

PRODUCTIVITY COMMISSION DRAFT REPORT
REGULATORY IMPACT ANALYSIS: BENCHMARKING
A SUBMISSION BY THE NORTHERN TERRITORY GOVERNMENT

OCTOBER 2012

1. Introduction

The Northern Territory Government welcomes the opportunity to contribute to the Commission's Draft Report on the Benchmarking of Regulatory Impact Analysis.

2. Concerns with references to the Northern Territory (NT)

| <i>Page no and Section</i> | <i>NT Reference in Report</i> | <i>Comments on Accuracy</i> |
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| Page 16: RIS Content | COAG-agreed best practice of nominating the option which generates the greatest net benefit for the community, is an important element of sound analysis, increasing the usefulness of RISs to decision makers. This practice has been adopted in all jurisdictions except the Commonwealth, South Australia and the Northern Territory. | The RMF process requires analysis of costs and benefits of all options. While not explicit, if the nominated option does not produce the greatest net benefit then clear justification is required for nominating that option (page 13 of RMF guidelines). Furthermore the criteria for assessing RIS' by the committee expressly includes '..whether it is demonstrated that the proposed regulatory response is the most efficient approach.' |
| Page 82: Potential areas for improvement in the NT | Guidance material does not accord with current practice and does not include sufficient information on: <ul style="list-style-type: none"> • Exceptions/exemptions • No consultation RIS • No RISs are published • No compliance reporting • No public ministerial statement of reasons for non-compliance or | Apart from from budget and tax measures there are no exemptions from or exceptions to the NT Regulation Making Framework requirements. All regulatory proposals are required to be subject to a Preliminary Regulation Impact Analysis. Unless the Preliminary Regulation Impact analysis is able to demonstrate |

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| | <p>exemptions</p> <ul style="list-style-type: none"> • Oversight body adequacy assessments not published • No Post Implementation Review required for exempt and non-compliant proposals | <p>a sound case for regulatory intervention, negligible impacts and/or a clear and obvious net public benefit, a full and detailed Regulatory Impact Statement is also required. (page 10 RMF Guidelines)</p> <p>Although the RMF refers to “exemptions”, this is somewhat misleading, in its context it refers to whether the Preliminary Regulation Impact Analysis itself demonstrates sufficiently that the proposal conforms with the COAG best practice regulation principles such that a further full RIS is not required. Because the NT RMF process applies to all forms of regulation, without exemption, the intention is to ensure that the level and depth of analysis required is commensurate with the magnitude of the problem and of the likely impacts, and that the RMF process itself does not result in an over-allocation and inefficient use of resources.</p> <p>Because there are no exemptions apart from budget/taxation legislation, and there is no capacity for non-conformance with the RMF requirements, Post Implementation reviews, Ministerial Statements of reasons, and non-compliance reporting have no relevance in the context of the NT RMF.</p> |
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| | | <p>distinguish between “proposals with an inadequate RIS” and proposals which the RIS is unable to justify as the best option. In the case of the former, i.e. where the RIS itself is not of an adequate standard or adequate level of analysis or is otherwise flawed – a Certificate will not be issued by the RIC and the proposal cannot proceed to Cabinet.</p> <p>In the (rare) case of the latter, i.e. where the RIS itself is adequate but it is unable to demonstrate that the regulatory proposal is necessary, with a net public benefit and is the best option, the RIC will issue a qualified certificate that sets out the shortcomings of the regulatory proposal. This ensures that Cabinet, as the ultimate decision maker, is fully informed in this context.</p> <p>Furthermore as part of the Cabinet submission process central agencies may review and highlight to Cabinet qualifications noted on the RIS Certificate.</p> |
| Page 124 | The PIA is used to establish whether the proposal is likely | The word exemption should be qualified. Different to ‘an |

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| | to impact significantly on the community, and therefore whether a full RIS or exemption is warranted. | exemption from the RMF process', the Regulation Impact Committee may determine that a further full Regulatory Impact Statement is not necessary. Furthermore a secondary function of the PRIS process is for early policy consideration to take place. |
| Page 136: Categories of Exceptions | In the Northern Territory, specific exception categories are not identified, but the exceptions are granted on a case-by-case basis at the discretion of the Regulation Impact Committee. | A mentioned above, we do not have any exemptions or exceptions from the RMF process apart from budget and tax measures. However, based on the assessment of impacts and the level of analysis contained in the Preliminary Regulation Impact Analysis, the Regulation Impact Committee may determine that a further full Regulatory Impact Statement is not necessary. |
| Page 137 Table 5.1 : Exceptions to state and territory RIA | NT's column is labelled as unknown | There should be a tick for taxation (an exemption from the RIA process) and crosses for the remainder categories. |
| Page 139: Categories of Exceptions | In this regard, the Commission notes that the Northern Territory RIA system provides the Regulation Impact Committee with a very high level of discretion in the determination of exceptions. | Same comment as above |
| Page 140: Proposals that have been subjected to prior analysis | In certain cases, the RIA process may have effectively been | This quote from our guidelines is referring to national reforms |

