2007a, p. 15). In a similar manner, COAG requires a RIS for regulatory proposals put forward by ministerial councils and national standard-setting bodies that ‘would encourage or force businesses or individuals to pursue their interests in ways they would not otherwise have done’ (COAG 2007b, p. 3).

RIS processes follow a formalised sequence of steps that provide a basis for informed decision making and establish whether particular regulatory proposals would be in the community’s interest by demonstrating a net benefit. A RIS identifies the problem the regulation seeks to address, outlines the objectives of government action, and assesses the impacts of a range of feasible options for addressing the problem. The RIS then documents community consultation, proposes a recommended option and outlines implementation and review mechanisms.

A well designed and implemented RIS process can improve the quality of new regulations, and thereby enhance the productivity of the economy in a number of ways, including:

- where it leads to a decision not to proceed with a relatively costly regulatory action — by demonstrating that a non-regulatory option is a better solution to the problem (or that the status quo is preferable)
- where regulation is found to be justified — by identifying the most effective and efficient design elements to build into it, thereby increasing the benefits and/or reducing the costs
- by building stakeholder support for proposals — through effective consultation processes and/or by allaying fears of unintended adverse regulatory impacts

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- by reducing the risk of over-regulation — through clearly specifying the nature, size and scope of the problem and indicating the extent to which government action is necessary and beneficial
 - by influencing over time the regulatory culture within government agencies to be supportive of good evidence-based processes.

Regulatory processes and the quality of regulation are, in many respects, considerably better than 20 years ago when governments were first embracing the concept of regulatory impact analysis. That said, concerns raised during this review suggest that there remains scope for the Australian Government to do more to improve regulatory outcomes, through:

- more systematic and rigorous application of existing regulatory best practice processes
- refinements and enhancements to aspects of the design and implementation of these processes
- increasing the transparency and accountability of current regulatory processes.

The Office of Best Practice Regulation (OBPR), within the Department of Finance and Deregulation, administers both the Australian Government and COAG regulation-making requirements. For a RIS to be assessed as ‘adequate’ by the OBPR, the detail and depth of analysis should be commensurate with the magnitude of the problem and the size of the potential impacts of the proposal. Subject to this overriding principle, the OBPR uses a number of ‘adequacy criteria’ to assess whether a RIS contains an appropriate level of information and analysis for it to be assessed as ‘adequate’. The criteria are broadly similar under both RIS processes (Australian Government 2007a, COAG 2007b).

Recent enhancements to Australian Government and COAG regulatory processes

In recent years both the Australian Government (2006) and COAG (2007c) have taken initiatives to strengthen their respective RIS processes by:

- ‘raising the bar’ on the standard of analysis considered adequate for a RIS to be approved
- making it harder for a regulatory proposal to proceed to a decision if the requirements of good process have not been adequately discharged.

Australian Government processes

The Regulation Taskforce (2006) identified some deficiencies with the Australian Government's RIS process and made a number of recommendations. In response, the Government strengthened the regulatory framework on 20 November 2006. Some of the more substantial changes were requirements for:

- 'preliminary assessments' for all regulatory proposals to determine the level of regulatory impact analysis required
- a formal assessment of business compliance costs, using the Business Cost Calculator (or an approved equivalent), and greater use of cost-benefit analysis generally
- a clear statement in the RIS adequacy criteria that the RIS should demonstrate that:
 - the benefits of the proposal to the community outweigh the costs
 - the preferred option has the greatest net benefit for the community, taking into account all the impacts
- a whole-of-government consultation policy
- strengthened gate-keeping arrangements. In the absence of exceptional circumstances (as determined by the Prime Minister), a regulatory proposal with 'medium' business compliance costs or 'significant' impacts on business and individuals or the economy, should not proceed to Cabinet or other decision makers unless it has complied with the Australian Government regulatory impact analysis requirements. Post-implementation reviews are required — within one to two years of implementation — when a proposal proceeds to the decision maker without an adequate RIS or a report assessing business compliance costs¹ (OBPR 2008a).

