

9 May 2012

RIA Benchmarking Study
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

Submission to the RIA Benchmarking Study

The Tasmanian Parliamentary Standing Committee on Subordinate Legislation is a statutory committee of the Tasmanian Parliament. It was established under the *Subordinate Legislation Committee Act 1969*.

The Committee would like to make its submission to the Study in relation to the areas in the Issues Paper considered relevant to its jurisdiction. These areas are indicated in **bold** and are followed by the Committee's comments.

The Committee's charter is to examine every regulation, by-law and rule. Regulations comprise all subordinate legislation made by the Governor-in-Council but do not include Orders, Proclamations or Rules of the Supreme Court. By-laws are those made by municipal councils, marine boards and other semi-government authorities. The Subordinate Legislation Committee Act 1969 uses "regulations" as the generic term to cover all subordinate legislation, be it a regulation, a by-law or a rule.

The Committee is required to conduct its examination of regulations with particular reference to the question of whether or not —

- (a) the regulation appears to be within the regulation-making power conferred by, or in accord with the general objects of, the Act pursuant to which it was made;
- (b) the form or purport of the regulation calls for elucidation;
- (c) the regulation unduly trespasses on personal rights and liberties;
- (d) the regulation unduly makes rights dependent on administrative decisions and not on judicial decisions;

- (e) the regulation contains matters that, in the opinion of the Committee, should be properly dealt with by an Act and not by regulation; or
- (f) whether the requirements of the Subordinate Legislation Act 1992 have been met.

The Committee also examines other instruments referred to it by Acts.

The *Subordinate Legislation Act 1992* requires a Regulatory Impact Statement for each new Regulation which is being drafted and a copy of the RIS sent to the Subordinate Legislation Committee. Alternatively, the Minister may apply to the Economic Reform Unit in the Department of Treasury and Finance for exemption if it is determined that no part of the Regulation would impose a significant burden, cost or disadvantage in any sector of the public. A copy of the exemption is sent to the Subordinate Legislation Committee. The Committee requires a copy of the RIS or Exemption Certificate before a Regulation can be reported as examined.

- **Are oversight bodies consistent in their advice and interpretation with respect to when a RIS is required? Should oversight bodies have the final say as to whether a RIS is required in any particular instance?**

The Subordinate Legislation Act 1992 – Administrative Handbook indicates that a decision is made by the Economic Reform Unit of the Department of Treasury and Finance as to whether subordinate legislation is likely to have a significant impact on the community and therefore whether a RIS is required.

It is not clear what tests are applied to determine the significance of any impact, but it does seem that the assessments made are subjective.

- **Are the processes for granting exemptions from RIA appropriate? To what extent are significant proposals avoiding timely and rigorous scrutiny through the granting of exemptions?**

The granting of exemptions seems to occur frequently, and whilst this may speed up the preparation of regulations, it may cause delays later during the scrutiny process.

If the Subordinate Legislation Committee was concerned about a possible significant impact it may require further scrutiny and a possible successful disallowance motion, which could then cause problems with the implementation of regulations at a later stage.

The Committee has recently initiated the provision of a Fact Sheet (from Departments to the Committee) setting out the reasons for the Regulations, the history and the implications. This information has been of great benefit

and assists in the Committee's review process.

In addition, it would be useful for the Committee to receive more detail when exemptions from the RIA processes are granted by the Secretary of the Department of Treasury and Finance. For example, the Water Management (Safety of Dams) Regulations 2011 – the exemption certificate stated that the Regulations "...comprise or relate to matters set out in Part 2 of Schedule 3 of the *Subordinate Legislation Act*".

Part 2 has three sections, as follows :

1. *Fees – where the rate of increase of a fee or group of fees does not exceed the rate of increase in the Consumer Price Index since the fee or fees were last fixed.*
2. *Court procedures – that do not impose fees, but relate to the procedure, practice or costs of a court or of a tribunal exercising judicial or quasi-judicial powers.*
3. *Remade subordinate legislation – that by way of consolidation and without substantive amendment, remake the provisions of earlier subordinate legislation, where –*
 - (a) the provisions have been in operation at some time in the preceding 12 months; and*
 - (b) not more than 10 years have elapsed since the making of the earlier subordinate legislation; and*
 - (c) a regulatory impact statement was prepared in relation to the earlier subordinate legislation.*

It would be beneficial to the Committee for the certificate to indicate the particular section(s) that have been determined to apply that remove the requirement for a RIS to be provided.

Although the *Subordinate Legislation Act 1992*, section 5(1)(C) provides that "A determination of the Secretary under subsection (1A) is conclusive", this information would assist the Committee to understand why the decision was made.

Another example of how this information would assist can be found with reference to the Vehicle and Traffic (Driver Licensing and Vehicle Registration) Amendment Regulations 2011. A certificate was issued by the Secretary of the Department of Treasury and Finance, stating that no part of the Regulations "... would impose a significant burden, cost or disadvantage on any sector of the public".

The Committee could have accepted this view and simply passed the Regulations as 'examined'. However, to gain a better understanding the Chair wrote to the Minister seeking further information regarding the road safety levy

that was being extended and increased. Although the increase had been announced in the 2011-12 State Budget, it was difficult to see how such an increase would not “impose a significant burden, cost or disadvantage on any sector of the public”. The Committee is of the view that this information should have been provided ‘up front’, and that a Certificate should not have been granted on this occasion.