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| <p>(see also page 141)</p> | <p>satisfied through earlier policy development processes, but as discussed above there is often a lack of clarity in guidance material around the type of assessment that would be deemed sufficient in order for a regulatory proposal to avoid RIA. For example, the Northern Territory guidance material states only that:</p> <p>... preparation of a RIS may not be appropriate for particular types of regulatory proposals ... because a sufficient level of relevant analysis has already been undertaken through other fora. (Northern Territory Government 2007, p. 16)</p> | <p>that are subject to the requirements of the <i>COAG Best Practice Regulation Guide for Ministerial Councils and Standard Setting Bodies</i>.</p> <p>However in practice an agency proposing development of legislation to implement a national reform must still prepare a Preliminary Regulation Impact Analysis that includes, where necessary supplementary analysis at the NT level. Where the PRIA references a national RIS, the Regulation Impact Committee will take that into account in assessing the overall adequacy of the PRIA and in determining whether a further full RIS is required. A concern of the Northern Territory has been that national RISs frequently do not include a sufficiently adequate assessment of impacts at the regional or jurisdictional level.</p> |
| <p>Page 142</p> | <p>In Queensland, South Australia, Western Australia and Tasmania, regulatory proposals relating to taxation matters are not subject to RIA.</p> | <p>The Northern Territory should be included in this list.</p> |
| <p>Page 148: How is an exemption sought and granted?</p> | <p>As discussed in relation to exceptions above, the oversight</p> | <p>A mentioned above, we do not have any</p> |

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| | <p>body in the Northern Territory (Regulation Impact Committee) has a very broad discretion to exclude particular types of regulatory proposals on a case-by-case basis — specifically, where ‘preparation of a RIS may not be appropriate ... due to the nature of the subject matter ’ (Northern Territory Government 2007, p. 16).</p> | <p>exemptions/exceptions from the RMF process apart from budget and tax measures.</p> |
| <p>Page 148:</p> | <p>A post-implementation review is required within two years of implementation for proposals exempted in the Commonwealth, Queensland and Western Australia and a late RIS, within 12 months of implementation for COAG and in South Australia, Northern Territory and New South Wales (regulations only).</p> | <p>As mentioned above there are no exemptions to the PRIS/RIS process in the Northern Territory.</p> <p>However where legislation is required to be introduced as a matter of urgency and the Regulation Impact Committee requires more information than has been provided in the Preliminary Regulation Impact Analysis, or requires a full RIS, the Committee may grant a postponement of the full RIS to enable the submission seeking approval to introduce the legislation to proceed to Cabinet. However such postponements are only rarely granted and are generally subject to the condition (reflected on the RIS Certificate) that the RIS is provided by the time the Bill reaches the “committee stage” of its passage through parliament (so that it can be subject to committee stage amendment if necessary).</p> |
| <p>Page 201 Table 6.10: State and territory content requirements</p> | <p>NT’s column is labelled as not applicable</p> | <p>There should be ticks for all rows relating to the NT.</p> |

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| for national or COAG RISs | <p>c The Northern Territory's requirements state that where a sufficient level of analysis has already been undertaken through other forums, the regulatory proposal will be exempted from requiring either a Preliminary Regulatory Impact Statement or a RIS. This is assessed on a case-by-case basis by the Regulation Impact Committee.</p> | See comment above re page 140 |
| Page 250 Table 8.1 How do jurisdictions hold their agencies to account for non-compliance with RIA processes? | No sanctions. The Cabinet Office will not proceed with regulatory proposals in the absence of certification from the Regulatory Impact Committee. However, with ministerial approval, a regulatory proposal can still proceed to Cabinet or Executive Council in the absence of RIS certification or with certification indicating that the regulation does not comply with regulation-making principles. | See comment above re page 106. |
| Page 258: Effectiveness of post implementation reviews as a sanction | A number of jurisdictions have a further sanction in place, in the form of a post implementation review (PIR) in the case of the Commonwealth, Queensland and Western Australia and a 'late' RIS, in the case of COAG, New South Wales, Victoria, South Australia and the Northern Territory. | See comment re page 148. |
| Page 251: How effective are Cabinet offices where they act | The Northern Territory Cabinet Office will not proceed with | See comment above re page 106. The Cabinet Office as |