Under the previous processes, when the former Office of Regulation Review (ORR) — which had responsibility for administering the RIS process prior to the establishment of the OBPR — assessed regulatory proposals as non-compliant, these proposals were still able to be implemented by the Government. Under the stronger gate-keeping arrangements now in place, this should no longer eventuate without a formal and transparent exemption. However, this requires gate-keeping arrangements to be administered and enforced effectively by the Cabinet Secretariat (for proposals proceeding to Cabinet) and other decision-makers such as ministers, agency heads and boards (for non-Cabinet proposals).

¹ Such reviews are required regardless of whether or not exceptional circumstances are granted.

According to the OBPR, in 2007-08 around 75 per cent of regulatory decisions requiring a RIS or report on compliance costs were made by a decision maker other than Cabinet (OBPR 2008a). Given that a majority of recent regulatory proposals are being subject to less formal gate-keeping processes (than those applied to proposals proceeding to Cabinet) the Government needs to have ‘checks and balances’ in place to ensure adherence to the regulatory processes. As is discussed in section 9.2, a post-implementation review is not a substitute for undertaking a RIS before a decision is made.

Council of Australian Governments processes

In April 2007 COAG agreed to strengthen its regulatory framework for national regulation making and for similar arrangements in the states and territories. These were outlined in the COAG *Best Practice Regulation Guide*:

COAG has agreed that all governments will establish and maintain effective arrangements at each level of government that maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition by:

- establishing and maintaining ‘gate keeping mechanisms’ as part of the decision-making process to ensure that the regulatory impact of proposed regulatory instruments are made fully transparent to decision makers in advance of decisions being made and to the public as soon as possible
- improving the quality of regulation impact analysis through the use, where appropriate, of cost-benefit analysis
- better measurement of compliance costs flowing from new and amended regulation, such as through the use of the Commonwealth Office of Small Business’ costing model
- broadening the scope of regulation impact analysis, where appropriate, to recognise the effect of regulation on individuals and the cumulative burden on business and, as part of the consideration of alternatives to new regulation, have regard to whether the existing regulatory regimes of other jurisdictions might offer a viable alternative
- applying these arrangements to Ministerial Councils. (COAG 2007b, p. 1)

9.2 Business concerns about processes followed for recent regulatory proposals

Notwithstanding these developments, at the roundtable meetings and during discussion with participants in this review, frustrations with the RIS process were regularly voiced. Many participants were concerned that RIS processes were often less than comprehensive (even for major policy proposals), did not allow for

adequate consultation, and that RIS documents were neither readily available nor easily accessible.

Some concerns raised by business in submissions to this review point to deficiencies in the RIS process as a whole. For example, according to UnitingCare Australia:

... there remains a systemic issue around the development and implementation of regulation by government agencies ... UnitingCare Australia believes that further work must be done to strengthen scrutiny of the Regulation Impact Statement process. (UnitingCare Australia, sub. DR70, p. 1)

Similarly, the Property Council of Australia (sub. DR83, p. 1) commented on ‘the ongoing failure of governments to properly assess the risks, costs, and benefits of regulation across all sectors of industry’ and urged the Commission to use its final report to ‘examine the process by which regulation is developed and reviewed, rather than merely examining specific regulations.’ In its view:

To achieve a competitive economy, greater emphasis needs to be placed on both the collaborative processes of COAG and a more effective approach to regulatory impact assessment. (Property Council of Australia, sub. DR83, p. 1)

The vast majority of Commonwealth regulations recently tabled by the Australian Government underwent no more than a preliminary self-assessment by the departments and agencies responsible for the regulation.

In 2007-08, only around two per cent of regulatory proposals tabled required regulatory impact analysis. (OBPR 2008a, p. 15)

For the regulatory decisions made on or after 20 November 2006 (when the Australian Government’s best practice regulation requirements came into effect) and tabled in 2007-08, 51 RISs were required and five were assessed as ‘inadequate’ by the OBPR — giving a compliance rate of around 90 per cent under the current process. In addition, seven regulatory proposals were assessed by the OBPR as requiring a report on business compliance costs. These were prepared and certified by the OBPR as meeting the best practice regulation requirements (OBPR 2008a).

Departments and agencies are strongly encouraged to contact the OBPR to confirm their preliminary assessments. Where they do not, they are still accountable for the decisions they make, since the OBPR reviews all regulation made by departments and agencies (in six month cycles) to ensure that the appropriate level of analysis was undertaken. Where the OBPR finds that a regulation was introduced without the appropriate level of analysis, it informs the responsible department/agency that

it will be reported as non-compliant and is required to undertake a post-implementation review (Australian Government 2007a).

