

Comments on the draft report of the Regulation Impact Analysis Benchmarking Study

Chapter 9 (pg 289) Information request: 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.

Comment:

On the whole, no, this would not be beneficial and would appear to be unnecessarily bureaucratic. The whole point of the RIS is to make sure that government is aware of the impact of a regulatory decision before it is made. A process of post-facto RIA is likely to be of questionable value, and is likely to serve little purpose other than increasing the ‘regulatory burden’ imposed by RIA processes upon those arms of Government charged with implementing decisions. More beneficial may be post implementation reviews that specifically consider the extent to which the RIS reflected the actual costs of implementing the regulatory decision.

General Comment:

While endorsing the principle of applying RIA to genuine regulatory imposition, we suggest there is merit in properly examining the scope of “regulation” currently subjected to RIA requirements. The PC Report identifies “regulation” as a rule endorsed by Government with an expectation of compliance (see chapters 1 and 4).

Primary legislation, subordinate legislation and quasi-regulation such as codes of practice are clearly “regulation” that warrants RIA. However, at present, at the Commonwealth level, treaties are also subsumed into the scope of RIA.

We would submit that it is worthwhile evaluating the continued inclusion of treaties within the scope of RIA requirements, both because they should not properly be considered “regulation” and because the inclusion of treaties in RIA requirements can result in the “regulation” in question being subjected to multiple RIA processes. In addition, attempting to integrate RIA requirements into ongoing negotiating rounds, risks damaging the Australian Government’s ability to negotiate effectively.

Treaties, being essentially contracts between states at international law, act to impose rights and obligations on the states party to the treaty, but cannot (as a matter of law) act to impose any rights or obligations on any third parties (such as companies, or natural persons). Where a treaty does seek to impose rights and obligations on non-parties, it usually does so by obligating a state party to implement domestic laws to obligate non-parties. The state party will then apply those obligations to the subject non-parties by taking action to impose rules the government expects to be complied with (the “regulation”). The treaty itself does not impose any rules on any parties other than the state parties. In such a circumstance, current RIA requirements (in theory) subject both the treaty and the subsequent implementing “regulation” (e.g. legislation, regulation, quasi-regulation) to RIA requirements, creating a situation where multiple RIA processes may be required.

The Department notes that some exemptions from detailed public RIA requirements exist for taxation and other subject matters where sensitivities may preclude wide publicity of proposals. The negotiation of treaties is a similar area of activity where public RIA processes prior to the conclusion of negotiation is impossible, as it would risk negative impacts on the Australian Government’s negotiating position and capability.

Against these issues with the inclusion of treaties within the scope of RIA requirements, the Department submits that there would be merit in excluding treaties from the scope of “regulation” subject to RIA requirements.