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| <p>as RIA gatekeepers?</p> | <p>regulatory proposals in the absence of certification from the RIC, but it does not have a 'veto power'. With ministerial approval a regulatory proposal can still proceed to Cabinet or Executive Council in the absence of RIS certification or with certification indicating that the proposal does not comply with regulation making principles (Northern Territory Government 2007).</p> <p>Where a regulatory proposal proceeds to the Cabinet without an adequate RIS, the Northern Territory Cabinet may provide approval subject to completion of the RIA process – either before or after the introduction of the regulation (Northern Territory Government, pers. comm., 4 April 2012).</p> | <p>gatekeeper will not allow proposals to go through to Cabinet without a PRIS/RIS certificate. Notwithstanding the RMF Guidelines, which require correction, the Cabinet Handbook gives no capacity for a Minister to approve a regulatory proposal proceeding to Cabinet in the absence of RIS Certification. If a Minister wished to bring a proposal to Cabinet without a RIS certificate, he/she would need to prevail upon the Chief Minister (who authorises the Cabinet business list) to overrule the Cabinet Office. There are no known instances of this occurring.</p> <p>In relation to a RIS certificate issued with an annotated qualification, the discussion above re page 106 refers.</p> |
| <p>Page 287: Late RIS' and Post Implementation Reviews</p> | <p>For COAG, New South Wales (for subordinate legislation), Victoria (for subordinate legislation), South Australia and the Northern Territory, a RIS has to be prepared within twelve months of making the regulation (that is, a 'late RIS').</p> | <p>It is not clear where this information has been taken from in relation to the NT (see comment re page 148 above).</p> <p>Table 9.2 'Processes for ex post review following RIS exemption or non-compliance' should be altered to reflect comments regarding postponements (re page 148 above). Late RIS (exemptions) are not applicable to the NT.</p> |

3. Information requests in the RIA Benchmarking report

RIA scope

1. If a proposal has already been assessed as not triggering the RIS requirements, are the benefits of requiring additional analysis and documentation for that proposal likely to outweigh the costs of satisfying such requirements?

In the Northern Territory, for a proposal to be assessed as not requiring a full RIS it would need to have negligible economic or competition impacts or alternatively, a clear and obvious net public benefit. As such, the costs of requiring additional analysis and documentation for that proposal would in most instances significantly outweigh the benefits of satisfying such requirements.

RIA exceptions and exemptions

2. The Commission seeks further information on the extent to which clauses in enabling legislation are being used to explicitly exclude the application of RIA.

This does not occur in the Territory.

3. The Commission seeks further information from jurisdictions on the extent to which such proposal-specific 'exceptions' to RIA exist, and where relevant, details of:
 - the number and types of proposals that have been excepted
 - the general criteria on which the exceptions are based
 - the process, including the body responsible, for making determinations in relation to particular regulations.

As above

Regulatory reviews

4. The Commission seeks views on whether the production of a 'late RIS' within 12 months after a decision is beneficial, including any strengths and weaknesses, and examples of how these late RISs have influenced regulatory policy.

As noted above, a postponement from the requirement to develop a full RIS (where required) may be granted in cases of genuine urgency. These require exceptional circumstances and are only rarely granted in practice and where practicable the "Postponement Certificate" is expressed to be subject to the condition that the RIS is developed by the time the Bill has reached the 'Committee stage' of its passage through the Parliament.

The production of a delayed RIS on that basis is considered to be useful because:

- the Bill may be amended in the Committee stage to address concerns that may be identified as a consequence of the RIS; and

- it is strategically and culturally important in reinforcing the strict NTG policy that all regulatory proposals are subject to the NT Regulation Making Framework disciplines without exception (including urgency).

5. The Commission seeks information from jurisdictions on the share of legislation which sunsets and is subsequently remade without any, or with only minor, changes (such as updating of language and other largely 'housekeeping' changes).

Sunset legislation is of limited application in the Territory.

6. The Commission also seeks information on the use of individual sunset requirements for specific pieces of legislation, including how widespread their use is and when they are most effective.

As mentioned above sunset legislation is of limited application in the Territory. However note that under the Competition Principles Agreement anti competitive legislation is required to be reviewed at least once every ten years.