In 2007-08, Australian government departments and agencies reported to the OBPR that they had undertaken 753 ‘preliminary assessments’ for proposals which they found required no further analysis and the OBPR agreed with these assessments (OBPR 2008a).

Regulation relating to strengthening of police checks and the reporting of missing residents in the aged care industry are two recent examples of regulations that were assessed by departments as requiring no further analysis, and endorsed by the OBPR, because of ‘no or low impacts’. Regulations relating to the original introduction of police checks and the reporting of alleged assaults in aged care and the reporting of vacancies in child care, are similar examples under the previous regulatory regime. These were each given an exemption from the previous RIS requirements by the ORR because they were assessed as being ‘minor or machinery in nature and did not substantially alter existing arrangements.’

However, in submissions to this review, business participants considered that the impacts of these measures were not of ‘low or no impact’ or ‘minor or machinery in nature’ — and there is substance to their position.

Regulation relating to the screening of liquids, aerosols and gels on international flights and the Australian Government’s intervention in the Northern Territory are also examples of regulatory proposals which raised concerns in submissions to this review. In these cases, exceptional circumstances (as determined by the Prime Minister) were granted prior to the regulation being implemented. For these regulations analysis was not required prior to implementation. Post-implementation reviews for these regulations are due in the second half of 2009.

Departments and agencies are expected to consult with stakeholders when undertaking post-implementation reviews. However, a post-implementation review is not equivalent to an ‘ex-post’ RIS because there is no requirement to follow all the steps required in a RIS. Instead, according to the Best Practice Regulation Handbook, the post-implementation review should:

... focus on the way the policy was implemented, whether the implementation is proving effective in meeting the policy objectives, and whether implementation or ongoing delivery methods might be adjusted to manage the policy’s ongoing delivery more efficiently and/or effectively. (Australian Government 2007a, p. 37)

As a consequence, a post-implementation review ‘is not a substitute for undertaking adequate analysis before a decision is made’ (Australian Government 2007a, p. 37). Moreover, there is no requirement for the post-implementation review findings and

recommendations to be made public in a transparent manner. And while the OBPR is expected to ‘monitor the status and adequacy of post-implementation reviews’ (Australian Government 2007a, p. 38) it is not explicitly required to make its assessment of post-implementation reviews public under current arrangements.

9.3 Suggestions for improving the processes

While a policy issue potentially requiring government action will often be first acknowledged at the political level, the RIS process is based on a ‘bottom up’ and sequential approach to the development of any subsequent regulation, with problem and objectives identified, options weighed, impacts analysed, recommendations made and outcomes then determined. There are on occasion influences in practice that can see this process being turned on its head – with a decision to regulate coming first, and the justification and implementation to quickly follow (Regulation Taskforce 2006).

The traditional ‘regulate first, ask questions later’ approach to policy development was a key reason why RIS processes were established, to impose a discipline on departments and agencies to undertake adequate analysis before resorting to a regulatory response to a policy concern. In this way, any regulatory action can be clearly justified and options and design principles thoroughly explored so that compliance costs are reduced and unintended consequences are given sufficient consideration. It is also why enhancement of the RIS process was seen as a priority by the Regulation Taskforce (2006) and reflected in the Australian Government’s best practice regulation requirements (Australian Government 2007a).

It may have been inevitable that the new arrangements would take some time to become effective, particularly given the need for cultural change within government. Nevertheless, in light of the ongoing concerns and complaints from business, there are some practical measures that should be applied to improve and strengthen the current Australian Government process. The first of these involves providing greater transparency and accountability with the regulatory impact analysis process. The second involves providing greater scope for business consultation at various stages of that process. In addition, the Government should commission an independent public review of the current best practice regulation requirements no later than five years after the requirements came into effect.

Develop a central register of regulatory impact analysis

Under existing arrangements, where a regulation is *tabled* in Parliament, the RIS (or report on business compliance costs) prepared for the decision maker must be included in the explanatory memorandum (for primary legislation) or the explanatory statement (for legislative instruments). Publication of the regulatory impact analysis can potentially occur months after a decision to proceed has been made by government. To find a RIS, interested parties must then navigate the Parliamentary website to locate the specific regulation (and associated regulatory impact analysis) of interest. Stakeholders have indicated difficulty in accessing this information.

