

Response from the Department of Treasury, Western Australia, to the Productivity Commission's Draft Report Regulatory Impact Analysis: Benchmarking

Context

Regulatory Impact Assessment (RIA) began in Western Australia in December 2009, and is the newest of the Australian regulatory regimes examined in the Productivity Commission's (PC) draft RIA benchmarking study. The delay in the commencement of RIA has allowed the State to select the most effective aspects from the longer established regimes. In its first year, RIA has had a significant positive impact on the quality of regulation and has resulted in savings of more than \$40 million to the Western Australian economy. In its second year, initial successes have been built upon and RIA has been reviewed and consolidated. The PC's assessment of RIA in Western Australia acknowledges the integrity of the process design and its implementation by the Regulatory Gatekeeping Unit (RGU) within the Department of Treasury (Treasury). Effective analysis under RIA has had a measurable, positive impact on the economy of Western Australia.

Efficiency and effectiveness of Regulatory Impact Analysis

The PC's draft report identifies leading best practices that should be followed under RIA. Western Australia's RIA process is found to accord with a number of best practices.

The draft report observes that critics of RIA have suggested the process may devalue the benefits of regulation and lead to insufficiently protective regulations, or that it may be interpreted as evidence of justification for a particular regulatory approach. However, RIA in Western Australia is focused on clear parameters and logical analysis of regulatory and non-regulatory options to resolve identified issues. The RGU is mindful of Ministers' needs to regulate and concentrates on ensuring the best regulatory outcome for the economy of Western Australia in balance with considerations such as health, safety and competitiveness. While the RGU is tasked with assessing new and amending regulation, it is careful not to diminish the relevance or efficient flow of that regulation. Further into the report, there is discussion of refining the RIA process, of which Treasury is particularly cognisant.

Institutions involved in Regulatory Impact Analysis

The draft report notes only six Decision Regulatory Impact Statements (RIS) were completed in Western Australia, and with so few examples, it would be difficult to determine the trend of costs for agencies to complete RIA. However, Treasury is mindful of costs that agencies may incur as a result of completing a RIS and is examining options to provide more assistance to agencies in fulfilling analytical requirements – this is anticipated to reduce costs and use of resources that may be a barrier to good policy-making.

Treasury appreciates that its efforts to actively include the Small Business Development Corporation (SBDC) in the RIA process have been recognised by the Commission.

The draft report notes the importance of the Cabinet RIA gatekeeping role to preclude proposals from progressing to the decision-maker if they have not complied with RIA requirements. Treasury points out that Cabinet submission cover sheets advise of a proposal's RIA-compliance, which is a form of gatekeeping. This notification advises Ministers but does not actively preclude approval of a proposal that is not RIA-compliant. Treasury notes that there is capacity to strengthen this role in Western Australia and will continue to collaborate with agencies to increase support for RIA and effect a change in culture.

Scope of Regulatory Impact Analysis

The draft report contains a number of recommendations in this area. Treasury had considered the inclusion of all quasi-regulation, as opposed to only those submitted to Cabinet, into the scope of RIA requirements. Although this would encourage more thorough assessment across a broader range of proposals, the availability of resources to contend with this increase in RIA factors against this expansion of coverage at this time.

In terms of the trigger for assessment through a RIS, the draft report suggests the provision of greater guidance in determining whether an impact would be deemed significant, thereby requiring a more detailed analysis in a RIS. The PC also calls for inclusion in RIA guidelines of a range of specific examples of the trigger. Treasury is concerned that providing specific examples and being overly prescriptive with RIA guidelines would be detrimental to the policy development process in Western Australia. Treasury prefers to adopt a flexible approach by working collaboratively with agencies to identify whether a RIS requirement has been triggered. This forms an important element in improving analysis and understanding among agencies of the impact of proposed regulations.

Treasury has always been cognisant of minimising red tape for agencies and has had a preliminary assessment process since the commencement of RIA in Western Australia. This summary of the proposed regulation assists in the

determination of those proposals that require further examination through a RIS. To further streamline the process, Treasury intends to remove requirements for machinery and administrative proposals to be subject to RIA. This would reduce the burden on submitting agencies and allow for better use of RGU resources.

Treasury is reviewing the threshold for triggering a RIS as part of its consideration of a suite of streamlining and strengthening measures, and will refine its guidance material as part of this process.

While Treasury can see some value in the concept of an agency self-assessment model for RIA, it does not feel the process in Western Australia is mature enough for this to be effectively implemented. Agencies continue to need guidance on when and how to assess the impacts of a regulatory proposal.

Exceptions and exemptions

The report makes several recommendations for amending the exception/exemption regime. The PC recommends that the process used to grant an exception is clarified and where an exception applies, line agencies should not have to prepare a PIA. The PC condones the granting of exceptions where prior analysis or a previous review has occurred. In Western Australia prior analysis is a ground for exception from full RIA examination.