It is possible that there are many other examples of where this has occurred, and a process that requires a more open and transparent determination would be welcomed.

- **Where exemptions are granted, are these requirements for subsequent RIA or post-implementation reviews? Are these requirements appropriate? Are they being satisfied? How could these requirements be improved?**

There appears to be no standard requirement for a subsequent RIA or post-implementation review. This would be an effective way of ensuring that careful consideration is given to granting an exemption as the work would still need to be done after the event. This may encourage greater investment in the front end process.

- **Have RIA actually influenced policy development and decision making?**

This question is not easy to determine as it is difficult to see evidence of policy changes in the majority of RIAs. There was one notable exception in relation to the review of mineral royalties that sought to facilitate an increase to the total percentage payable where the advice from industry was taken. This resulted in the Department agreeing to a more equitable apportioning of the percentages to the different components of the royalty payment points at which mineral royalty payments are imposed. This could be seen as an example of where specific revisions to regulatory proposals may have resulted from the RIA process.

The Committee believes that generally the RISs received are produced in the template format set out in the Administrative Handbook, and included below. However, the Committee is not able to assess whether agencies meet all the requirements under the template.

Template RIS

Identify the problem and the need for action

Objectives of the Proposed Subordinate Legislation

- Include a clear statement of the objectives sought to be achieved and the reasons for them.

Alternative Options

- Identify all alternative options by which the desired objectives can be achieved, either wholly or substantially.

Costs and Benefits of Each Option

- Include a summary of the dollar costs and benefits of the proposed subordinate legislation and each of the identified options. In addition, agencies and authorities will need to fully discuss those financial and socio-economic impacts that are not able to be quantified in dollar terms.

Impact of Proposed Subordinate Legislation on Competition

- Include an assessment of whether the proposed subordinate legislation will have significant impact on competition and, if so, an evaluation of whether the benefits of the proposed restriction outweigh the likely costs. If the benefits outweigh the likely costs, this section should include an evaluation of whether the restriction represents the absolute minimum in the public interest.

Greatest Net Benefit / Least Net Cost Alternative

- Include an assessment of which of the alternative options involves the greatest net benefit or least net cost to the community. This assessment may involve a comparison of the proposal and its alternatives.

Statement of Consultation Process

- Provide details of the consultation process to be undertaken.

Note:

- where costs and benefits are referred to, economic, social and environmental costs and benefits, both direct and indirect, are to be taken into account and given due consideration.
- costs and benefits must, where possible, be quantified. If this is not possible, the anticipated impacts of the proposed action and of each alternative must be stated and presented in a way that permits a comparison of the costs and benefits.

- **Has the RIA contributed to improved transparency and better governance over time?**

If a RIA was undertaken on all substantial regulations (not including minor amendments), this would create a culture where the impacts – economic, social, environmental, competition, etc are always considered as a matter of course.

If RISs are being prepared for the relevant Minister and guide the policy decision-making and subsequent translation into subordinate legislation, it would be of significant benefit for this information to be available to the Committee when the Regulations are tabled. This would make it much clearer to see when regulations that formalise policy are not fully supported by the RIA.

- **Are there adequate mechanisms in place to ensure accountability and compliance with RIA processes?**

It appears that the issue is more related to completing a RIA in the first instance. The standard or assessment of likely significant impact or uncertain impact seems to be quite a high bar or test to meet to actually trigger a RIA.

It is considered that the publication of the oversight body's assessment of the adequacy of each RIS would create a stronger incentive for agencies to undertake RIAs of an appropriate standard.

- **How can RIA processes be better insulated from political expediency? How can systems avoid the abandoning or bypassing of RIA processes when there are pressing political demands?**

Having clearly defined triggers for the requirement to undertake a RIA and a post-implementation review for those that don't have a RIA. If it is a more common occurrence for a RIA to be prepared, political expediency would not only be more unlikely, but also more visible.

- **To what extent is there independent scrutiny and performance monitoring of RIA processes? Should government auditors or other external bodies conduct assessments of RIA, including the quality of RISs, assessments by oversight bodies and exemptions granted?**

As this scrutiny would be outside the scope of the Tasmanian Parliamentary Standing Committee on Subordinate Legislation, it is considered appropriate for the Auditor-General to conduct a performance audit of RIA processes.

- **Is there evidence that the quality of regulation has been improving? To what extent are any improvements due to RIA processes? Do differences in RIA systems help explain differences in regulatory outcomes within and across jurisdictions?**

As there are few RIAs provided as part of the parliamentary process, it is difficult to assess whether the quality of regulation has been improved by the RIA process.

If there was a national standard, or similar, that clearly indicated when a RIA is to be undertaken and how this information is to be provided to Parliament, some changes in Tasmania may result, with a likely increase in the number undertaken and published.

Costs associated with the preparation of a RIA are of course a significant matter and there must be a balance. However, it would appear that this level of detail would be required by a Minister before making most legislative changes and would therefore not create any additional work in providing it to the Parliament or the Committee.

- **Does RIS analysis undertaken for national regulation include an appropriate level of detail on specific impacts in individual states and territories?**

As these RISs are not provided to the State Parliament, it is impossible to comment or to know if our individual State's interests or impacts on our State are being adequately considered.

This Committee recommends that these be provided to Parliament with the national regulations when these are made and tabled in the State Parliament.

The Committee looks forward to receiving the results of the Productivity Commission's Regulatory Impact Analysis: Benchmarking Study.

Yours sincerely

RUTH FORREST MLC
Chair