On the other hand, under the current arrangements for regulation that is *not* tabled (for example, other non-legislative instruments and new or amended quasi-regulation), RISs (or reports on business compliance costs) ‘should be made public when the regulation is made or announced’ (Australian Government 2007a, p. 32). In the Commission’s view, there is no compelling reason why regulatory impact analysis for all regulation, whether or not it will be tabled, cannot be made public at the time the government decision to regulate or amend existing regulation is announced.

The difficulties in obtaining copies of RISs are illustrated by this review. To better inform the Commission’s deliberations it sought copies of past RISs on some issues. Some were available on Departmental web sites or through explanatory memoranda tabled with bills. Others were in time provided by agencies in response to specific requests by the Commission. But there was no central point of access for copies of RIS documents. The OBPR advised that it was unable to assist in this regard, as RIS documentation remains the property of the government department or agency that prepares it (OBPR, pers. comm., 4 August 2009).

To further increase transparency, once government decisions have been taken on regulatory proposals that have required a RIS or a report on business compliance costs, the regulatory assessment documents, along with the OBPR’s adequacy assessment, should be posted at a central register on the OBPR’s website. Alternatively, the regulatory impact analysis could be accessible via direct links in a central register on the OBPR’s website — though this would be less effective, because there would be a reliance on all departments and agencies releasing their regulatory impact analysis in a timely manner and it would also require them to maintain these links. The information should be posted at the time the government decision is publicly announced. This would allow the community to access the information easily and in a timely manner.

A central register, that the public could freely access on the internet, would increase scrutiny of the performance of departments and agencies in producing regulatory impact analysis, and also the OBPR, in assessing the quality (or adequacy) of such analysis. This enhanced transparency would encourage agencies to undertake better quality analysis. It would also allow regulatory impact analysis to be more easily compared both within and between agencies. This would in turn encourage knowledge transfer, greater consistency in approach to identifying and measuring specific impacts, and promote a more informed understanding of the quality of analysis applied to regulatory proposals under the Australian Government's best practice regulation requirements.

Victoria's Competition and Efficiency Commission already maintains such a register (www.vcec.vic.gov.au), as does the New Zealand Treasury (www.treasury.govt.nz), and the United Kingdom's Department for Business Enterprise and Regulatory Reform (www.ialibrary.berr.gov.uk).

Provide greater scope for consultation with business on regulatory impact analysis

Discussions with business throughout this review have identified a number of concerns with consultative processes under the Australian Government's regulatory framework. The Government has recently announced its intention to appoint a Small Business Advisory Committee (SBAC) to provide advice on regulatory proposals that have a significant impact on small business, including through commenting on any RIS that is developed.

The advantage of such arrangements is that SBAC members could be asked to pass security checks and sign confidentiality agreements. This would enable them to see proposals much earlier than might be possible in the usual public consultation process, overcoming some of the concerns that consultation often happens 'too late' under current arrangements to have any meaningful impact.

The role of the SBAC could potentially be extended to include consideration of preliminary assessments, where departments bring these to the attention of the OBPR because of some uncertainty as to their expected business impacts. Allowing business to be directly consulted at a very early stage would provide a more systematic and consultative approach to determining what level of analysis is required.

If the SBAC was evaluated as effective after a sufficient period of operation, such arrangements could be extended beyond small business to also include other businesses in a broader Business Advisory Committee.

In addition, the existing annual regulatory plan process could be improved by making it mandatory for departments and agencies to update their plans as preliminary assessments are completed. This would improve the information value of annual regulatory plans by informing business not only about what regulation is proposed but also what level of regulatory impact analysis will actually be undertaken (i.e. no regulatory analysis beyond the preliminary assessment, a report on business compliance costs, or a RIS). At present, departments and agencies are only required to publish a regulatory plan each July on the internet and they have discretion as to when and how many times they update these plans within the financial year. Moreover, there is currently no requirement to specify the level of regulatory impact analysis to be undertaken (OBPR 2008b).