The draft report discusses the exception and exemption regime in Western Australia in several instances. The PC supports the ability for agencies to request exceptions for adoption of an Australian or International Standard, and taxation matters. The PC suggests Western Australia's obligation on agencies to partially complete a PIA in cases of exception is not the best use of resources and recommends Queensland's approach of agency self-assessment via a checklist. This will be considered by the RGU, although, as mentioned earlier, Treasury feels RIA in Western Australia is not yet mature enough to adopt a self-assessment model.

The PC believes that election commitments should prima facie be subject to appropriate RIA. The concern is that regulatory proposals put forward as electoral commitments, which would otherwise require thorough examination through a RIS, are being exempted from RIA, resulting in a lack of transparency. In practice, most election commitments are granted a Treasurer's Exemption in Western Australia. RIA may be undertaken where there is value in an assessment of the implementation options. Most of the other states apply a public interest test to determine whether an exemption should be granted, while in Western Australia the Treasurer grants an exemption only in specific circumstances.

Recommendations of the PC are that exemptions should be restricted to genuinely exceptional circumstances and, to avoid exploitation of exemptions for political expediency, power to grant these be wielded by the head of government, and all exemptions should be disclosed publicly and subjected to a Post Implementation

Review (PIR). Treasury is considering further strengthening measures and will review the PC's comments.

The PC notes that the Western Australian RIA approach is not as transparent as best practice would have in the reporting of exemptions. Further criticism is expressed by the SBDC, which is concerned that there has been a disproportionate number of Treasurer's Exemptions granted. Treasury considers that the exemptions have been granted following careful consideration. Significantly, the majority have related to the substantial development of policy prior to the commencement of RIA. In terms of publication of exemptions, Western Australia has not yet implemented public reporting on agency compliance under RIA. Improvements to transparency will be considered as part of the review of RIA.

The PC also raises concerns about the two-year wait before a PIR is completed. This maximum period for review is for purely practical reasons: it is difficult to gauge the effectiveness of a regulation in a lesser period of time as available information and data may not provide an accurate picture. The RGU is yet to receive a PIR. Once it has measurable data on the effectiveness of PIRs, it will reconsider the issue.

Analytical requirements and impact assessment

The RGU acknowledges that some of the draft report's RIS analysis leading practices are in only partial operation in Western Australia – Treasury provides minimal guidelines on identifying national market implications and there is no explicit requirement for agencies to state whether competition impacts have been assessed. However, this is addressed in explanatory material and the lack of formal requirement does not preclude the RGU from requesting consideration of these issues where relevant.

The immediate priority in Western Australia is to prompt agencies to give greater attention to implementation, monitoring and compliance issues in their RISs. Treasury is also raising the standard required for assessment to be deemed adequate, and is planning a series of workshops and individual strategy sessions to support this.

There is provision in Western Australia's guidelines to choose the regulatory option that yields the greatest net benefit and state the reasons for selecting and rejecting options. However, Treasury recognises that a larger degree of quantification of costs and benefits in all elements of the RIS (particularly for implementation) would improve decision-making and it has this as a focus for reform. Furthermore, Treasury appreciates that providing guidance to agencies on quantitative approaches such as cost-benefit analysis would be beneficial, and this will be examined in future reform initiatives.

The RGU has been working with proponent agencies to strengthen implementation planning, requiring them to propose reasonable timeframes, consider the use of pilot

programs to gauge effectiveness, provide adequate resources to communicate change and evaluate the effectiveness of regulatory change. It intends to put greater emphasis on this approach in future RISs.

Treasury agrees with the draft report's leading practices for national reform processes – taking the costs and benefits for each jurisdiction into account in the Council of Australian Government's RIS would inform better decision-making and consequently result in better outcomes for all.

Transparency and consultation

Treasury recognises the importance of transparency in the RIA process. Transparency creates a greater need for regulatory decisions to be well considered and rigorously analysed; contributing to the accountability and credibility of government. In Western Australia, government agencies are encouraged to undertake best-practice consultation that is effective and appropriate. Transparency of the consultation process has been supported by a number of measures including a two-stage RIS process, with the first version being used as a consultation document, and the consultation outcomes reflected in a final RIS, and publication of RIS documents. Additionally, Treasury recommends as best practice that agencies conduct a three-month consultation. However, it concedes the prescription of a minimum time period may be insufficient or excessive depending on the nature of the regulatory proposal.