Finally, to improve the quality of analysis used to inform government decisions, where a preliminary assessment has indicated a RIS is required, the Australian Government regulatory requirements should provide for a ‘consultation RIS’ in a similar fashion to the arrangements outlined in the COAG *Best Practice Regulation Guide*. Strengthening consultation requirements in the Australian Government RIS process, by following the approach taken by COAG, was previously suggested by the Regulation Taskforce which stated:

Where a RIS is required, a draft version should be made available for comment (as is required by COAG for making national regulations and standards). The draft should have sufficient detail to enable meaningful feedback. (Regulation Taskforce 2006, p. 155)

The consultation RIS could then form the centrepiece of the consultation process and be helpful in identifying further impacts and refining the existing estimates of impacts. Under the COAG arrangements, the consultation RIS must be first cleared by the OBPR. This adds to time and cost, and may not bring commensurate benefits in terms of the quality of the initial analysis. Public scrutiny should encourage departments and agencies to undertake an appropriate level of analysis without OBPR clearance.

After incorporating relevant community input, the consultation RIS would be developed into a ‘decision RIS’, and assessed by the OBPR, before being provided to the decision maker. In this way stakeholders would be provided with tangible evidence of the extent to which their views were incorporated when the decision RIS is made public.

While there is currently no requirement under the Australian Government’s regulatory process for a consultation RIS, the current arrangements do require a ‘green paper’ for proposals of ‘major significance’. A green paper is a policy options paper released as a basis for consultation. If done thoroughly a green paper

should closely replicate a consultation RIS (Australian Government 2007a) — and may be more extensive.

According to the OBPR, no green papers were required for proposals tabled in 2007-08 (OBPR 2008a). A small number have been developed since then, including for Financial Services and Credit Reform, the National Aviation Policy and the Carbon Pollution Reduction Scheme.

As outlined in the Best Practice Regulation Handbook:

... a green paper ... should contain most of the elements of a Regulation Impact Statement (RIS) such as:

- the problem
- objectives
- some options (including a preferred option)
- identify the main groups affected by the options
- include a preliminary impact analysis (Australian Government 2007a, p. 44).

Irrespective of whether Australian Government green papers replicate consultation RISs for regulatory proposals of ‘major significance’ (only), it is not clear why a consultation RIS is not part of the Australian Government’s best practice regulation process more generally for proposals that are likely to have significant impacts on business and individuals or the economy.

Greater transparency, via a consultation RIS, could improve the quality of analysis used to inform government decisions. More importantly, the regulation resulting from a more transparent process should improve the design of regulation, lessen business compliance costs, reduce unintended consequences and lower the cumulative burden of regulation on business. At the very least, the regulatory proposal would go forward with a greater understanding and acceptance by all stakeholders of its full impact.

That said, it is recognised that for a minority of regulatory proposals a public consultation RIS may not be appropriate. For example, where there is a need for Cabinet confidentiality, such as for national security or commercial-in-confidence matters, or for proposed tax regulation to deal with tax avoidance, a consultation RIS may be prepared for consideration by the Business Advisory Committee proposed above — where security clearances and confidentiality agreements would apply.

RECOMMENDATION 9.1

The Australian Government should improve the transparency and accountability of its best practice regulation assessment processes by:

- *developing a central register of regulatory impact analysis. The register would include:*
 - *Regulation Impact Statements (and the Office of Best Practice Regulation’s adequacy assessments) at the time government decisions are made public, and*
 - *post-implementation reviews (and the Office of Best Practice Regulation’s adequacy assessments) at the time these reviews are made public*
- *subject to review of the new Small Business Advisory Committee’s effectiveness, considering the extension of this model beyond small business to include other businesses within a broader Business Advisory Committee*
- *improving the existing annual regulatory plan process, by making it mandatory for departments and agencies to update their plans as preliminary assessments are completed*
- *incorporating a ‘consultation’ Regulation Impact Statement in the regulation making process (in a similar manner to the COAG requirements) for use in public consultations where possible, or as part of confidential consultation with the Small Business Advisory Committee (or Business Advisory Committee should the concept be broadened beyond the small business sector).*

RECOMMENDATION 9.2

The Australian Government should commission an independent public review of the current best practice regulation requirements no later than five years after the requirements came into effect (that is, 20 November 2011).