The RGU has explicitly outlined the RIS Adequacy Criteria in its RIA Guidelines¹ which guide the assessment of regulatory proposals. The RGU's Compliance Assessment Notice provides clear advice on agency compliance through comment on the adequacy of RISs. Agencies are required to publish the Compliance Assessment Notice on their websites at the same time as publishing the RIS. RIS compliance is not publicly reported annually at this stage. The RGU has the opportunity to comment on all Cabinet submissions, and may provide comments to Cabinet outlining the reasons for an agency's non-compliance. This in turn holds Ministers accountable to justify why a proposed regulation that has been found inappropriate should still proceed.

The PC recommends that RIA guidelines include a statement that consultation should occur at all stages of the regulatory cycle. The RGU is not convinced this is a good use of limited agency resources, and instead requires and encourages appropriate and effective consultation. This approach reduces red tape, promotes efficiency and enables consultation to be designed to meet the needs of the individual circumstances.

Consideration was given to a central register of published RIA documents, However, given the early stage of RIA and the few documents to be published, it was decided

¹ *Regulatory Impact Assessment Guidelines for Western Australia*, Appendix 3.

that it would be more efficient and just as effective to require agencies to publish RISs and assessment notices on their websites. The RGU provides a link from its homepage to RISs published on agency websites.

Accountability and quality control

While the report makes it clear that Western Australia has no sanctions in place for agencies or ministers who circumvent the RIA process, it does not take into consideration the not-yet-entrenched nature of the Western Australian system and the deliberate and pragmatic approach taken by the RGU to support and encourage agencies to comply. The report also questions the validity of calling the unit a Gatekeeper when it does not possess an effective power of veto, however it does acknowledge that international RIA practice does not have unelected officials holding the power to block regulatory proposals from proceeding.

The report advocates strongly for regulatory oversight bodies to be independent, noting this would require specific legislation, accountability to Parliament and published annual reports. The PC proposes four suggestions to increase the independence of regulatory oversight bodies, thus boosting transparency and accountability:

Formalising a Memorandum of Understanding with the central department on the independence of the RIA oversight body;

- Supporting the oversight body with an advisory board;
- Creating an executive agency to oversee RIA; or
- Establishing oversight functions within the departmental structure, headed by an independent statutory office holder who reports directly to a Minister.

Western Australia's RIA process is not mature enough to require consideration of these issues at this time. Further strengthening measures under consideration would assist in addressing accountability. Treasury notes the PC's concern about regulatory oversight bodies being held accountable for the quality of their assessments. However, the RGU adheres strictly to its comprehensive adequacy criteria, published in its *Regulatory Impact Assessment Guidelines*, and routinely calls on experts from other areas of Treasury to add value to its analyses. Further oversight in the area of quality of assessment may be appropriate once the RIA regime is better settled in Western Australia.

The report advocates introducing mechanisms to make governments more accountable, such as a greater relationship between the regulatory oversight body and Parliament, and greater scrutiny of decisions made from a RIA perspective. The RGU notes that Cabinet is placing increasing reliance on agencies complying with RIA on regulatory proposals.

Regulatory reviews

This chapter notes Western Australia's reluctance to include sunset clauses in legislation (compulsory, timed reviews). This is unlikely to change in the foreseeable future and would be extremely costly. However, where regulation contains review clauses, these reviews are subject to RIA.

Although no PIRs have been completed in Western Australian, Treasury notes that a number are due within the next 12 months. These will take the same format as a RIS and will be assessed just as stringently. They will require verifiable evidence based on detailed quantitative and qualitative analysis of the impacts of the regulation put in place. The RGU is confident of the effectiveness of a PIR as a sanction and as a vital step of robust policy process. What remains to be seen is whether a PIR will lead to legislative change and whether this would be in the economic interest of the Western Australian economy.

The SBDC's call to have all new and amending regulation reviewed post-implementation to assess the realised impacts, and either justify or not the case for continued regulation, is seen as costly and unrealistic. While PIRs are justifiable in certain cases, particularly for proposals that are granted a Treasurer's Exemption or that circumvent the RIA process in other ways, applying such an expensive and time-consuming requirement would not be seen to be in the best interests of the Western Australian economy.

Treasury notes that the Western Australian Department of Transport in its submission to the PC, requested a standardised PIR process including analysing a series of specified, measurable indicators. The RGU would argue that the RIS adequacy criteria in the RIA Guidelines, against which a PIR is assessed, do allow and encourage this.

Improving integration

Despite its newness, the Western Australian RIA regime is generally accepted by line agencies for its value to the policy-making process. The RGU continues its strategy of close, targeted engagement with key staff in line agencies and through the cross-sectoral RIA Working Group. It is confident there is a growing understanding of when RIA should be applied, and recognises that there is opportunity for improvement on the analysis of RISs. On their finalisation, the RGU will roll out streamlining and strengthening measures and will use its targeted engagement approach to communicate these changes and to support agencies in their implementation.